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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 TO EXCLUDE EXPERT EVIDENCE

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 to Exclude Testimony of Dr. Ali Saad and Oracle's Motion to Exclude the Expert Report and Testimony of Janice Fanning Madden, Ph.D. (collectively the "Cross Motions to Exclude Expert Evidence").

For the reasons set forth below, the Cross Motions to Exclude Expert Evidence are denied.

I. PROCEDURAL BACKGROUND

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. Oracle denies these allegations. *See generally* DA at 1-7. A central area of dispute in this case concerns the statistical analysis of compensation at Oracle, and the inferences that can be drawn (or not drawn) from that evidence. OFCCP and Oracle have both engaged statistical experts to support their positions. OFCCP engaged Janice Fanning Madden, Ph.D., and Oracle engaged Ali Saad, Ph.D.

On October 21, 2019, OFCCP filed a Motion to Exclude Expert Testimony of Dr. Ali Saad and Memorandum of Points and Authorities ("OFCCP's Motion to Exclude" or "PM") along with a declaration from Charles Song attaching one exhibit ("PMX A"). On November 1, 2019, Oracle filed an Opposition to OFCCP's Motion to Exclude ("DO") supported by a declaration from Kathryn G. Montoan attaching five exhibits ("DOX A-E"). OFCCP filed a reply brief on

November 8, 2019, along with a declaration of Priyanka Jampana, declaration of Maura Joglekar, and declaration of Janet M. Herold with four attached exhibits ("PRX A-D").

Also on October 21, 2019, Oracle filed a Motion to Exclude the Expert Report and Testimony of Janice Fanning Madden, Ph.D. ("Oracle's Motion to Exclude") and supporting memorandum ("DM"). Oracle's Motion to Exclude is accompanied by a Request for Judicial Notice with one exhibit ("DNX A") and a declaration from Kathryn G. Mantoan with 10 attached exhibits: DMX A, DMX 2, DMX 3, DMX 5, DMX 9, DMX 10, DMX 11, DMX 14, DMX 23, and DMX B.[1] OFCCP filed an Opposition to Oracle's Motion to Exclude ("PO") with two exhibits ("POX A-B") on November 1, 2019.[2] On November 8, 2019, Oracle filed a reply brief supported by another declaration from Kathryn G. Mantoan with one attached exhibit ("DRX A").

II. LEGAL STANDARD

This proceeding is 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. 41 C.F.R. § 60-30.1. 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. 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.*

OALJ's Rules of Evidence provide that "[i]f scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." 29 C.F.R. § 18.702. OALJ's rules of evidence were promulgated in 1990. *See* 55 FR 13219, Apr. 9, 1990. OALJ's Rule 702 was taken almost verbatim from the version of Federal Rule 702 in effect at that time and up until the 2000 amendments: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." *See* Fed. R. Evid. 702 (1999).

The Supreme Court interpreted this rule in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Under Rule 702, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. Expert witnesses are "permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation," so the rule requires that the evidence antecedently meet a certain standard of scientific reliability and be helpful to the fact-finder. *Id.* at 590-92. Before expert testimony can be admitted,

> the trial judge must determine at the outset [] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the

[1] The numbered exhibits are actually attachments to DMX A, which contains excerpts from Dr. Madden's deposition. For ease of reference, I simply cite to them as distinct exhibits.

[2] POX B is a declaration from Dr. Madden produced to respond to Dr. Saad's rebuttal report. I do not find it relevant to the issues presented in the instant motions and it plays no role in the determinations below.

> reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 592-93.

The inquiry is a "flexible one" that can involve "[m]any factors." *Id.* at 593-94. But "a key question to be answered" is whether the theory or technique "can be (and has been) tested." "Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication." Next, "the court ordinarily should consider the known or potential rate of error [] and the existence and maintenance of standards controlling the technique's operation." Courts also look to whether the technique or theory is generally accepted in the relevant expert community. *Id.* In determining whether expert opinion should be admitted, the "overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission." "The focus, of course, must be solely on the principles and methodology, not on the conclusions that they generate." *Id.* at 594-95. The inquiry looks to the reliability of methodology and indicia of this reliability—for instance, whether the opinion is an outgrowth of normal research or based on studies done solely for litigation is a relevant consideration. *Daubert v. Merrill Dow Pharms.*, 43 F.3d 1311, 1317-18 (9th Cir. 1995). This analysis applies to not only "scientific" evidence but to any expert evidence based on technical or other specialized knowledge. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

The required inquiry is not just whether the proposed expert is qualified—that is a threshold question. Rule 702 requires that the particular method employed by the expert renders the *opinion* properly scientific or expert and that the particular opinion is relevant in that it fits the particular issue in the case where expert opinion would be useful. *Daubert*, 43 F.3d at 1315-16. Expertise combined with bare assertions of scientific validity in insufficient—a showing must be made in regards to the reliability of the methodology in question. *Id.* at 1319. In examining fit, courts look to the required showings in the case at hand and the manner in which the expert opinion might speak to one of the issues in dispute and assist the proponent in showing the legally relevant point. *Id.* at 1320-21.

Federal Rule of Evidence 702 was amended in 2000 as a result of *Daubert* and its progeny. It now provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702; *see also id.* Advisory Committee Note to the 2000 Amendments.[3] The current rule thus spells out the requirements that the expert evidence rest on a solid foundation and be relevant to the issues in the case.

[3] The quoted version is the result of the 2011 stylistic amendments. *See* Fed. R. Evid. 702 Advisory Committee Note to the 2011 Amendments.

Though reliability must be probed, the task at this stage does not involve reaching conclusions about credibility: in determining whether to exclude expert evidence, "the [] judge is 'a gatekeeper, not a fact-finder.'" *Primiano v. Cook*, 598 F.3d 558, 564-65 (9th Cir. 2010) (quoting *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006)). "Scientific evidence is deemed reliable if the principles and methodology used by the expert are grounded in the methods of science." *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1056 (9th Cir. 2003).

III. THE EXPERT REPORTS

The Cross Motions to Exclude Expert Evidence are based on alleged deficiencies in the expert reports. Dr. Madden issued a July 19, 2019, expert report ("MER") and an August 16, 2019, rebuttal report ("MRR").[4] Dr. Saad issued an expert report on July 19, 2019 ("SER") and a rebuttal report on August 16, 2019 ("SRR").[5] To understand the arguments for excluding the expert evidence, a basic overview of the expert reports and opinions is necessary.

This litigation is based on the allegations in the SAC. Dr. Saad's expert report analyzed the analyses in the SAC. 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 only choosing to report those that favored its hypothesis of discrimination. *E.g. id.* at 15, 127-33. He argues against theories premised on the role of prior pay, *id.* at 110-11, and assignment of job or career path, *id.* at 112-21.

[4] They are attached in the briefing here as DMX 2 and DMX 3, respectively.

[5] The reports are found in the papers filed for the present motions at DMX 23 and DMX 5, respectively.

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 lesser value.[6] 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. And she then estimated damages. MER at 1. She 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 do not need discussion here. 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 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.[7] 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 provided 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). 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, and concluded that it did. *Id.* at 50-52. Finally, Dr. Madden performed damage calculations/estimations. *Id.* at 52-57, 81-83.

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[6] 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.

[7] 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'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 it 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 critique of Dr. Madden's report, which is the basis for OFCCP's claims going forward. 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 poor proxies for education and experience and should have used better measures that looked to the type 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 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 and 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 assignment. *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.

IV. DISCUSSION

Under Rule 702, "only relevant and reliable expert testimony is admissible. Expert opinion testimony is relevant if the knowledge and experience underlying it has a 'valid . . . connection to the pertinent inquiry.' And it is reliable if the knowledge underlying it 'has a reliable basis in the knowledge and experience of [the relevant] discipline." *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006) (quoting *Kumho Tire*, 526 U.S. at 149). "Relevancy simply requires that '[t]he evidence . . . logically advance a material aspect of the party's case.'" *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir. 2014) (alterations in original) (quoting *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007)). Reliability

> requires that the expert's testimony have a reliable basis in the knowledge and experience of the relevant discipline. The district court must assess whether the reasoning or methodology underlying the testimony is scientifically valid and properly can be applied to the facts in issue, with the goal of ensuring that the expert employs in the courtroom the same level of intellection rigor that characterizes the practice of an expert in the relevant field. The test is not the correctness of the expert's conclusions, but the soundness of his methodology, and when an expert meets the threshold established by Rule 702, the expert may testify and the fact finder decides how much weight to give that testimony.

United States v. Ruvalcaba-Garcia, 923 F.3d 1183, 1188-89 (9th Cir. 2019) (internal quotations and citations omitted).

"Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. The *Daubert* test is flexible and non-exhaustive—not each of the factors will apply in every instances. *See Kumho Tire*, 526 U.S. at 141-42. Trial judges have

"broad latitude" in determining the reliability and admissibility of evidence. *Id.* at 142. The inquiry is flexible in part because indicia of reliability vary from field to field and from case to case—factors that may be important in some cases may have no application in others. *Primiano*, 598 F.3d at 565. In addition, "[r]eliable expert testimony need only be relevant, and need not establish every element that the [proponent] must prove, in order to be admissible." *Id.* (citing *Stilwell v. Smith & Nephew, Inc.*, 482 F.3d 1187, 1192 (9th Cir. 2007)). Before admitting expert evidence, the court must first make findings that the testimony is relevant and reliable, but the test is "malleable" and courts have "broad latitude" in how reliability is analyzed and which factors are considered. *Ruvalcaba-Garcia*, 923 F.3d at 1189 (citing *Murray v. S. Route Mar. SA*, 870 F.3d 915, 922-23 (9th Cir. 2017)).[8]

A. Dr. Janice Fanning Madden

Dr. Madden is a professor in the Department of Sociology at the University of Pennsylvania. She earned a Ph.D. in economics from Duke University in 1972. Her professional research includes work on the statistical analysis of discrimination. *See, e.g.,* MER at 109-23; *see also* POX A at ¶¶ 3-7. There is no challenge to Dr. Madden's expert qualifications or ability to engage in and opine about statistical analyses. *Cf.* PO at 2-3. Oracle simply maintains that her qualifications do not immunize her from a *Daubert* challenge and that statistical analyses must be scrutinized for their assumptions. DR at 3-4.

Oracle contends that Dr. Madden's opinions should be excluded, averring that other courts have done so, her opinions have shifted and contradict one another, and her methodology does not compare similarly situated employees, rendering her opinions "unreliable and irrelevant, and thus inadmissible."[9] DM at 1. In Oracle's view, Dr. Madden's initial report departed from the prior allegations and made no attempt to compare similarly situated employees, instead only grouping employees using measures of education and experience; her rebuttal report changed the view and used a "job descriptor" variable as well, but this contradicted her original report and does not track similarly situated employees; and her deposition shifted to control for job code, but this again contradicted her earlier views and did not use a factor that tracks similarly situated employees because job codes do not combine employees performing substantially similar work. *Id.* at 3-5; *see generally* MER; MRR; DMX A. OFCCP retorts that Oracle has mistaken the law about the showings and burdens in the case and that the criticisms it levels go to credibility, not admissibility, and so are not a basis to exclude Dr. Madden's opinion altogether. PO at 3-5. Oracle's reply contends, generally, that while statistical models are appropriate in these sorts of case, Dr. Madden's models rely on unfounded assumptions and use crude proxies and thus should be excluded. DR at 4-5.

Oracle offers several discrete arguments to exclude Dr. Madden's opinions. Predominantly, it argues that Dr. Madden's expert opinions are both irrelevant and unreliable: since the analyses do not compare similarly situated employees, they are either irrelevant to the issues in the case or unreliable evidence pertaining to those issues. It deems Dr. Madden's method "simplistic" because it doesn't even attempt to consider relevant factors like the job performed and instead assumes that

[8] Neither Oracle nor OFCCP challenge the underlying qualifications of Dr. Madden or Dr. Saad, and neither really challenge the soundness of the basic methods of statistical analysis used. Rather, the challenges concern the application of those methods to the facts of this case, and choices made about how to engage in the analysis, as well as the relevance of the results to the underlying issues in dispute. The inquiry under Rule 702 is thus somewhat narrowed—this is not a case where I must determine whether or not the underlying statistical methods, e.g. regression analysis, is a reliable way of forming statistical conclusions.

[9] Oracle's motion pertains to the opinions in Dr. Madden's original and rebuttal reports. It indicates that if OFCCP attempts to introduce opinions from later reports—which Oracle contends are untimely—those opinions will be addressed in a separate motion. DM at 3 n.2.

any differences must be due to discrimination. DM at 6-8; *cf.* DMX A. Even within the categories that Dr. Madden did consider, education and experience, Oracle asserts that the analysis is unreliable because the measure of experience is based only on time at Oracle and age, which fails to capture both relevance and amount of experience. The measure for education only looked at the highest degree received and was missing 50% of the time. DM at 8-9. In Oracle's view, Dr. Madden's resort to job code fails to rehabilitate her opinion because job codes combine individuals who have different duties, skills, and responsibilities. *Id.* at 9-11. Further, Oracle contends that Dr. Madden's opinions cannot be relevant because she failed to consider the factors that Oracle does use to set pay. *Id.* at 11-12.

OFCCP responds that Dr. Madden looked at the factors that Oracle says that it uses in setting compensation—education and experience. It argues that Oracle has not identified other factors and that are relevant and should have been incorporated by Dr. Madden. Dr. Madden compared employees with the same job title with the same education and experience. OFCCP asserts that this suffices to make her opinions relevant to the discrimination claims at issue. It asserts that this methodology is supported by "human capital theory" and is the mode of analysis standardly used by labor economists. It argues that Dr. Madden appropriately excluded factors that could be means of discrimination, like job assignment, and focuses on controls that pertained to groups, not individuals. PO at 5-10. As to the missing educational data, OFCCP complains that Oracle provided the incomplete data, but argues that Dr. Madden did an analysis looking only to the individuals where data was available. *Id.* at 10-11; *see also* POX A at ¶¶ 9-10. Further, Dr. Madden did do analyses involving job descriptors/titles/families, global career level that served as proxies for some of the factors Oracle now deems important. PO at 11-14.

Oracle replies that the caselaw requires comparing similarly situated employees. It maintains that Dr. Madden, whatever her qualifications, did not attempt to compare employees who were similarly situated because they perform different sorts of work. PR at 1-2, 7-8. It argues that the opinion should be excluded because Dr. Madden simply did not make the right comparisons and so it cannot assist the fact-finding in drawing an inference to intentional discrimination. It asserts that this is about more than credibility and goes to admissibility because it involves shortcomings going to the heart of her methodology, not omissions of particular variables. *Id.* at 5-7. Oracle rejects the proposition that Dr. Madden did not have to model factors that she deemed "too hard" to account for, asserting that the law does not provide for such an exception. *Id.* at 9.

"Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). Statistical evidence that is admissible may be found not credible and unpersuasive due to infirmities. *Penk v. Or. State Bd. Of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987). In *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174, 1184-89 (9th Cir. 2001), the Ninth Circuit affirmed the admission of a statistical analysis in a compensation/promotion discrimination case where the expert had conducted an analysis of employees in lower management without filtering for qualifications or corporate vs. store management and without narrowing the pool by reference to qualifications, education, and preferences, finding that the shortcomings went to weight not admissibility.

I reach the same conclusion here. Oracle points to a number of potential infirmities—indeed potentially serious infirmities—that could render Dr. Madden's analysis unpersuasive on the important questions in the case. Depending on other findings that are made in regards to Oracle's compensation practices and the factors that matter in Oracle's compensation decisions, Dr. Madden's analysis could be highly relevant or only tangentially relevant, speaking mostly to different

questions. As determined in the contemporaneous order denying the parties' cross-motions for summary judgment, genuine disputes remain on these important facts, including about which employees are similarly situated for the purposes of the claims at issue. Hence, the evidentiary value of Dr. Madden's opinions will need to be determined at hearing. I find that Dr. Madden's evidence is relevant and she used reliable methods. How probative the analysis will be is an open question. This is a clear case where the appropriate response to the alleged infirmities is vigorous cross-examination and presentation of opposing evidence, not exclusion. *See Daubert*, 509 U.S. at 596.

Oracle also makes a string of other arguments to support exclusion. It contends that various other courts have excluded Dr. Madden's opinions on the grounds that they do not use relevant controls.[10] DM at 12-14. OFCCP complains that these cases are cherry-picked or taken out of context and represents that there are many others were her analyses have been credited.[11] PO at 16-19; *see also* POX A at ¶¶ 6-7. Oracle replies that the analysis here is similar to those that have been rejected and that the comparison to cases involving class certification are apt because the cases turn on the question of commonality, which is the same point here—whether Dr. Madden's analysis can establish discrimination across a large group of employees. *Id.* at 9-10.

This is not a good basis for excluding Dr. Madden's evidence. The *Daubert* inquiry is fact specific and varies from case to case. *Primiano*, 598 F.3d at 565. The implementing regulations for EO 11246 discussing compensation discrimination are clear that what it means for a group of employees to be similarly situated is a case-specific inquiry, with the relevant considerations varying from case to case as the underlying facts vary. *See* 41 C.F.R. § 60-20.4(a). What happened with different facts, then, does not determine what should happen here. OFCCP has brought a very broad-based set of allegations. That creates difficulties in proof, *cf. Penk*, 816 F.2d at 464, but it also means that relevant statistical evidence will make broad-based comparisons. This differs from many other cases that bring more tightly defined allegations meaning that broad-based studies, like those produced by Dr. Madden, might not be relevant and would confuse the issues. Oracle contends that, derivatively, Dr. Madden's opinions cannot establish the claim because its workforce cannot be analyzed in this manner, but this leads back to the point just discussed. Those alleged deficiencies are best explored at hearing.

Next, Oracle argues that Dr. Madden has no experience offering expert opinions about technology companies and does not understand Oracle's products, line of business, or the sort of

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[10] Oracle (DM at 2-3, 12-14) points to *Copper v. Southern Co.*, 390 F.3d 695, 726 (11th Cir. 2004); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 466 (N.D. Ill. 2009), *aff'd*, 675 F.3d 709 (7th Cir. 2012); *Williams v. The Boeing Co.*, No. C98-761P, 2006 WL 126440, at *4 (W.D. Wash. Jan 17, 2006); *Frazier v. Se. Penn. Transp. Auth.*, Civ. A. Nos. 84-2950/84-3004, 1990 WL 223051, at *14-15 (E.D. Pa. Dec. 21, 1990); *Gosho v. U.S. Bancorp Piper Jaffray, Inc.*, No. C-00-1611-PJH (N.D. Cal. Oct. 1, 2002); *EEOC v. Sears Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). The *Gosho* order is contained as DNX A. Oracle asks that I take judicial notice of the order as a matter of public record. OFCCP does not address this request. The applicable regulations empower an ALJ to "[t]ake official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice." 41 C.F.R. § 60-30.15(k); *see also* 29 C.F.R. § 18.84; 29 C.F.R. § 18.201; Fed. R. Evid. 201. As Oracle points out, judicial notice has traditionally been taken of court filings and matters of public record. *E.g. Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower)*, 755 F.3d 1130, 1142 (9th Cir. 2014) (citing *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006)). Oracle's request for official notice is thus granted and I have considered the *Gosho* order in DNX A. But for the reasons stated in the text, I do not find the decision persuasive on the question presented in the pending motions.

[11] OFCCP (PO at 16-17) points to: *OFCCP v. Enter. RAC Co. of Baltimore, LLC*, ALJ No. 2016-OFC-00006, slip op. at 106 (July 17, 2019); *Ketchum v. Sunoco, Inc.*, 217 F.R.D. 354, 356 (E.D. Pa. 2003); *EEOC v. Akron Nat. Bank & Tr. Co.*, 497 F. Supp. 733, 756 (N.D. Ohio 1980); *OFCCP v. Ford Motor Co.*, ALJ Nos. 1997-OFC-00008 / 2000-OFC-00001/2/3/4/5/6/7/8/9 (Feb. 16, 2000).

work involved. DM at 10. Its reply contends that OFCCP did not rebut these critiques. DR at 2-3. OFCCP did not need to rebut these critiques. Businesses in the technology industry, like businesses in any industry, have their own uniqueness. But they are not so different and special that they are entitled to their own legal standards and own array of experts. This is a case about compensation, not technology. If something idiosyncratic about the industry was missed by Dr. Madden and that omission matters, Oracle is free to explore that on cross-examination. I will not exclude a statistical expert altogether simply because Oracle asserts that the technology industry is special.

Oracle also argues that Dr. Madden's prior practice at her own institution employed a different methodology and evaluated pay using statistical models that did control for factors that she did not consider here, and that her prior publications reject the sort of broad proxy analysis that she employed in this case. DM at 14-15; *see also* DMX 9; DMX 11; DMX 14; DR at 3. OFCCP contends that this is baseless and attempts to distance Dr. Madden from the work of the Gender Equity Committee that issued the report in question. PO at 19-20; *see also* POX A at ¶ 8. This is also an issue best explored on cross-examination. Different situations may call for different sorts of analysis and so any variance may be warranted. Moreover, this is not a case where some new statistical technique is being used for the litigation where the expert declines to use it elsewhere. The underlying mode of analysis—a regression analysis—is generally accepted and non-controversial. Oracle disputes the judgments that Dr. Madden made in how to construct the particular analysis here, but those are fact-specific judgments that can be probed at hearing, not a rationale to exclude the evidence from hearing in toto.

Last, Oracle makes some arguments to the effect that Dr. Madden's opinions should be excluded because they cannot assist OFCCP in establishing the various theories of discrimination at issue, and are thus irrelevant. It contends Dr. Madden's analyses cannot assist OFCCP in establishing a pattern or practice disparate treatment claim because it does not evaluate whether the disparities it alleges are the product of a pattern or practice. DM at 16-17. As to a disparate impact claim, Oracle avers that Dr. Madden's analyses are irrelevant because they do not connect disparities to a particular employment practice. *Id.* at 17-18. Finally, Oracle contends that Dr. Madden's opinion regarding discriminatory job assignment are not admissible because there is no factual support for the assumption that Oracle makes assignments adverse to women and minorities. It asserts that Dr. Madden's opinions otherwise are cherry-picked slices that cannot support the broader claims at issue. *Id.* at 18-20. Oracle's reply asserts that Dr. Madden cannot show assignment discrimination because her analysis assumes that such assignments occur, contrary to the evidence. PR at 2-3. It maintains that Dr. Madden merely noted different global career levels and assumed assignment without providing evidence that there is any assignment, discriminatory assignment, or pattern of assignments suggesting discrimination. *Id.* at 8-9.

This line of argument is somewhat confused. As to the pattern or practice claim, Dr. Madden's analysis is meant to support the inference that the statistical disparities are more likely than not due to a pattern or practice of discrimination by Oracle. She does not need to directly establish the sort of connection Oracle requires. Oracle confuses the ultimate conclusion with the evidence that could support that conclusion. To be admissible, the expert evidence need only be relevant as to an element of a case; it does not need to reach the ultimate conclusion. *See Primiano*, 598 F.3d at 565. Dr. Madden's evidence goes to statistically significant disparities that persist through various controls. That is relevant to a pattern or practice claim of discrimination.

Similarly, Oracle confuses the line of reasoning OFCCP and Dr. Madden urge in reference to the assignment discrimination claim. Dr. Madden did not merely note different global career

levels and assume that Oracle made assignments. She did an analysis controlling for what she deemed "exogenous" factors and comparing this to an analysis including "endogenous" factors concluded that the measured disparities were statistically significant in both, but had decreased markedly. It is this statistical evidence that is meant to support an inference that Oracle is "assigning" or steering different employees into different positions. Oracle vigorously challenges the propriety of that inference based on deficiencies in the statistical analyses and other evidence, such as evidence showing that Oracle could not be assigning or steering employees, might lead to a conclusion that the inference should not be drawn despite Dr. Madden's showings. But again, this is about the ultimate resolution, not the relevance of Dr. Madden's evidence or its ability to offer *some* support to the claims being pursued. Moreover, Dr. Madden did consider and address more particular evidence concerning assignments/steering. *See* MRR at 32-37. That evidence may not be persuasive and the inference suggested may fail, but those are questions to be determined on the merits.

Oracle's critique as to the disparate impact claim has some merit, but that point is more properly addressed in the contemporaneous order concerning the cross motions for summary judgment. As to a disparate impact claim focused on the alleged policy or practice or relying on prior pay in setting starting salaries, however, Oracle's argument is incorrect—this is a point that Dr. Madden discussed. *See* MER at 49-50, 77. Oracle has argued forcefully elsewhere that the opinion is unconvincing for a variety of reasons, but that is a merits question and could not support excluding Dr. Madden's opinion because it cannot support the theory. Here and elsewhere, Dr. Madden's views should be heard. If they are infirm, they will be found not credible.

B. Dr. Ali Saad

Oracle relies on Dr. Saad to provide an expert opinion on its behalf in this litigation. Dr. Saad earned a Ph.D. in Economics from the University of Chicago. He has held academic and consulting positions and is currently the Managing Partner at Resolution Economics LLC. His work focuses on statistical and economic analysis in employment litigation matters. *See* DMX 23 at A1-8.

OFCCP seeks to exclude Dr. Saad's opinion because there are "[f]undamental flaws in [his] methodology." It faults Dr. Saad for not completing an independent analysis, for including future unvested stock compensation in his analysis, for not considering whether Oracle channeled employees into positions, for applying controls that do not affect Oracle's compensation, for disregarding principles of econometrics in his analysis, and for adopting the view that women are inferior to men and minorities are inferior to whites. PM at 1-3. In Oracle's view, however, OFCCP is mistaking the burdens in the case and Dr. Saad's opinions are relevant precisely because they show how OFCCP has not carried its burden. It accuses OFCCP of misrepresenting the record and engaging in inappropriate ad hominem attacks on Dr. Saad. DO at 1-2.

OFCCP asserts that in order for Dr. Saad to be able to offer an expert opinion, he had to first engage in his own study of compensation discrimination. Since he did not do so and instead critiqued Dr. Madden's (and other) studies, OFCCP contends his opinions are insufficient as a matter of law and should be excluded. PM at 9-10. Oracle replies that Dr. Saad's evidence challenges the reliability, relevance, and soundness of Dr. Madden's opinion, which is central to the case. Oracle maintains that OFCCP has the burden of persuasion and cannot assume that Dr. Madden's reports establish an inference of discrimination that must be defeated by Dr. Saad—his evidence goes to the question of whether Dr. Madden's reports are sufficient to raise that inference to begin with. DO at 3-5, 11-12. It also contends that OFCCP misrepresents Dr. Saad's opinion in

portraying it as a piggyback analysis of Dr. Madden. Rather, Dr. Saad's central opinions go to the heart of whether the sort of analysis Dr. Madden performed could show discrimination in this case. *Id.* at 6-8.

As discussed more fully in the order on the cross motions for summary judgment, OFCCP's argument here is based on a misreading of the applicable law. The role of statistical evidence is to support an inference to a pattern or practice of intentional discrimination. While merely pointing to hypothetical flaws or omissions in an analysis supporting that sort of inference is insufficient, rebuttal can be accomplished with a showing that the statistics are flawed, that they are not significant, or that more probative statistical evidence supports a different conclusion. When flaws go to the basis of the statistics offered by a plaintiff, they alone suffice. *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 Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977); *Penk*, 816 F.2d at 464; *Palmer v. Shultz*, 815 F.2d 84, 99 (D.C. Cir. 1987). Put otherwise, the burden on rebuttal is to produce evidence that would lead a finder of fact to *not* draw the inference suggested by the statistical evidence offered by the plaintiff. *Segar v. Smith*, 738 F.2d 1249, 1267-69 (D.C. Cir. 1984), *cert. denied sub nom.*, *Meese v. Segar*, 471 U.S. 1115 (1985). Dr. Saad's critiques do far more than merely poke holes in OFCCP's statistical analysis. There is no rule that required Oracle to complete its own regression analysis and certainly no rule that would lead to the exclusion of Dr. Saad's evidence because he didn't produce such an analysis. His evidence remains relevant to the issues in dispute.

More relevant to the Rule 702 inquiry, OFCCP contends that Dr. Saad did not address its "channeling" or "assignment" claim, did not conduct a salary discrimination analysis, and did analyze true total compensation because he used a figure that departed from what was actually received. PM at 10-12. As re-stated in the reply brief, the claim is that Oracle provided Dr. Saad with the wrong base data to analyze OFCCP's assignment claim and so his opinions on the subject are irrelevant and unhelpful. It contends that Dr. Saad's analysis was missing data and could only deal with individuals who were hired through requisitions, rather than college graduates before 2015, acquisition hires, and employee referral hires. Further, OFCCP alleges that Oracle recruiters seek out applicants for positions, indicating a pre-determined assignment, and that global career level may be set at one level up or down from the requisition. PR at 6-8. In addition, the reply OFCCP's asserts that Dr. Saad's testimony is irrelevant because Oracle told him not to study salary discrimination. PR at 1. It maintains that Dr. Saad studied compensation promised, not received, and that this renders his opinion inadmissible. *Id.* at 9-10.

Oracle replies that Dr. Saad did study OFCCP's claim of channeling/assignments and found them wanting. DO at 12-13. As to the sort of compensation analyzed, Oracle argues that this is a difference in opinion between the experts as to the most accurate approach, but that in any case the difference is gender and race neutral since both experts use the same compensation metrics for each employee in the analysis. It adds that Dr. Saad's reports critique the use of the compensation measures used by Dr. Madden and that OFCCP should not be able to exclude that critique on the grounds that it doesn't agree to use the same measures. DO at 10, 13-15.

There are several issues floating through these arguments. As to the assignments claim, Oracle is correct that Dr. Saad did study the claims and issue opinions. *See* SER at 112-120; SRR at 54-55, 62-65. OFCCP's argument is that they are not probative. But the alleged shortcomings concern not accounting for various speculations about assignments, or accepting OFCCP's assertion that Oracle does engage in assignments. That's a disputed fact and not a basis to exclude relevant evidence. If OFCCP's various critiques are correct, Dr. Saad's evidence will be given less weight.

For instance, the limited basis for the study of the assignments claim might mean that the evidence isn't as probative. What doesn't follow is OFCCP's argument from potential infirmity to the conclusion that the opinion must be excluded entirely.

OFCCP faults Dr. Saad for his measure of total compensation and for not separately studying salary, as opposed to total compensation. The dispute over the proper measure of total compensation concerns a professional disagreement between the experts. Dr. Saad included stock options in the year that they were awarded. OFCCP points to evidence that for some employees this is deceptive, since their subsequent separation from Oracle meant that the options did not fully vest. PR at 9-10. Dr. Saad's rationale is based on inaccuracies that would result if those forms of compensation are counted in the year exercised, since then employee choice is inflating compensation in one year for work performed in a prior year. *See* SRR at 68-69. There are problems either way total compensation is measured and the mere fact that Dr. Madden and Dr. Saad disagree about which problem is worse does not mean that Dr. Saad's testimony should be excluded. I could just as well exclude Dr. Madden's testimony on the same basis.

OFCCP's newfound focus on salary as opposed to total compensation is discussed in the contemporaneous order on the cross motions for summary judgment. It is a non-issue here. Even if Dr. Saad's opinions only went to total compensation, they would still speak directly to the complaint as pled in terms of total compensation. OFCCP's critique repeats one of Oracle's errors, contending that if an expert opinion cannot speak to the entire range of issues in play, it should be excluded under Rule 702. OFCCP's argument here is no more impressive than Oracle's.

Next, OFCCP contends that Dr. Saad ignored the relevant facts in the case because some factors he controlled for are not contained within Oracle's compensation policies, such as the product that an employee works on, "Cost Center," leaves of absence, method of entry, and whether the employee has done work leading to a patent. PM at 12-16. It its reply, OFCCP ups the critique, claiming that because Oracle does not keep data on the front-line factors that influence compensation, Dr. Saad's analysis must be irrelevant and inadmissible since it is not tethered to actual data. PR at 1-2, 4-6.

Oracle maintains that OFCCP's argument is based on misrepresentations of the evidence and that it does not have any compensation policies in the guise of rules. It accuses OFCCP of misstating testimony to support inaccurate accounts of the way compensation works at Oracle and the role of "Cost Centers" or "Organizations" at Oracle. DO at 5-6, 8; *see also* DOX B; DOX C. Oracle emphasizes its position that compensation varies with skill and market forces, including the product an individual might work on, and argues that Dr. Saad's additional controls were attempts to build proxies into Dr. Madden's analysis and improve it. DO at 8-10; *see also* DOX E. It contends that Dr. Saad did not ignore facts in the case—he attempted to refine Dr. Madden's analyses by introducing factors that would improve their value. It maintains that if Dr. Saad's refinements should be excluded, then Dr. Madden's original models must be excluded as well since they are less in line with the way compensation is awarded at Oracle. DO at 16-17.

OFCCP's critique fails. Oracle's position is, and has been, that compensation decisions are made in a decentralized manner and thus cannot be analyzed using crude global proxies. OFCCP misunderstands or misrepresents what Dr. Saad is up to. In its telling, he is making up new global policies for an imaginary technology company. In actuality, he is attempting to create measures that can capture some of the factors considered in the decentralized decision-making and thereby improve on what he believed to be Dr. Madden's flawed approach. Dr. Saad might not be very

convincing in these attempts or I might reject Oracle's claim that it makes these decisions in a decentralized manner. But OFCCP's argument for exclusion misrepresents the purpose of the measures Dr. Saad uses.

OFCCP further charges that Dr. Saad does not apply reliable principles and methods of labor economics because he attributes disparities across race and gender to unmeasured skill or hard work. OFCCP deems this contrary to "mainstream principles underlying labor economics and core Title VII precedent." It focuses in particular on Dr. Saad's use of leaves of absence in his analysis, contending that this is bias because of its adverse effect on women who become pregnant. It also accuses Dr. Saad of failing to understand principles of statistical analysis by building in "Cost Center" designations, which OFCCP sees as a way to simply add explanatory variables to destroy the significant output, even when those variables are unprincipled. PM at 16-19; *see also* PMX A.

Oracle retorts that this argument accuses Dr. Saad of making statements that he never made, representing that Dr. Saad is biased against groups simply because he critiqued Dr. Madden. It points to actual statements from Dr. Saad that are the opposite of the offensive claims about inferiority that OFCCP attributes to him. *Id.* at 18-19. It argues that OFCCP's other claims regarding Dr. Saad's methodology are really just difference of opinions between experts about how a leave of absence should be factored in an analyses. *Id.* at 19-20. Finally, it rejects OFCCP's critique that Dr. Saad added too many explanatory variables, arguing that OFCCP opted to bring a case spanning thousands of employees in a variety of roles and so is not in a position to complain when an expert tries to account for how differently situated those employees are in the analysis. *Id.* at 20.

In its reply, OFCCP represents that it is not personally attacking Dr. Saad, though it then goes on to attack him as a professional expert with inadequate qualifications. PR at 1. It then asserts that contractors agree to make pay decisions on objective factors, "not allegedly 'unmeasurable' gender and racial differences," implying that Dr. Saad endorses these practices. It adds that biases "find fertile ground precisely when employment decisions are not based on hard data of measured skills and characteristics." PR at 2.

Some of these points were addressed above. Attempting to develop variables that can capture factors of subjective decision-making does not render Dr. Saad's opinion inadmissible or contrary to established practice. Whether or not the sorts of factors Dr. Saad attempted to capture are relevant to compensation and whether his proxies adequately captured them are points that can be pursued via cross-examination and other evidence. OFCCP's disagreement with Oracle and Dr. Saad about what does impact compensation is not grounds to exclude Dr. Saad's opinions.

The rest of OFCCP's arguments, and especially attacks on Dr. Saad's integrity, lack merit. To begin with, OFCCP has abandoned any claim that any low-level manager in the relevant job functions engaged in any wrongdoing. It cannot change its theory to assert that the use of subjective factors allows implicit or explicit bias to influence pay decisions at the point where they are made. Based on other briefing, it is claiming that policies and decisions of upper management are the source of the discrimination. But on the rendering here it would be the culture or bias or unfettered discretion that is the source of the discrimination—because subjective factors are involved, individual managers are given license to discriminate, resulting in systematic discrimination. Whether such a claim could succeed is one question, but OFCCP decided to abandon any such claim by maintaining that it was not accusing any low-level manager in the relevant job functions of wrongdoing.

OFCCP's accusations of bias are baseless. Dr. Saad can cogently opine that the workforce that society presents to Oracle possesses disparities that are reflected in Oracle's workforce without making any of the offensive claims about inferiority that OFCCP is keen to implicate him in.[12] Moreover, the allegation of bias for looking at leaves of absence lacks punch. The experts both have ways for considering the detrimental impact of leaves of absence on pay. Simply because they do so differently doesn't mean that Dr. Saad is biased while Dr. Madden is not.

More strikingly, OFCCP's entire framing creates a false dichotomy between objective factors and subjective gender and racial differences. PR at 2. Not all subjective factors involve gender or racial differences. Oracle and Dr. Saad can claim that compensation is driven by subjective judgments that are not gender or race based. OFCCP's error is compounded when it asserts that either Oracle had policies of discrimination or it allowed subjective decision-making, which is discrimination. *Id.* at 3-4. But this is just the legally incorrect proposition that any disparity is discrimination and that the case ended when OFCCP had a statistician run an analysis that found a disparity. If there are disparities, they might be due to Oracle or they might be due to factors well beyond Oracle's control. Those factors may need correction, but if the disparity isn't the result of something Oracle did, then Oracle can't be held liable here.

C. Conclusion

In EO 11246 administrative enforcement proceedings at OALJ, there is no jury. The ALJ is the finder of fact. Rule 702 and the *Daubert* standard apply in both bench and jury trials, but in a bench trial, the underlying concerns about gatekeeping "are of lesser import" because "no screening of the factfinder can take place." *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002). As a result, while Rule 702 still applies in bench trials, judges are given greater discretion as to procedure and stringency in admitting testimony and may admit testimony subject to exclusion later. *See* Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 6270 (3d ed.). Barriers are "relaxed in a bench trial situation, where the judge is serving as factfinder and we are not concerned about 'dumping a barrage of question scientific evidence on a jury.'" *U.S. v. Brown*, 415 F.3d 1257, 1268 (8th Cir. 2005) (quoting *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999)).

"'*Daubert* is meant to protect *juries* from being swayed by dubious scientific testimony. When the district court sits as the finder of fact, there is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the game only for himself.'" *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018) (quoting *David E. Watson, P.C. v. United States*, 668 F.3d 1008, 1015 (8th Cir. 2012)).

> In bench trials, the [] court is able to "make its reliability determination during, rather than in advance of, trial. Thus, where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702."

[12] Commenting on an observed gender pay gap in a published article, Dr. Madden observed

> Of course, the gender pay gaps listed in this table are not necessarily entirely due to discrimination. The gender pay gaps shown potentially include pay differences that arise from gender differences in education, experience and training, as well as differences associated with occupations and industries. Gender discrimination in pay occurs, however, when employers pay women, who make the same contribution to the productions of goods or services as men, a lower rate.

DMX 23 at 2. Dr. Saad can be understood as making a similar point.

Id. (quoting *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006)); *see also FTC v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014) ("When we consider the admissibility of expert testimony, we are mindful that there is less danger that trial court will by 'unduly impressed by the expert's testimony or opinion' in a bench trial").

This case will, at least in part, be a battle of the experts. Both sides seek to preliminarily exclude the opinions of the opposing expert, but both sides are making predominantly credibility arguments that are best decided at or after hearing, not at the admissibility phase. After review of the reports, I find at this point that both experts are qualified, used reliable methodology, applied that methodology based on some of the facts (or perspectives on the facts) in this case, and offered opinions that have some relevance to the underlying issues. Their opinions are thus admissible under Rule 702. Whether the expert focused on the right facts, took the right perspective, and offered opinions most relevant to the issues are matters of further dispute and will go to credibility and weight. If the various assertions of OFCCP and Oracle have merit, they can best be pursued through vigorous cross-examination and the presentation of contrary evidence. *Daubert*, 509 U.S. at 596.

ORDER

For the reasons stated above, OFCCP's Motion to Exclude Testimony of Dr. Ali Saad and Oracle's Motion to Exclude the Expert Report and Testimony of Janice Fanning Madden, Ph.D. are denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge