U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)

Issue Date: 22 September 2020

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.

Appearances:

Kate O'Scannlain, Esq., Solicitor of Labor
Janet M. Herold, Esq., Regional Solicitor
Laura C. Bremer, Esq.
Ian H. Eliasoph, Esq.
Norman E. Garcia, Esq.
M. Ana Hermosillo, Esq.
Paige B. Pulley, Esq.
David Edeli, Esq.
Eduard Meleshinsky, Esq.
Jennifer Flores, Esq.
Kiesha Cockett, Esq.
Hailey McAllister, Esq.
Charles Song, Esq.
U.S. Department of Labor, Office of the Solicitor
For the Plaintiff

Gary R. Siniscalco, Esq.
Erin M. Connell, Esq.
Warrington S. Parker III, Esq.
Kathryn G. Mantoan, Esq.
Orrick, Herrington & Sutcliffe LLP
For the Defendant

Before:

Richard M. Clark
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

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" or "Plaintiff") filed the operative Second Amended Complaint ("SAC") on March 13, 2019. Defendant Oracle America, Inc. ("Oracle" or "Defendant") answered ("DA") on April 2, 2019. Hearing occurred over eight days between December 5, 2019, and December 17, 2019.

After considering the allegations, the arguments, and the evidence of record in light of governing law, I find that OFCCP has not established its claims. Accordingly, I recommend that OFCCP's complaint be dismissed.

SUMMARY OF SIGNIFICANT FINDINGS

This is a case about alleged systemic discrimination by a corporation. But it is not a case about whether or not any individual instance of discrimination occurred. This case is also not about the existence, let alone acceptability, of systemic economic and other gender and race-based inequities that persist in society. It is broader than any individual claim, but far narrower than the underlying, persistent problems of racial and gender inequality.

OFCCP contends that Oracle is responsible for disparities in its workforce because it is engaging in systemic gender and racial discrimination against groups of its employees. Because this is a lengthy recommended decision reflecting the voluminous material presented, I included a summary of the most significant findings below to help guide the reader. Based on the record presented, burden of proof, and applicable law, on the specific issues presented for hearing, I find that:

1. Oracle did not engage in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions; or against Asian and African American employees in the Product Development job function. (Section VIII.A)

    a. A number of current and former Oracle employees appeared and offered their anecdotal experiences. While I appreciated the time and courage it took for those witnesses to appear at this hearing, the case is ultimately not about whether or not any individual instance of discrimination occurred or how witnesses may have been treated in a particular circumstance. In this case, the anecdotal evidence did not bring the statistics to life and was not suggestive of widespread discrimination by the alleged wrongdoers. There was no good evidence for OFCCP's allegation that Oracle's executives knew about, hid, and ignored widespread disparities. The evidence concerning Affirmative Action Program compliance is mixed, but it does not support the suggested inference to a pattern or practice of disparate treatment discrimination. Oracle is budget conscience and seeks to make money, but there is no evidence that this is driven by discriminatory intent or that Oracle intentionally discriminates in order to save money. The evidence of record did not paint a flattering picture of Oracle's internal investigations, but this is very limited support

for the suggested inference to a pattern or practice of disparate treatment based on gender or race. As a whole, the non-statistical evidence does not support an inference that Oracle is engaged in a pattern or practice of disparate treatment compensation discrimination. (Section VIII.A.4)

b. There is no plausible mechanism for systemic discrimination by the alleged wrongdoers. Lower-level managers are the primary decision makers in compensation outcomes and the potential mechanisms of discrimination that are available to Oracle's higher-level executives and HR personnel (budgeting, instructions, approvals) are not likely means for the sort of discrimination alleged. There is no evidence that these mechanisms were actually being used in a discriminatory manner beyond the inference urged by OFCCP. (Section VIII.A.5)

c. The statistical evidence does not support an inference that Oracle is engaged in the alleged intentional compensation discrimination. Dr. Madden's analysis is highly aggregated and not attuned to potentially important differences between groups within job functions. Dr. Madden's analysis does not similarly situate employees with respect to the work performed. The jobs at issue require particular skills, experience, and expertise. They involve work on particular products or types of product. Organization matters for compensation and for making relevant comparisons between employees. Dr. Madden's measures of experience and education are very rough estimates and poorly capture the sort of education and experience that matters for compensation at Oracle. Dr. Madden's analysis relies largely on assumption about aggregation and the view that it is unnecessary to control for variances between employees at a group level, but this assumes away the important question about potential explanations for the raw disparities and thus undermines the inferential power of the model. (Section VIII.A.6)

d. Taking all of the evidence together, OFCCP has not established a prima facie case of a pattern or practice of disparate treatment compensation discrimination. Even if it had, Oracle would have rebutted the prima facie case and considering the entire record, OFCCP has not established that Oracle has a pattern or practice of disparate treatment compensation discrimination against women and minorities as alleged. (Section VIII.A.7)

2. Oracle did not engage in assignment, job classification, or steering discrimination at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions; or against Asian and African American employees in the Product Development job function. (Section VIII.B)

a. The non-statistical evidence does not support an inference that Oracle is engaged in a discriminatory pattern or practice of steering women and minorities into lower paying positions as alleged. (Section VIII.B.2)

b. There is no plausible mechanism by which the alleged wrongdoers could be engaging in a pattern or practice of discriminatory steering. The suggested mechanisms are not in the control of alleged wrongdoers and/or could not be used to discriminate on a systemic basis against employees in the manner asserted by OFCCP. The roles that are played by Oracle's higher-level executives and HR personnel are limited and

unlikely mechanisms of systemic discrimination, and there is no evidence that they were actually used in a discriminatory manner. (Section VIII.B.3)

c. The statistical evidence does not support an inference that Oracle is engaged in a pattern or practice of intentional steering discrimination against women and minorities as alleged. Dr. Madden's model is poorly constructed to draw inferences about potential steering since it does not attempt to study steering and does not account for the major factor influencing the job an employee holds. The statistical evidence that might support an inference to discrimination could not support an inference to the systemic discrimination alleged by OFCCP. (Section VIII.B.4)

d. OFCCP has not made a prima facie case supporting its claim that Oracle is engaged in a pattern or practice of discriminatory steering against Asians and African-Americans in the Product Development job function or against females in the Product Development, Information Technology, and Support job functions. If it had, Oracle would have rebutted the case with the evidence presented, and considering the record, OFCCP has not established that Oracle is engaged in the alleged pattern or practice of discriminatory steering. (Section VIII.B.5)

3. Oracle did not have a policy or practice at its headquarters facility during the relevant time period of relying on prior pay in salary setting and OFCCP did not show a disparate impact attributable to such a policy on female employees in the Product Development, Information Technology, and Support job functions; or on Asian and African American employees in the Product Development job function. (Section VIII.C)

   a. There are two distinct policies or practices that could be at issue. One is the collection of prior pay information; the other is the consideration and reliance on prior pay in formulating starting pay offers. While the record indicates that it is more likely than not that prior to October 2017 Oracle had a policy of collecting this information, it does not indicate that Oracle had any policy or practice of considering and relying on this information in a systematic manner. Despite indications that there was a policy of collecting the information, the record reflects that in practice Oracle was not doing so on a consistent basis. Managers could not consider information that was not present. There was no direct evidence of a policy or practice of relying on prior pay information in formulating compensation offers and the witnesses consistently denied it. (Section VIII.C.3)

   b. Even if there had been such a policy or practice, the record does not support an inference that it would have caused a disparate impact against women and minorities as alleged by OFCCP. Some correlation between starting pay and prior pay is expected because both employers are compensating an employee with the same skill set. The credible evidence here indicated that the correlation found at Oracle is similar to the correlation found generally. (Section VIII.C.4)

   c. OFCCP's disparate impact claim must be denied because it did not establish the relevant policy or practice or causation. In addition, the underlying disparities that would reflect the disparate impact are based on Dr. Madden's analysis and given the deficiencies in these models, the record could not support this claim. (Section VIII.C.5)

4. Oracle's request for costs is denied since there is no basis for an award of costs. (Section VIII.E)

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, 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.[1] 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.* Enforcement proceedings at OALJ result in a Recommended Decision and Order. 41 C.F.R. § 60-30.27. This is sent to the Administrative Review Board ("ARB"), which hears any exceptions and issues an Administrative Order. 41 C.F.R. §§ 60-30.28 – 60-30.30.

II. PROCEDURAL HISTORY

This case was docketed at OALJ on January 17, 2017, when OFCCP filed an Administrative Complaint against Oracle. The complaint alleged both "procedural" violations relating to refusal to produce data and records, and "substantive" violations relating to race and sex[2] discrimination in

[1] 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.

[2] EO 11246, as amended, forbids discrimination on the basis of both "sex" and "gender identity." Discrimination based on gender or gender identity is discrimination because of sex. *See Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). The complaints in this matter allege discrimination on the basis of "sex," but in the record the allegations and issues are often

hiring and compensation. The case has an extensive procedural history, most of which is not relevant to the issues decided here. The procedural history includes continual, voluminous discovery disputes, where the details are no longer relevant to the decision. Below, I recount only the most important aspects of the lengthy pre-hearing process that bear on the issues decided.[3]

The operative issues derive from OFCCP's Second Amended Complaint submitted on March 12, 2019, and filed in an order issued on March 13, 2019. Oracle filed its answer on April 2, 2019. The SAC made both "procedural" allegations of failing to produce data and records during the compliance evaluation and "substantive" allegations alleging both hiring and compensation discrimination on the basis of race and sex. Oracle denied the allegations and pled 39 affirmative defenses.

On February 6, 2019, I issued an order setting hearing in this case to begin on December 5, 2019, and continue for 10 court days, along with a Pre-Hearing Order governing matters of procedure not otherwise provided for. On April 25, 2019, the parties submitted consent findings and a proposed order relating to the allegations of hiring discrimination, and the related allegations of procedural violations. *See* 41 C.F.R. § 60-30.13. These consent findings involved further commitments to compliance, a process to conciliate and pursue allegations of non-compliance, and reporting requirements. On April 30, 2019, I issued an Order Adopting Consent Finding Regarding College Recruiting Program Allegations. This order approved the agreement of the parties and entered a final administrative order resolving the hiring allegations concerning Oracle's college recruitment program and the related compliance/record-keeping allegations. Only the compensation discrimination allegations and related procedural allegations remained at issue[4] and are addressed in this recommended decision.[5]

OFCCP sent a letter dated April 4, 2019, to a number of Oracle employees soliciting information and assistance. The letter triggered extensive motion practice. Oracle objected to a number of the representations in the letter, which OFCCP defended as appropriate. Oracle propounded requests for admissions touching on the statement that OFCCP was not accusing recipients of the letter or wrongdoing. On August 8, 2019, I ordered OFCCP to state its position with respect to Oracle's managers, and who it was and was not accusing of wrongdoing. On August

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discussed in reference to "gender." For instance, OFCCP's post-hearing brief is framed in terms of gender. The two are concepts are not identical, but the differences do not appear to be material to the allegations raised or evidence presented. Given the nature of the claim and the evidence presented, the allegation is more properly understood as based on gender discrimination, which would be a form of sex discrimination. In this decision, I have deferred to the usage in the record before me, with the result that "sex" and "gender" are sometimes used interchangeably. This is not based on any finding or conclusion or judgment, but simply the state of the record in the case.

[3] OALJ has made proactive disclosure of the filings in this case pursuant to the Freedom of Information Act. The voluminous pre-hearing filings can be found here: https://www.dol.gov/agencies/oalj/about/FOIA_Frequently_Requested_Records#Oracle.

[4] Oracle's answer contained 39 affirmative defenses. On April 17, 2019, OFCCP sought partial summary judgment as to two of those affirmative defenses related to conciliation, and OFCCP's alleged failure to meet its conciliation requirements. *See* 41 C.F.R. § 60-1.20(b); *see also* EO 11246 § 209(b); 41 C.F.R. § 60-1.26(a)-(b). I denied this motion on May 23, 2019. I found that viewing the history of the compliance review and the process leading to the filing of the complaint in January 2017 in the light most favorable to Oracle, a reasonable fact finder could conclude that OFCCP had not satisfied its conciliation obligations. As recounted below, however, I later granted summary decision to OFCCP on these defenses on alternative grounds.

[5] Parallel litigation has been ongoing in a case pending in the Superior Court of California for San Mateo County, *Jewett v. Oracle America, Inc.*, No. 17-CIV-02669 ("*Jewett*"), with areas of overlap with this case. *Jewett* involves a statewide class while this case is limited to Oracle's Redwood Shores headquarters facility.

22, 2019, OFCCP filed its statement of position disavowing any theory in which lower-level managers outside of human resources were responsible for any discrimination.

On August 8, 2019, I issued an order adjusting the pre-hearing deadlines and extending the page-limit for dispositive motions based on the agreement of the parties. On September 24, 2019, I issued an order modifying the schedule to accommodate necessary delays in expert discovery, but denying OFCCP's continuance request. On October 8, 2019, I modified the post-hearing briefing schedule as requested by the parties.

In early October 2019, Oracle filed a motion for a protective order or to strike in relation to additional expert analyses being served by OFCCP. The parties had agreed to a schedule, which was approved, involving simultaneous initial expert reports followed by simultaneous rebuttal expert reports. Oracle complained that after the expert rebuttal reports were issued, OFCCP continued to serve new expert analyses in the guise of declarations, which was contrary to the scheduling order in the case. After receiving expedited briefing from the parties, I denied the motion, but without prejudice to making evidentiary and other objections on the same grounds at the proper juncture.

On October 21, 2019, OFCCP filed a Motion for Summary Judgment and Oracle filed a Motion for Summary Judgment or, in the Alternative, for Partial Summary Judgement. OFCCP also filed a Motion to Exclude the Testimony of Dr. Ali Saad, while Oracle filed a Motion to Exclude the Expert Report and Testimony of Janice Madden, Ph.D. In accordance with the pre-hearing schedule, the parties filed oppositions to these motions on November 1, 2019, and replies on November 8, 2019. On November 25, 2019, I issued an Order Denying Cross Motions to Exclude Expert Evidence, finding that under applicable legal standards both experts should be permitted to offer evidence at hearing, which would then be assessed for credibility and weight.

On November 25, 2019, I also issued a 59-page order denying the cross motions for summary judgment, finding that genuine disputes of material fact remained for hearing. That order granted in part Oracle's Motion for Partial Summary Judgment. It determined that Oracle was entitled to summary judgment as to any disparate impact theory *except* that based on reliance on prior pay to set salaries. It also determined that Oracle was entitled to summary judgment on the denial of access claims still remaining on the grounds that access had subsequently been granted and/or there was no remedy given subsequent events in the litigation. Last, the order directed Oracle to show cause why OFCCP should not be granted summary judgment on Oracle's affirmative defenses involving the Show Cause Notice and OFCCP's conciliation obligations. After receiving briefing, on December 3, 2019, I granted OFCCP summary judgment as to those defenses on the grounds that there was no remedy available for the alleged historical violations, given subsequent developments in this case.[6]

The parties made their pre-hearing filings November 21, 2019, and the telephonic pre-hearing conference was held on November 26, 2019. This was followed by a November 29, 2019, Order Following Pre-Hearing Conference addressing hearing logistics, the issues for hearing, the exhibits, witnesses, and stipulations. The order attached the stipulations agreed to by the parties,

[6] This order coupled with the partial grant of summary decision on the remaining denial of access claims had the effect of removing the "historical" or "procedural" disputes from the case for hearing. Both parties were keen to litigate the conduct of the other during the compliance review, but neither party pointed to meaningful relief that would be available, given everything else that had happened. The hearing thus focused on the substantive issues and allegations of discrimination. As will be seen below, events during the compliance review were made part of this case, and end up having some relevance to some of the arguments presented, resulting in some consideration of those events below.

which was marked as ALJX 1.[7] I also encouraged the parties to discuss settlement. The pre-hearing filings were amended on several occasions, with the following representing the "final" versions: November 21, 2019, Joint Pre-Hearing Statement; November 21, 2019, Joint Witness List; November 26, 2019, Joint Exhibit List; OFCCP's December 4, 2019, Second Amended Exhibit List; and Oracle's December 3, 2019, Second Amended Exhibit List. On December 4, 2019, I issued an order clarifying the issues for hearing.

The order denying the cross-motions for summary judgement observed that despite discussion of the substantive affirmative action requirements, the case did not involve a complaint for violations of those requirements. During the November 26, 2019, pre-hearing conference, OFCCP made an oral motion to amend the complaint to add allegations that Oracle committed Affirmative Action Plan[8] violations. I denied the motion on November 29, 2019, explaining that the case had been pending since January 2017 and the investigation had been active for far longer, and that adding a new variety of complaints on the eve of hearing was far too late in the process. I noted that OFCCP had information before it for years about Oracle's compliance or non-compliance with the regulations and made choices about which claims to pursue and how to pursue them. I determined that there would be substantial prejudice in allowing a government agency to upend the course of litigation just before hearing, requiring further delay and a shift in the nature of the allegations at issue.

Both parties filed motions in limine prior to hearing[9] and on December 2, 2019, I issued an Order Regarding Motions in Limine dealing with various evidentiary issues. I found that OFCCP's motion was largely moot because the evidence in question was not being offered. Oracle's motions were mostly denied on similar grounds. I granted Oracle's Motion in Limine #9 and #10 in part excluding some evidence of executive compensation and disparate impact theories not at issue. Oracle's Motion in Limine #1 raised the previously disputed issue of the propriety of supplemental expert analysis offered in the guise of declarations from the expert. I denied this motion in part as moot, but granted it as to the late declaration/reports of Dr. Madden dated October 11, 2019, October 31, 2019, and November 7, 2019. OFCCP had agreed to a schedule for the production of expert reports, and rejected an alternative sequential schedule that would have permitted Dr. Madden to issue a report after Dr. Saad had issued his report critiquing Dr. Madden's initial report. OFCCP never sought to amend the schedule involving simultaneous reports so that it could produce more expert reports. Instead it engaged in unilateral modification and had its expert conduct new analyses and issue them as declarations to circumvent the agreed upon schedule for expert discovery. I found this improper, especially since OFCCP would have known of the apparent need for additional reports since mid-August, but did not seek modification of the

[7] Throughout I use the following abbreviations:

- Administrative Law Judge Exhibit: "ALJX"
- Joint Exhibit: "JX"
- Plaintiff's Exhibit: "PX"
- Defendant's Exhibit: "DX"

[8] I capitalize "Affirmative Action" when referring to the particular Plan or Program, but not when discussing the general concept or referring generally to the concept or requirements.

[9] Earlier Oracle sought to procure depositions of current and former Oracle employees who were potential witnesses and had not been identified previously due to the invocation of the government informant privilege. I denied this motion on November 25, 2019, as well as the alternative motion to exclude the testimony of those witnesses.

schedule or other relief, instead engaging in a version of self-help in disregard for the rules governing the proceeding, which must apply equally to Oracle and the government in this forum. I determined that the declarations were functionally reports, that they were untimely, and that OFCCP had not shown good cause to modify the schedule. I thus excluded new analyses not timely disclosed.[10]

I also granted in part Oracle's Motion in Limine #13, which bifurcated the hearing into liability and damages phases. The hearing beginning on December 5, 2019, would determine Oracle's liability, with damages to be determined, if necessary, at a later date after an additional opportunity to offer evidence and argument. However, I denied the motion insofar as it sought to exclude all evidence of damages. While I indicated that detailed evidence and exploration of damages would not be permitted, I allowed some discussion since the damage calculations were part and parcel of the expert reports and provided context for the expert opinions, as well as some indications of methodology and potential issues regarding credibility.

Hearing began on December 5, 2019, with both parties giving opening statements. *See* Hearting Transcript ("HT") at 34-57. Counsel for OFCCP and Oracle appeared and were given a full and fair opportunity to present evidence and argument. Hearing was scheduled for 10 court days, but the parties were able to complete their presentation of the case in eight days: December 5, 6, 10, 11, 12, 13, 16, and 17.[11] I heard testimony from the following witnesses:

Date	Witnesses
December 5, 2019	Dr. Kirsten Susanne Hanson Garcia Kirsten Klagenberg Donna Ng Mythily Shah
December 6, 2019	Diane L. Boross Patricia Esteva Shauna Holman-Harries Avinash Pandey
December 10, 2019	Tamberlane Baxter Nicole Alexander Vicky Hardman Sean Ratliff
December 11, 2019	Dr. Janice Madden
December 12, 2019	Kuassi Mensah Steven Miranda Kate Waggoner

[10] Counsel for OFCCP complained strenuously at the hearing that not allowing it to at least add portions of its new expert reports was prejudicial because it meant that Dr. Madden could not reply to Dr. Saad's analysis with additional analyses. *See* HT at 821-23. This is a proceeding before a DOL ALJ brought by a DOL agency, but the touchstone in procedure and evidentiary rulings in this forum is that both sides are treated equally and given a fair opportunity to be heard. Hence, OFCCP was compelled to answer interrogatories, to appropriately apply its privileges, and to sit for depositions probing the basis for its complaint. OFCCP was held to the same schedule and rules as Oracle in regards to expert reports. Counsel's argument at hearing was misguided because it fundamentally confused a question of due process and procedural fairness with a question of whatever would be most beneficial to OFCCP in this case.

[11] Oracle made an oral motion for judgment on partial findings under Rule 52(c) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 52(c), after OFCCP concluded presentation of its case. *See* HT at 1049-61. I denied the motion in a December 13, 2019, order. *See also* HT at 1277-78.

December 13, 2019	Carolyn Balkenhol Victoria Thrasher Campbell Webb Balaji Bashyam Juan Loaiza Kow Adjei Janet Chan
December 16, 2019	Dr. Ali Saad
December 17, 2019	Nachiketa Yakkundi Leor Chechik

The parties discussed their evidentiary objections prior to hearing and were able to narrow the issues considerably.[12] Most of the exhibits were admitted on the first day of the hearing. *See* HT at 13-14, 19-30. Others were entered later in the hearing. *See, e.g.*, HT at 252, 472-74, 677-78, 997, 1006, 1011, 1015, 1020, 1364, 1370, 1881. At the close of the hearing, the record consisted of the following: ALJX 1, JX 1 – JX 101, JX 103 – JX 165, PX 1 – PX 2, PX 8 – PX 9, PX 28 – PX 59, PX 61 – PX 87, PX 89 – PX 92, PX 94 – PX 191, PX 193 – PX 262, PX 264 – PX 270, PX 272 – PX 328, PX 330 – PX 435, PX 437 – PX 499, PX 501 – PX 512, DX 1 – DX 89, DX 92, DX 94, DX 98, DX 107[13] – DX 117, DX 120 – DX 341, DX 343 – DX 438[14], DX 444 – DX 445, DX 447, and DX 449.[15] The following exhibits had been withdrawn: PX 60, PX 88, PX 93, PX 500, DX 90 – DX

[12] Leading up to the hearing the parties submitted various evidentiary objections to particular hearing exhibits. I took these under submission. *See also* HT at 29. On December 9, 2019, I issued an Order Regarding Objections to Hearing Exhibits. *See also* HT at 472-74. I admitted some exhibits, did not admit others, noted that some had been withdrawn, and took some under submission. I also directed Oracle to prepare the deposition designations.

[13] Though DX 107 was formally admitted, Oracle's exhibit list indicates that it was removed. In both the electronic and paper copies of the exhibits, there is no document in DX 107.

[14] DX 349 is described as containing a "Data attachment including promotion, new hire, dive-and-save, or other justifications"—a standard exhibit descriptor used by Oracle. It actually contains one PowerPoint slide laying out an Options Analysis for wholesale vs. retail contracts in cloud deployment.

[15] The Joint Exhibits, Plaintiff's Exhibits, and Defendant's Exhibits are marked with sequential pagination that begins anew in each exhibit, except that some exhibits are not paginated at all, given the format of submission. Where possible, I use the pagination inserted by the parties in the exhibit. I do not use any pagination internal to the exhibit, or earlier Bates pagination used during discovery.

The submissions are voluminous and in many instances of dubious relevance. Below I discuss the evidence relating to the compliance review only as background. I also do not discuss the exhibits dealing with the document and data production, and the disputes involved therein during the compliance review or litigation, or exchanges between counsel in litigation, for instance: JX 98; PX 132, PX 133, PX 197, PX 199, PX 200, PX 201; PX 208; PX 209; PX 210; PX 211; PX 212; PX 213; PX 214; PX 215; PX 216; PX 217; PX 218; PX 220; PX 221; PX 222; PX 223; PX 224; PX 225; PX 226; PX 227; PX 228; PX 229; PX 230; PX 231; PX 232; PX 233; PX 234; PX 235; PX 240; PX 241; PX 242; PX 243; PX 246; PX 251; PX 258; PX 269; PX 443.

I do not discuss the large data files exchanged by the parties, either as part of the compliance review, as part of discovery, or as presented to or manipulated by the experts. For example: JX 128 (location data); JX 129 (all earnings data); JX 130 (appraisal data); JX 131 (employee qualification, experience, and assignment data); JX 132 (compensation and performance data); JX 133 (vacancy and offer data); JX 134 (salary, assignment, and Medicare wages data); JX 135 (requisition data); JX 136 (requisition data); JX 137 (H-1B and E-3 holder data); JX 156 (all earnings data); JX 160 (open dive and save requests); JX 161 (compensation history, including performance, bonus, and stock information); JX 162 (employee data, to include qualifications, prior employment, and assignment); JX 163 (similar collection updated); JX 164 (assignment, Medicare wages, and salary information); PX 191 (approver technical readout); PX 219 (cost center hierarchy spreadsheet); PX 236 (compensation history); PX 237 (comp history tabbed by year); PX 238 (salary history with assignment and Medicare wages); PX 239 (history of changes in compensation); PX 259 (excerpts from the 2014 snapshot discussed at PX 18 at 80-97); PX 260 (2014 snapshot); PX 319 (data related to college hires); PX 320 (cost

center data); PX 327 (another excerpt from Dr. Saad's backup data); PX 328 (data file used by Dr. Madden related to term frequency); PX 330 (data file containing compensation and job title distribution information); DX 40 (information related to college hires, applications, promotions, and terminations); DX 45 (combined data on 7421 employees); DX 50 (similar file); DX 264 (talent review notes spreadsheet); DX 265 (spreadsheet described as containing workflow data); DX 266 (workflow data for salary adjustments and promotions); DX 290 (H-1B data used by Dr. Saad); DX 291 (all earnings data sheet used by Dr. Saad); DX 300 (spreadsheet with workflow data); DX 301 (appraisal data); DX 302 (additional appraisal data); DX 303 (salary, Medicare wages, and "assignment" data sheet used by Dr. Saad); DX 304 (equity data used by Dr. Saad); DX 305 (performance review data); DX 306 (similar spreadsheet); DX 307 (vacancies data sheet used by Dr. Saad); DX 308 (additional vacancies data sheet used by Dr. Saad); DX 309 (offer approval data); DX 310 (same); DX 311 (same); DX 312 (same); DX 313 (offer compensation spreadsheet used by Dr. Saad); DX 314 (candidate data spreadsheet used by Dr. Saad); DX 315 (spreadsheet containing equity and other compensation related to offers); DX 316 (similar spreadsheet); DX 317 (requisition data used by Dr. Saad); DX 318 (additional requisition data used by Dr. Saad); DX 319 (same); DX 320 (same); DX 321 (combined employee information including qualifications, acquisition, previous employment, and assignment used by Dr. Saad); DX 322 (combined performance and compensation data used by Dr. Saad); DX 323 (vacancy data used by Dr. Saad); DX 324 (spreadsheet with offer approval data); DX 325 (similar collection)' DX 326 (spreadsheet combining offer information); DX 327 (similar collection); DX 328 (spreadsheet related to approvals for promotions and salary adjustments); DX 343 (file containing performance review data); DX 344 (same); DX 345 (data file with compensation and compensation change information); DX 444 (updated compensation report produced during compliance review). Though these files provide the raw material for analysis, I am neither equipped nor permitted to conduct my own statistical analysis and manipulations to draw conclusions.

I have reviewed the various discovery responses submitted by the parties, both in this case and in the *Jewett* matter—*e.g.* PX 207; PX 247; PX 248; PX 249; PX 250; PX 270; PX 279; PX 280; PX 281; PX 282; PX 283; PX 284; PX 304; PX 305; PX 306; PX 307; PX 308; PX 309; PX 310; PX 311; PX 471. However, I only discuss those portions that the parties have suggested have some particular relevance (e.g., in PX 207) and/or provide facts that are not otherwise presented. Taken independently, the discovery would tend to show that the attorneys involved did not get along and did not conduct themselves consistent with the spirit of civil discovery. But this much was already known from the pre-hearing motion practice, and it does not lead to any particular outcome on the merits.

PX 266 contains OFCCP's Statement of Genuine Disputes of Material Fact in response to Oracle's Motion for Summary Judgment and PX 267 contains Oracle's Response to Plaintiff OFCCP's Statement of Uncontested Fact submitted with OFCCP's Motion for Summary Judgment. PX 449 contains Oracle's Response to OFCCP's Statement of Additional Uncontested Facts submitted with its opposition to Oracle's motion for summary judgment. I declined the invitation to adjudicate each individual fact asserted by one or the other parties at that stage of the proceeding, and I have no intention of doing so now. My role is to decide cases, which does not require adjudicating every quibble and quarrel between the parties. Where the facts asserted in these documents are relevant, material, and in need of decision, they will be addressed by reference to the substantive evidence, not assertions by the parties as to what the evidence shows.

The submissions are also highly repetitive, with the same trainings submitted many times over in various guises, or portions of trainings that continue from deck to deck and thus appear many times over. I note some overlaps below, while in other instances I simply do not cite repeats of prior exhibits. For instance, PX 175 contains a collection of the trainings in JX 24 and JX 140, which are separately submitted multiple times, as well as a copy of Oracle's employee handbook, which is already provided in various forms in multiple other exhibits. It then appends the training already submitted in JX 141, JX 142, JX 143, and JX 144, which, as with the earlier trainings, are also submitted in multiple other exhibits. PX 253 contains a declaration from Ms. Waggoner in the *Jewett* matter. The declaration itself provides relevant information about Oracle, but this is better covered elsewhere, such as in her testimony. The bulk of the 267-page exhibit is redacted copies of five trainings related in some way to compensation (what I cite to as JX 78, JX 138, JX 140, JX 144 and JX 114). Each of the five is independently submitted, multiple times. PX 274, in turn, contains Ms. Waggoner's declaration in support of the 2019 motion for summary judgment in this case. It covers the same material as relevant to this case and attaches the same five trainings. The paper and electronic version of the file also differ—I have followed the electronic version, since it matches the description on the exhibit list and the paper exhibit is in the slot for PX 274 but is marked PX 285.

A number of other exhibits contain declarations from prior motions in this case, some of which are addressed below. PX 276 is a short declaration from Ms. Thrasher in support of a motion for a protective order, submitted to show "how Oracle develops and treats its organizing, hiring, promotion and compensation policies, practices, strategy, processes and procedures." But all it really says is that Oracle has these sorts of things, devotes effort into developing them, and treats

91, DX 93, DX 96 – DX 97, DX 99 – DX 106, DX 118 – DX 119, DX 342, and DX 448. The following exhibits were not admitted: PX 4 – PX 6, PX 192, PX 263, PX 436, PX 513, PX 514, DX 95, DX 446, and DX 450. Last, the following exhibits remained under submission, pending submission of the designated portions of the exhibits contained therein: JX 102, PX 3, PX 7, PX 10 – PX 27, PX 271, PX 329, DX 439 – DX 443.

During the hearing several individuals were referred to using pseudonyms in order to protect their privacy. On December 19, 2019, the parties submitted a stipulation identifying those individuals. *See also* HT at 1960. On January 7, 2020, I marked this stipulation as JX 166, admitted JX 166 into the record, and sealed the exhibit. The deposition designations were an issue of dispute at the hearing, *e.g.* HT at 14-19, and were left open at the end of the hearing, *see id.* at 1957. Oracle made submissions of the designated portions, as directed, but OFCCP objected to Oracle's submissions as errant in various ways. Oracle conceded some errors and made corrections, but disputed others. The deposition designations were a product of the parties' decisions about what to designate, so the open issue was solely how to best put those portions before me for a decision. On January 13, 2020, I issued an order bringing this process to the end. I complied the listings of designated portions of the depositions and marked them as JX 102A, PX 10A, PX 12A, PX 14A, PX 16A, PX 18A, PX 20A, PX 21A, PX 22A, PX 24A, PX 26A, DX 439A, DX 440A, DX 441A, DX 442A, and DX 443A. I admitted these exhibits and then admitted the underlying depositions as specified in those exhibits.[16] The other portions of the depositions were not admitted, and PX 3, PX 7, PX 11, and PX 15 were not admitted since they had no designated portions. I admitted the

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them confidentially. The declaration in PX 277 provides information about how Oracle stores information, but that doesn't bear on the issues presented. PX 285 contains a 258-page declaration from Ms. Thrasher filed with a motion to seal.in this litigation. Its girth is the product of containing redacted versions of the 2014 Affirmative Action Plan and a training module on managing pay. Both are already present in multiple other exhibits. PX 286 is a declaration submitted with a position statement, attaching an email from the compliance review and discovery responses.

PX 290 and DX 329 contain a declaration from Mr. Miranda in the *Jewett* matter. Mr. Miranda testified here, and I rely primarily on his testimony. The attached information is otherwise present in the record. PX 326 is a declaration of Ms. Connell submitted with Oracle's summary judgment motion. The exhibit contains only the declaration identifying the attachments, not the evidence attached. PX 439 is Dr. Saad's declaration in the class certification motion in the *Jewett* matter, which attaches Dr. Saad's report critiquing the expert report of Dr. David Neumark and totals 215 pages. PX 440, in turn, is the declaration of Dr. Neumark attaching his expert report for the motion. This exhibit totals 116 pages. Both PX 439 and PX 440 are submitted only as material reviewed by Dr. Madden, and I treat them as such—i.e. I do not treat these exhibits as additional expert reports to be considered on the merits of this matter beyond what the pre-trial orders permitted. PX 442 is a 194-page document containing a compendium of evidence that Oracle submitted in the *Jewett* matter to support its motion for summary judgment. Much of the material pertains to the individuals named in that suit, and has no real relevant here. It is submitted here as something Dr. Madden reviewed. Where there are portions that might bear on the issues here, I rely instead on the hearing testimony and exhibits containing the documents themselves.

[16] In citing to the depositions I use the internal pagination of the deposition, rather than the imposed sequential page markings, since the designations are made in reference to the internal numbering.

Where a deponent also testified at hearing, I focus on the hearing testimony, adding citations to the depositions to reflect similar discussions or new points. I do not add string citations to depositions (or other exhibits) where the underlying point at issue (e.g. the definition of a compa-ratio) is amply established elsewhere.

I have restricted review to the designated portions of depositions. Sometimes this results in the loss of context and it isn't clear to me exactly what process is being discussed (*e.g.* PX 22 at 239 as designated leaves ambiguity; PX 26 at 103 and 330 as designated contains too little to use; DX 439 at 169-70 and 173 doesn't give enough context to know what is being discussed). In these instances, I have not attempted to contextualize the point, since the basis for doing so is outside the record. In other instances I can gather the point that the party intends me to take, but cut so starkly out of context I cannot fairly evaluate what is being said. The result is that some testimony is given no real weight.

errata in PX 13, PX 17, PX 19, PX 23, PX 25, and PX 27, but did not admit the errata in PX 271 and PX 329.[17]

Issues of confidentiality permeated the litigation in this case, with a number of motions to seal filed concerning pre-hearing filings and the hearing exhibits. On April 20, 2020, I issued an Omnibus Order on Motions to Seal, which adjudicated all pending issues of confidentiality in the various motions to seal. On May 6, 2020, I issued an Order on reconsideration of Omnibus Order on Motions to Seal, which altered the disposition as to one exhibit. Issues of confidentiality and the constitution of the public file are dealt with in those orders and will not be discussed herein.

After discussion at the close of hearing, I ordered the parties to file simultaneous post-hearing briefs limited to 40 pages and proposed findings of fact limited to 15 pages by April 10, 2020. I directed the parties to file simultaneous reply briefs limited to 15 pages by April 24, 2020. HT at 1961. On March 19, 2020, Chief Administrative Law Judge Stephen R. Henley issued an Administrative Order and Notice (No. 2020-MIS-00006) suspending all hearings and procedural deadlines due to the COVID-19 National Emergency. This impacted the briefing deadlines in this case. On March 20, 2020, I issued an order vacating the post-hearing briefing deadlines and directing the parties to meet and confer and propose new, workable deadlines in the current reality. The parties reached an agreement, and on April 6, 2020, I issued an Order on Post-Hearing Briefing Deadlines specifying that post-hearing briefs and proposed findings of fact, limited to 40 and 15 pages respectively, were due on May 15, 2020, and reply briefs limited to 15 pages were due on June 12, 2020. I ordered the parties to make their filings via email.

On May 15, 2020, OFCCP filed Plaintiff OFCCP's Post Hearing Brief ("PPB") and Plaintiff's OFCCP's Proposed Findings of Fact ("PPF").[18] Also on May 15, 2020, Oracle filed a Post-Hearing Brief of Defendant Oracle America, Inc. ("DPB") and Proposed Findings of Fact of Defendant Oracle America, Inc. ("DPF"). On June 12, 2020, OFCCP filed Plaintiff OFCCP's Post-Hearing Reply Brief ("PRB") and Oracle filed its Post Hearing Reply Brief by Defendant Oracle America, Inc. ("DRB").

Upon review, I found that a number of exhibits had been submitted in electronic form only as WinZip files. When the files were unzipped, the exhibits in question were composed of a number of documents, some of which were provided in file types that could not be opened on OALJ computers. On July 7, 2020, I issued an Order Regarding Format of Exhibits notifying the parties of the issue and directing the parties to re-submit the exhibits in question in accessible formats

[17] The order gave the parties an opportunity to file objections to my complications of the deposition designations in the "A" exhibits. None were received. There are some ambiguities in the designations. For instance, in PX 26 OFCCP designates "155:12-158:6-15." *See* PX 26A at 1. This is improper grammar, but I have read it to include through line 15. The designations also include "242:12-244:33." *See id.* Each page contains only 25 lines, so I have treated this as including through the end of page 244.

[18] OFCCP filed a compendium containing the authorities cited that were not easily available. It also filed redacted versions of the brief and proposed findings of fact. The redactions obscure a minimal amount of information, and are derivative from redactions in the April 20, 2020, Omnibus Order on Motions to Seal. No additional motion to seal has been filed, so no additional adjudicative action has been taken.

within seven days, if they wished for the underlying material to be reviewed.[19] OFCCP and Oracle both filed converted exhibits on July 14, 2020.[20] No further filings have been received.[21]

III. STIPULATIONS AND STATEMENTS OF POSITION

Prior to hearing the parties agreed to the following stipulations, which were attached to the November 29, 2019, Order Following Pre-Hearing Conference:

1. Oracle is headquartered in Redwood Shores, California (at its "HQCA" location).
2. Oracle is a government contractor as defined by Executive Order 11246.
3. At all relevant times, Oracle had 50 or more employees.
4. OFCCP conducted a compliance review of Oracle's HQCA location that it initiated on September 24, 2014.
5. The audit period for the compliance review of Oracle's HQCA location was January 1, 2013, through June 30, 2014.
6. OFCCP issued a Notice of Violation ("NOV") to Oracle on March 11, 2016, in relation to the compliance review of HQCA.
7. OFCCP issued a Show Cause Notice ("SCN") to Oracle on June 8, 2016, in relation to the compliance review of HQCA.
8. OFCCP and Oracle participated in a single in-person meeting following the issuance of the SCN, which took place on October 6, 2016.

See ALJX 1; *see also* HT at 29-30. These facts require no additional proof and are established for all purposes.

Two statements of position, *see* 41 C.F.R. § 60-30.14(b), filed in the course of this litigation also serve to limit the scope of the issues in this case. During discovery, OFCCP sought Oracle's compensation analyses, which Oracle claimed were privileged. After extended briefing and review of a privilege log, I found that the analyses were privileged, but ordered Oracle to file a position statement regarding its compliance with 41 C.F.R. § 60-2.17(b)(3), which requires evaluation of "[c]ompensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." Oracle filed a response on October 3, 2019. As relevant here, Oracle took the position that it complies with the regulation in question through a decentralized process tailored to its compensation system, and not via centralized pay analyses. PX 287 at 1-2, 8-9. Hence, any centralized compensation analyses that it did complete were for the purposes of litigation, not as part of its regulatory compliance.

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[19] The exhibits in question were PX 434, PX 435, PX 469, PX 470, DX 203, DX 204, DX 245, DX 336, DX 337, DX 338, DX 339, DX 340, and DX 341.

[20] In some instances the reformatted filings provided additional information discussed below. Most of the material re-filed, however, involved the back-up files for the expert reports and earlier statistical analyses. The re-filings made the information mostly accessible, but the exhibits in question are not discussed in detail below. The backup files generally consist of "programming" type files and databases, in different formats, containing raw and manipulated data. They give the underlying mechanics of the expert reports. I am not a statistical expert and am not equipped to engage in my own analysis, or to reverse engineer the expert analysis. Though I have reviewed all filings submitted in accessible formats, much of the material does not bear on the decision below.

[21] I have reviewed all filings and submissions. The discussion below focuses on submissions that are relevant and material to the issues in dispute in this case. *Cf.* 5 U.S.C. § 557(c). I have not attempted to summarize all evidence submitted. *Cf. Austin v. BNSF Ry. Co.*, ARB No. 2017-0024, ALJ No. 2016-FRS-00013, slip op. at 2 n.3 (ARB Mar. 11, 2019).

OFCCP was also compelled to file a statement of position, arising out of ongoing disputes about OFCCP's communications with Oracle employees, and particularly its representation, in a letter sent to some managers, that they were not accused of any wrongdoing. 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.[22]

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, it is inconsistent with OFCCP's committed position in this case.

IV. OPERATIVE COMPLAINT AND ISSUES FOR ADJUDICATION

OFCCP alleges that Oracle engages in "widespread" discrimination at its headquarters facility against "women, Asians, and African Americans 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."[23] *Id.* at ¶ 32. In addition, OFCCP made complaints

[22] Oracle addresses this point in DPF at ¶ 6.

[23] The backup files associated with the statistical analysis underlying the allegations in the SAC are found in DX 340.

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 denied OFCCP's allegations of discrimination. *See* DA at 2-6. It also pled 39 affirmative defenses. *See id.* at 7-14. Aside from some of the defenses that speak more directly to the substantive allegations at issue, these affirmative defenses have either been disposed of in prior rulings or are no longer being pursued by Oracle. Oracle asks that the complaint by 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.

As set forth in the December 4, 2019, Order Clarifying Issues for Hearing, the issues in this case are as follows:

1. Whether Oracle violated Section 202 of Executive Order 11246 and the implementing regulations at 41 C.F.R. Part 60 by engaging in compensation discrimination against female, Asian and African American employees at its Redwood Shores headquarters, as follows:
    a. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions;
    b. Whether Oracle engaged in assignment, job classification, position, or steering discrimination at its headquarters facility during the relevant time period against Asian and African American employees in the Product Development job function;
    c. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against female employees in the Product Development, Information Technology, and Support job functions;
    d. Whether Oracle engaged in intentional compensation discrimination (wage-rate, salary, or total compensation) at its headquarters facility during the relevant time period against Asian and African American employees in the Product Development job functions.

2. Whether Oracle had a policy or practice at its headquarters facility during the relevant time period of relying on prior pay in salary setting; and whether that policy or practice had an adverse disparate impact on female employees in the Product Development, Information Technology, and Support job functions and against Asian and African American employees in the Product Development job function; and whether that policy is not shown to be job-related and consistent with business necessity.

3. Whether OFCCP must establish a violation during the 2013-2014 audit period as a prerequisite for attempting to prove a continuing violation.

4. If OFCCP prevails, it seeks the following relief:[24]
   a. *Back Pay*: For Oracle to come into compliance by providing make-whole formula back wage relief for victims of Oracle's discriminatory conduct from 2013 to the present date and implementing immediate pay equity adjustments and alterations of its compensation policies to ensure that Oracle ceases engaging in gender and racial compensation discrimination prospectively.
   b. *Prospective Relief:* OFCCP requests that Oracle be ordered to make corrective prospective relief, including necessary pay adjustments and career level adjustment for all members of the victim class, through objective evidence that eliminate the compensation disparities identified through Dr. Madden's analyses. Oracle should also be ordered to revise its compensation policies and practices to the satisfaction of this Court to ensure there is no re-occurrence of systemic racial and gender disparities in setting compensation.
   c. *Injunctive Relief:* Oracle should be enjoined against further violations of the Executive Order. Oracle should be ordered to provide training subject to OFCCP's advanced approval, and certify that it provided training, to all persons at its Redwood Shores headquarters regarding compensation discrimination. In addition, Oracle should be required to post information about compensation discrimination and notify all employees annually that they have the right to contact OFCCP should they be concerned that they are the victim of compensation discrimination.
   d. *Reporting:* Oracle should be ordered to report to OFCCP on its progress and all aspects of the relief required for a period of two years from the date it first comes into compliance by implementing the pay equity adjustments, changes to its compensation policies, and paying the back wages due.

5. If Oracle prevails, it seeks the following relief:
   a. A final administrative order be issued in Oracle's favor on all claims;
   b. OFCCP's Second Amended Complaint be dismissed with prejudice; and
   c. Oracle be awarded its costs of suit.
   d. In the event the Court finds any relief is warranted, any such relief be limited to the remedies sought by OFCCP in its Second Amended Complaint.

See also HT at 7-8.

At this stage, the issues are limited to OFCCP's disparate treatment claim as to compensation discrimination and steering discrimination and OFCCP's disparate impact claim based on a reliance on prior pay, as well as derivative disputes. OFCCP contends that the evidence establishes that Oracle breached its duties as a federal contractor and asks that judgment be entered in its favor on liability. PPB at 1-2, 40; PRB at 15. Oracle contends that OFCCP has not established any of its discrimination claims and asks that a final administrative order be issued in its favor, that the SAC be dismissed with prejudice, and that it be awarded its costs. DPB at 2, 40; DRB at 15.

[24] The December 2, 2019, order on motions in limine bifurcated the hearing into a liability and damages phase. *See also* HT at 8. Hearing proceeded only as to liability. The appropriate damages, if any, are not at issue in this decision.

V. FACTUAL BACKGROUND AND FINDINGS

A. Basic Background

1. *Oracle in General*

Oracle is a large publically traded corporation in the technology sector. *See generally* PX 264; *see also* DX 257. At the time most relevant to this case, its Board was composed of 12 directors, which increased to 14 in 2018 and 15 in 2019. PX 264 at 18; PX 450 at 11; PX 451 at 16. The Board has four standing committees: Finance and Audit, Nomination and Governance, Compensation, and Independence Issues. PX 264 at 28; PX 450 at 16; PX 451 at 24.

Globally, Oracle has between 135,000 and 140,000 employees, with roughly 50,000 employees in the United States. HT at 1164. As of 2019, Oracle employed roughly 38,000 "developers and engineers." DX 251 at 2. Oracle's headquarters facility is in Redwood Shores, California and has in the range of 16,000 employees, predominately professionals, sales workers, and managers. *See* DX 40 at 2-4. The SAC alleges that Oracle has, at all times relevant to this case, had 50 or more employees and at least one federal contract worth over $50,000, and is thus a contractor in the meaning of EO 11246. SAC at ¶¶ 3-5. Oracle admitted as much is discovery, *see* PX 247 at 7-9, and the parties stipulated to these underlying jurisdictional facts prior to the hearing, *see* ALJX 1.

In fiscal year 2019, Oracle reported $40 billion in revenue. DX 251 at 1. It had 430,000 customers in 175 different countries. *Id.* An A-Z online listing of Oracle Products accessed in 2019 identifies 356 distinct products sold by Oracle. *See* DX 254. An earlier list, apparently compiled with more granularity, contains roughly 756 Oracle products. *See* PX 290 at 8-19. A declaration submitted in this matter in 2019 reports that Oracle now markets over 800 products and services in a variety of areas related to enterprise informational technology. PX 274 at 3. As of 2019, Oracle owns more than 18,000 patents worldwide. DX 251 at 2.

Oracle is active in acquisitions, which provide a number of its products. Between 2012 and 2018, it acquired 23 companies providing applications, 12 companies in the "Industry Solutions" space, 10 companies focused on middleware, and 8 companies that provided server, storage, and networking services. *See* DX 108. A January 2019 printout from Oracle's website lists a total of 291 products that Oracle came to own via acquisitions of other companies. *See* DX 109. Another 2019 website printout reports that Oracle has completed more than 140 acquisitions. DX 251 at 2.

2. *Relevant Oracle Employees*

This case concerns allegations of discrimination by Oracle's senior executives and/or human resources personnel. Identifying those individuals, and their sometimes-shifting roles at Oracle, is thus important at the outset. As of 2017, Lawrence J. Ellison was Oracle's founder, Chairman of the Board, and Chief Technology Officer. During the period most relevant to the case, Oracle had co-Chief Executive Officers: Safra Catz and Mark Hurd. *See* JX 152 at 3; *see also* PX 262 at 1 (biographical blurbs for Ms. Catz and Mr. Hurd). Ms. Catz was sole-CEO at the time of the hearing.[25] Mr. Ellison and the CEO(s) report to the Board of Directors. PX 22 at 64.

[25] Mr. Hurd has now passed away. HT at 1226.

Thomas Kurian was Oracle's President of Product Development. *See, e.g.,* PX 261 at 3; PX 264 at 84. Mr. Kurian left Oracle in September or October 2018, but had been with the company during the other periods relevant to this case. He was not replaced—the people who reported to him were reorganized with some leaving and some now reporting to Mr. Ellison. HT at 1104; PX 12 at 104, 205. His organization included the largest portion of the Product Development function and many of Oracle's products. PX 22 at 50, 55-56. He reported to Mr. Ellison. *Id.* at 58

Steven Miranda is the Executive Vice-President of Applications Development at Oracle. HT at 1065. In that role, he leads "the group that builds all of our applications, our Cloud based applications and our on-premise applications. We have design reviews, speak with customers, manage the group product strategy, product direction." *Id.* at 1066. Juan Loaiza and Andy Mendelsohn have similar positions in Database, and Don Johnson has the position with Infrastructure. *Id.* at 1073. Mr. Miranda and the others report to Mr. Ellison, but previously reported to Mr. Kurian. *Id.* at 1103-04.

Juan Loaiza joined Oracle in 1988 and is now Executive Vice-President of Mission Critical Database, a position he had held for about a year. Previously he was Senior Vice-President of Database Systems. He reports to Mr. Ellison. HT at 1464-65.[26] He leads the Mission Critical Database line of business, which includes sub-lines of business related to products Oracle sells, such as "Exadata, Zero Data Last Recovery Appliance, Memory Database, Advance Compression, Golden Gate" and others. *Id.* at 1466. Andy Mendelsohn is Executive Vice-President of General Database Systems and leads the other part of Oracle's database team. *Id.* at 1467-68. When Mr. Loaiza was a Senior Vice President he reported to Mr. Mendelsohn, who at that time reported to Mr. Kurian. *Id.* at 1482.

Campbell Webb is currently the Senior Vice President of Oracle Managed Services, which is the IT organization at Oracle. He is "responsible for managing all the applications and services that our employees use on a daily basis, things like e-mail, calendaring, financial systems, support systems, as well as systems of our customers, again, financial systems." HT at 1391-92. At the time of the hearing, he reported to Charles Rozwat, Executive Vice President of Support, but a week earlier had reported to Richard Sarwal, who was Senior Vice President of Support. Before that, he had reported to Thomas Kurian for ten years. Mr. Kurian oversaw product development and part of IT. Part of IT reported to Mark Sunday during that period. *Id.* at 1414-16.

Balaji Bashyam is an Oracle employee of 23 years. At the time of the hearing he was the Senior Vice President of Customer Support for Database, but his job had just changed and prior to December 2, 2019, he had been Senior Vice President of Customer Support for SaaS Services. HT at 1431-32. In his prior position, he "was responsible for providing customer support for a number of different products that all fall under the Cloud umbrella and Applications, Fusion Applications, Taleo, Marketing Cloud, Service Cloud, et cetera." *Id.* at 1433. In his current position, his "responsibilities are to provide support for the Database Cloud, which we generally call as Autonomous Database, and some on-premise strategic products, like Exadata." *Id.* He previously reported to Mr. Miranda and now reports to Mr. Mendelsohn. Before he had 11 direct reports and an organization of 1,500. Now he has four direct reports and an organization of 240. *Id.* at 1433-34. Chuck Rozwat is/was an Executive Vice-President leading a large part of the support organization. PX 22 at 59. He reported to Mr. Hurd, at least in July 2018. *Id.* at 60. Two individuals led IT organizations, with one reporting to Mr. Rozwat and one reporting to Mr. Kurian. *Id.*

[26] Mr. Loaiza's background is also discussed at PX 21 at 16-17, 26, 27-29.

Carolyn Balkenhol is an Oracle employee of 25 years who currently works as a business-planning director, a position she has held for nine years. Her duties are "[p]rimarily reviewing transactions, HR, purchase requisitions, things of that nature, that require approval from our most senior executives." HT at 1286-87. Currently that is Mr. Ellison and Ms. Catz. She has two direct reports, Yvonne Sieber and Lynn Taylor who have similar responsibilities. *Id.* at 1287-88. She reports to Rich Allison, who reports to Ms. Catz. *Id.* at 1304.

Joyce Westerdahl has been with Oracle since 1990 and is the Executive Vice President of Human Resources. She started and is the executive director of the Oracle Women's Leadership program. HT at 1240; PX 81 at 1; PX 26 at 12, 17, 338. She "oversees all areas of HR: compensation, benefits, employee relations, HR systems." PX 22 at 62. Or, as she put it, "I run everything that encompasses HR, benefits, comp, employee relations, investigations, union worker counsel, activities." She also oversees things like "Oracle Foundation, Oracle Academy, Oracle High School," "data privacy groups, the emergency groups for disaster reliefs with our employees," and HR internal IT systems. PX 26 at 12-13. She reports to Ms. Catz. *Id.* at 13. Ms. Westerdahl does not make or approve compensation decisions for the job functions at issue in this case or assist with global compensation programs. HT at 1240-41.

Kate Waggoner is the Senior Director of Global Compensation at Oracle. She has been with Oracle in compensation-related positions since 2005, and in her current position since 2018. Before then she was Director of Global Compensation. She reports to Phil Genish, Vice-President of Work Force Intelligence and Compensation, who reports to Ms. Westerdahl. Ms. Waggoner's team is responsible "for anything that really has a global reach when it comes to compensation at Oracle." This includes administration of any global compensation program like focal reviews, bonuses, or equity distributions, managing the Global Job Table, mapping acquisitions onto Oracle's organization, and executive compensation, as well as assisting the Board's Compensation Committee. HT at 1162-63; JX 102 at 8-10, 28-29; *see also* PX 22 at 25-30 (discussion of job and duties); PX 24 at 7-9 (same).

Lisa Gordon was a peer of Ms. Waggoner's who took over responsibility for the Product Development organization at some point. Ms. Gordon joined Oracle in the Sun acquisition and left before the hearing. For a period, Ms. Gordon supported Non-Sales and the Corporate Bonus Program while Ms. Waggoner supported Sales and the Equity Program. HT at 1244-45; *see also* JX 102 at 12. Madhavi Cheruvu is a Vice-President of Human Resources. PX 12 at 11. She manages a team of individuals and provides HR support to seven lines of business, including "Database" and "Fusion." *Id.* at 23. In 2015 she supported the "development organization" that was run by Mr. Kurian. *Id.* at 60, 264-65. Anje Dodson is an HR Vice President who reports to Ms. Westerdahl. HT at 64-65. She gave a deposition in the *Jewett* matter concerning training and performance management at Oracle, and that deposition has been submitted as designated here. *See* PX 14; PX 14A.

Tamberlane Baxter is a Senior Director in HR at Oracle, who since late 2014 has managed Oracle's workplace investigations for the United States. She reports to Vickie Thrasher, who reports to Joyce Westerdahl, who reports to Safra Catz. HT at 477-78; *see also* PX 10 at 20-22. Victoria Thrasher is Senior Vice president of Human Resources Organization and People Capability at Oracle. She has responsibility over "Talent Development Organization, Top Talent Programs, Diversity Inclusion, Diversity Compliance, the HR Communications and Learning Capabilities" and has been responsible for Diversity and Inclusion Initiatives since June 2015. HT at 1341-43.

Lawrence (or Larry) Lynn was the head of Oracle's college recruiting program. HT at 1310. Chad Kidder is, or at least was, a Director of Talent Advisory for North America Product Development, except for Oracle Cloud Infrastructure. Previously he was a senior recruiter, interim recruiting manager, executive recruiter, recruiting manager, and then a senior manager working in talent advisory. PX 20 at 12-13. He is responsible for managing recruiting related to product development. *Id.* at 14. He sat for a deposition on Oracle's behalf in the *Jewett* matter, and that deposition, as designated, has been submitted in this case. *See* PX 20; PX 20A.

Shauna Holman-Harries was the Director of Diversity Compliance from October 2011 until sometime in 2017, and then became the Senior Director of Diversity Compliance, a position she held at the time of the hearing. HT at 331; *see also* PX 16 at 18. She reports to Ms. Thrasher, who reports to Ms. Westerdahl. HT at 332. Ms. Holman-Harries was responsible for overseeing Oracles OFCCP compliance efforts and affirmative action. She oversaw the audit in this case and provided data to OFCCP. *Id.* at 332-34, 344-45; *see also* PX 16 at 33-34. She is one of the two individuals responsible for implementation of Oracle's yearly Affirmative Action Plan. HT at 337-39; *see also* PX 16 at 57.

B. OFCCP's Compliance Review[27]

OFCCP initiated a compliance review on or about September 24, 2014, issued a Notice of Violation on March 11, 2016, issued a Notice to Show Cause as to enforcement proceedings on June 8, 2016, attempted conciliation with one in-person meeting, and initiated litigation in January 2017. *See* ALJX 1; *see also* SAC at ¶¶ 6-10; DPF at ¶ 1. There was a considerable amount of information in the record related to the conciliation process, most of which is not relevant since the conciliation process is not at issue any longer. However, some conciliation information is relevant because OFCCP makes an argument alleging discriminatory intent based on Oracle's behavior during the review process.

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[27] Since OFCCP's procedural complaints and Oracle's procedural affirmative defenses are not at issue in this decision, I provide only a general overview of the history that gives helpful context and sets up consideration of an argument below that relies, in part, on Oracle's behavior in the compliance review. Significant other evidence about what happened during the compliance review has been submitted. For instance, PX 44 is a declaration collecting a variety of exchanges. PX 134 contains various exchanges from the period. PX 272 is Ms. Holman-Harries declarations from Oracle's 2019 Motion for Summary Judgment or Partial Summary Judgment. PX 273 is Mr. Siniscalco's declaration from the same motions. Both discuss and append documents related to the compliance review (and in one case a prior declaration appending documents related to the compliance review). PX 275 is Mr. Siniscalco's declaration from the 2017 Motion for Summary Judgment (or to stay) on conciliation, again attaching documents related to conciliation, all of which are already in the record, sometimes many times over. Other exhibits contain various exchanges that do not inform the basic history. Though I have reviewed all submissions, I do not discuss this material in detail since it does not inform the resolution of disputed issues for this decision.

Oracle has also submitted several exhibits going to the proper protocols and procedures for a compliance review: DX 2 is OFCCP Directive 307, "Procedures for Reviewing Contractor Compensation Systems and Practices," dated February 28, 2013, and DX 20 is OFCCP's complete Federal Contract Compliance Manual from October 2014, coming to 537 pages. I do not address the substance of this material, since the proper conduct of the compliance review is no longer an issue for adjudication.

Portions of the depositions submitted and designated concern conduct during the compliance review: PX 16 (Ms. Holman-Harries); PX 18 (Ms. Holman-Harries as 30(b)(6) deponent for Oracle); DX 439 (Hea Jung Atkins, relevant District Director of OFCCP during review process). Ms. Atkins, for instance, testified about the process of a compliance review generally (*e.g.* DX 439 at 32-24, 35-38, 189) and the review in this case in particular (most of the designated portions in DX 439A). I cite to this material sparingly, and only when it adds to the basic history.

Hea Jung Atkins, OFCCP's District Director in San Francisco at the relevant time, received directions from OFCCP's national office to conduct a review of Oracle's HQ facility. Several compliance officers, Hoan Luong and Brian Mikel, did work on the review. DX 439 at 12-13, 39-40. Jane Suhr was the acting and then official Deputy Regional Director. Janette Wipper was the Regional Director. *Id.* at 16; DX 443 at 14. The process at this stage between OFCCP and the contractor is meant to be collaborative, not adversarial. The aim is to not litigate. DX 439 at 49-50; *see also id.* at 51-52. On September 24, 2014, OFCCP sent Oracle a letter announcing a compliance review of Oracle's headquarters facility. *See* JX 13 at 1-2; *see also* PX 254. Ms. Holman-Harries replied to OFCCP with spreadsheets and a variety of other materials. *See* JX 14; PX 63; DX 41; *see also* PX 64; DX 442 at 29; JX 15; PX 45; DX 40.

On November 19, 2014, OFCCP sought a broad array of additional information, giving Oracle only until November 26, 2014, to comply. *See* JX 18 at 1-3; PX 47 at 1-4; *see also* DX 442 at 30-31. Ms. Holman-Harries requested and received an extension. JX 19 at 1; JX 20 at 1-2. She initially provided a spreadsheet with most of the information (54 columns), though she said some was unavailable. She represented that "[b]ecause of the diversity in products sold at Oracle, job group or job title have little bearing on an employee's pay." JX 20 at 1; *see also* JX 21 (additional information). OFCCP sought additional information (for a total of 99 columns) on February 11, 2015.[28] JX 22 at 1-3. OFCCP requested Oracle policies on February 17, 2015, with only two days to comply. JX 23 at 1. Ms. Holman-Harries provided additional information, with more information the next week. *Id.*; *see also* PX 256; PX 49; PX 53 at 1.

On February 25, 2015, OFCCP informed Oracle that the desk audit was completed and it would be doing an on-site review, which it scheduled for the week of March 23, 2015. *See* DX 3 at 2; *see also* JX 26 at 1-2; DX 4 at 1-2; PX 244; DX 4 at 5-6; DX 44. Oracle had difficulty gathering all of the requested information on short notice, and expressed concerns about OFCCP's approach and lack of transparency, as well as its methods of analysis. OFCCP "noted" Oracle's concerns, but did not provide any explanation.[29] *See* DX 5; DX 110; *see also* DX 439 at 71-72; JX 28. Oracle provided OFCCP with additional data on March 17, 2015. *See* DX 45. OFCCP sent further instructions and requests on March 19-20, 2015. *See* PX 245; *see* DX 46.

The onsite occurred March 24-27, 2015. After the onsite, disputes continued to arise between Oracle and OFCCP concerning the provision of additional data and information. The parties also engaged in arguments over OFCCP's conduct of the compliance review, including alleged bullying and unprofessional behavior by OFCCP officials threatening Oracle employees with criminal prosecution. OFCCP believed that Oracle was not being truthful about complaints of discrimination. *See* DX 8; JX 30; *see also* DX 18 at 136-39. These disputes were ongoing. *See* DX 9; JX 32. On April 27, 2015, OFCCP sought to schedule a second onsite and requested a variety of

[28] The initial request on February 6, 2015, had been for 102 columns, with a 10-day turn around. Oracle responded that the request was impossible and OFCCP requested a conversation on February 9, 2015, seemingly leading to the February 11, 2015, request. *See* DX 43.

[29] Ms. Atkins acknowledged that OFCCP was not fully responsive to Oracle's request for information in this period. DX 439 at 62-63, 66-67. She also acknowledged that Ms. Holman-Harries was reporting that OFCCP was not being transparent or fair, and that her office was behaving differently than other OFCCP offices in regards to compliance reviews. She claimed that she couldn't remember whether she was under a directive not to give Oracle information. She also claimed that she was unaware of the details of the investigation. OFCCP would have had those details at this time, but did not share them with Oracle. *Id.* at 74-77. Ms. Atkins could not remember if OFCCP gave Oracle any indication of what it was worried about while it was conducting the compliance review. *Id.* at 102.

additional information by May 8, 2015. *See* JX 31; PX 54 *see also* JX 33; DX 50; DX 51. The parties negotiated the process, which included repeat interviews and data requests that Oracle found impossible to meet without significant investment of resources. *See, e.g.,* JX 34; JX 35. At the end of May 2015, OFCCP demanded the personal contact information of all Oracle employees, giving Oracle one week to gather the information. Oracle sought some basis for such a request. *See* DX 10.

While generally the parties cooperated in the process, it appears to have been tense and full of disagreements based on OFCCP's reluctance to share any information about its concerns and Oracle's resistance to providing information that it believed it had already given or would be too burdensome to procure. *See, e.g.*, JX 38; JX 39; JX 40; PX 55; PX 65; *see also* DX 442 at 68-70. Oracle did continue to provide additional data. *E.g.* JX 41; PX 59; DX 52; DX 54; DX 444. Another onsite occurred in June 2015, with OFCCP subsequently accusing Oracle of a variety of misconduct. OFCCP also declined to schedule any exit conference to complete the on-site in the HQCA review. *See* DX 11; *see also* DX 111. Oracle disputed the allegations and the parties continued to quarrel. *See* DX 53; *see also* DX 439 at 151.

At the end of July 2015, OFCCP requested resubmission of data provided with more fields and other additional information, to include contact information of all current and former Oracle employees. *See* JX 42; *see also* JX 46. Oracle replied that the request was "enormous" and deadline could not be met, but that the information would be provided as soon as possible. *See* DX 55 at 1. In the following months, Oracle continued to complain about the difficulty of compiling the information requested, while OFCCP continued to complain about not receiving it by the imposed, generally short deadlines. *See* JX 47; JX 48; PX 66. In October 2015, OFCCP requested Oracle provide a long list of additional information, with one week to comply. Oracle provided a large amount of additional information, though it continued to dispute various requests on various grounds, including that it did not maintain the information requested about its employees and applicants.[30] *See* JX 51; PX 61; *see also* DX 13; DX 442 at 72-76. On November 2, 2015, OFCCP sent a "final request" for additional information, with a one week deadline. *See* JX 52; PX 58; *see also* DX 442 at 57-60, 64-68, 85-86. Oracle responded that it had just provided information, but OFCCP claimed that the responses were not complete and not accurate, a characterization that Oracle found confusing. *See* DX 14; *see also* DX 84; DX 442 at 87-91. Oracle continued to provide some information, and OFCCP continued to request more, with Oracle maintaining that the amount requested was very time-consuming and asking for information about OFCCP's concerns.[31] *See* JX 53; DX 85. In January 2016, OFCCP sent Oracle various interview notes from the compliance review for signature, but Oracle declined given the 7-10 month delay in producing the notes for review. PX 257.

OFCCP issued a Notice of Violation ("NOV") on March 11, 2016, asserting findings of hiring discrimination and compensation discrimination, as well as affirmative action and

[30] On October 29, Oracle also provided OFCCP with 28 personnel files. *See* DX 56; DX 57; DX 58; DX 59; PX 60; DX 61; DX 62; DX 63; DX 64; DX 68; DX 69; DX 70; DX 71; DX 72; DX 73; DX 74; DX 75; DX 76; DX 77; DX 78; DX 79; DX 80; DX 81; DX 82; DX 83; *see also* DX 442 at 86-87.

[31] Sean Ratliff, testifying on behalf of OFCCP, acknowledged that Oracle was responding to requests for information that had already been provided, and that OFCCP had not communicated what was deficient in Oracle's production at that time. DX 442 at 75-76. He also acknowledged that Oracle had sought clarification and explanation of some of the requests, but that OFCCP had not provided a response to these questions. *Id.* at 80-82.

recordkeeping/access violations.[32] *See* JX 54 at 1-9. It attached an outline compensation analysis to support some of its findings.[33] *Id.* at 10-12; *see also* PX 135; DX 441 at 83-86, 97-108, 112-28, 132-37, 141-44, 147-50 (testimony about analysis).[34] With a NOV issued, the process moved into conciliation, which became the responsibility of Ms. Wipper. DX 443 at 14-16. On March 16, 2016, OFCCP requested a position statement from Oracle as a condition precedent to conciliation. *See* JX 55. Oracle resisted providing a position statement, pointing to the lack of any requirement for a statement and alleged various procedural violations by OFCCP in the investigation. *See* JX 56. OFCCP declined and sought conciliation based on a detailed rebuttal position from Oracle.[35] *See* JX 57 at 1. Oracle responded through counsel on April 11, 2016, and posed a series of additional questions and seeking more detail. *See* JX 58; *see also* DX 16. OFCCP replied on April 21, 2016, providing some answers but generally refusing and maintaining that Oracle now had a rebuttal burden. *See* JX 60 at 1-11. This led to further disputes from Oracle, which sought more information. *See* JX 62; *see also* PX 202; DX 443 at 29. On May 25, 2016, Oracle provided a position statement, alleging a variety of procedural violations and errors. *See* JX 65; *see also* DX 443 at 30.

On June 8, 2016, OFCCP issued a Notice to Show Cause announcing that the finding of discrimination was unrebutted and conciliation had failed.[36] *See* JX 68; *see also* PX 136. Per Ms. Suhr, the Notice to Show Cause was issued because Oracle asked that the NOV be withdrawn. *Id.* at 33. Oracle responded through counsel on June 29, 2016, accusing OFCCP of bullying behavior and disregard of its own procedures, and arguing that there had been no meaningful opportunity to engage or attempts at conciliation. *See* JX 69; *see also* DX 443 at 36-38. OFCCP responded on September 9, 2016, refusing to withdraw the Notice to Show Cause but offering to engage in conciliation. *See* JX 73. On September 16, 2016, Oracle accepted the offer. *See* JX 75. OFCCP, however, withdrew and conditioned its participation in conciliation on Oracle's producing a rebuttal statistical analysis within five days. *See* JX 74. Oracle strenuously objected to the late insertion of new conditions on conciliation. *See* JX 76. OFCCP replied that the law required a rebuttal analysis and that Oracle had to concede the violations, concede it had no rebuttal, or provide the rebuttal.

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[32] Mr. Ratliff recalled that Oracle did not provide a 2013 snapshot prior to the litigation. He didn't recall Oracle ever refusing to provide the material, but averred that not producing it after multiple requests was a refusal. DX 442 at 77-78. He acknowledged that some of the information sought, including the snapshot in question, was provided in the litigation. *Id.* at 84, 91-92. Ms. Holman-Harries acknowledged that Oracle did not provide OFCCP with a 2013 snapshot during the compliance review and did not provide educational data requested. They did not believe that they retained the educational data, but it turned out that some databases held some of the information. The information was later provided in the litigation. HT at 364-68, 378-79; *see also* PX 16 at 288-89; PX 18 at 71-73, 126-28; PX 19 at (corrections in first cited portions of PX 18). But she added that Oracle produced a wide variety of information in response to OFCCP's request, including a 2014 snapshot that ended up with over 100 columns. HT at 387-88; *see also* PX 260 (snapshot). She maintained that Oracle did not decline to provide the 2013 snapshot—rather it was in the process of compiling it. HT at 388. In the period in question they were responding to multiple audits, between 22 and 35 at any given point. They were trying to keep up with limited staffing, and given the variety of information requested had to be pulling data from multiple databases. *Id.* at 388-90.

[33] Ms. Suhr agreed that the entrance conference had only informed Oracle that there were potential compensation or hiring issues and that product development might be involved, and that the exit conference only told Oracle that information would be provided later. No specific findings had been given to Oracle before the NOV. DX 443 at 20-22.

[34] The backup files associated with the statistical analysis are found (partially redacted) in DX 341.

[35] Ms Suhr, testifying later on behalf of OFCCP, confirmed that a position statement is often requested but is not required of a contractor as part of conciliation. DX 443 at 17-19.

[36] OFCCP completed a Standard Compliance Evaluation Report Form on July 28, 2016, summarizing the compliance review and findings, though OFCCP subsequently redacted almost all of the substantive information in the document. *See* DX 17.

But it did schedule a conciliation meeting with a rebuttal due beforehand. *See* JX 77; *see also* DX 18 (reply).

A meeting took place on October 6, 2016. OFCCP and Oracle continued to disagree regarding the appropriate way to analyze Oracle's employees. *See* JX 79 (handwritten notes from OFCCP); JX 80 (transcribed notes); JX 81 (additional OFCCP notes); JX 165 (notes from Ms. Holman-Harries); PX 203 (emails after meeting); *see also* PX 18 at 205-33, 235-37; DX 439 at 190-93; DX 443 at 45-50, 52-58. The meeting lasted several hours and was cordial. DX 443 at 47-48. Some additional explanation was given, and back pay was discussed, but OFCCP presented no draft agreement. *Id.* at 48-50. OFCCP continued to request a rebuttal analysis. Oracle continued to aver that products mattered for pay. *Id.* at 52-53. OFCCP gave ballpark figures to resolve the violations and represented it had ideas about programmatic changes, but those discussions required a prior admission of liability. JX 165 at 6-7; *see also* DX 443 at 56-58. Counsel for OFCCP threatened litigation and represented that "[t]his is a big case for the OFCCP." *Id.* at 7.

On October 31, 2016, counsel for Oracle sent OFCCP a letter responding to and generally arguing against the various allegations made in OFCCP's Notice of Violation. JX 84 at 1-13; *see also* PX 204. OFCCP responded on December 9, 2016, stating that Oracle had not rebutted the allegations and it would refer the matter for enforcement. *See* JX 85; PX 205. Conciliations at OFCCP can stretch out over a long period of time and involve multiple meetings. In this case, OFCCP had one meeting and believed that conciliation ended by the December 9, 2016, letter. It did not provide Oracle with a draft conciliation agreement or give Oracle details on what non-monetary remedies it needed to implement beyond the NOV or monetary remedies beyond the general figures mentioned orally at the meeting. DX 443 at 63- 66. Through the remainder of December 2016 and into January 2017 OFCCP, Oracle, and the Solicitor of Labor exchanged letters as the matter proceeded towards litigation. *See* JX 86 at 1-3; JX 87 at 1-2; DX 19; *see also* PX 137; PX 138. Oracle responded to OFCCP's request for a final "counteroffer" on January 17, 2017, expressing continued concern over OFCCP's conduct and suggesting that the timing of the process was driven by political considerations and the impending change of administrations. Oracle also expressed a desire to continue to negotiate. *See* JX 89; *see also* PX 139; PX 206. Counsel for OFCCP replied later that day, rejecting those contentions and stating that a complaint would be filed. *See* JX 90 at 1; *see also* PX 140. OFCCP filed its initial Administrative Complaint on January 17, 2017.

C. Oracle's Organization and Job "Architecture"

1. *Job Classifications*[37]

Oracle employs full-time regular employees, part-time regular employees, and temporary employees. JX 147 at 9.[38] Per a 2015 training, "Job Classification is a consistent global framework for job related information that supports a number of key HR and non-HR processes as well as

[37] OFCCP proposes facts partly related to the classification scheme in PPF at ¶¶ 15-18. Oracle provides its gloss in DPF at ¶¶ 7-10.

[38] I cite to the 2017 version of the Employee Handbook in JX 147. The record contains other versions: a version sometime after July 2014 in DX 259, a September 2014 version in PX 50, a 2014 or 2015 version in JX 23, a 2015 version in DX 34, a January 2018 version in JX 154, a March 2018 version in DX 38, a July 2018 version in DX 36, a September 2918 version in DX 38, and a November 2018 version in JX 155. The parties have not pointed me to any material differences in the different versions related to the issues in this case, and I have found none.

management reporting." JX 25 at 11.[39] Each job fits into the "Global Job Table." *Id.*

> Each job is assigned a unique combination of globally defined attributes
> - Job code: Unique identifier
> - Job Title: Commonly known as the "system job title"
> - Function: Describes the type of work the person performs. It is not specific to the employee's line of business ("LOB")
> - Speciality: A subset of the Function
> - Career Level: Broad category that indicates increase in responsibilities and performance expectations

Id. at 12. A job code automatically fixes the other elements. *Id.* "Global career levels are a set of broad categories related to the level a job is performed." *Id.* at 13. Responsibility and complexity increase with career level and jobs in different organizations at the same career level have the same level or responsibility and complexity. *Id.*; *see also* JX 114 at 4-5[40]; JX 149 at 7-8; PX 30 at 22-23. Job codes reflect function, not line of business, so an employees with the same job code can be located throughout the company in various lines of business, depending on their particular role in the line of business. *E.g.* PX 30 at 25. Internally, employees at Oracle can access the job code information for themselves and other employees using "Aria," which would display department, cost center, then then the job code with function, specialty area, and career level. It also shows discretionary job titles. HT at 1182-83.

Oracle's internal HR webpage explains:

> Global career levels are recognizable steps in job families where responsibilities and performance expectations increase from one job to the next higher job. The global career level structure has two tracks: Management and Individual Contributor. An employee is considered a manager if his/her primary duty is management (with hire/fire authority) of two or more regular full time equivalent Oracle employees. All other employees should be considered individual contributors.

JX 94 at 2.[41] It then adds, "This approach to compensation is tailored to incorporate the flexibility necessary to excel in various lines of business, retain pre-eminence in the marketplace, and compete for the most talented people." *Id.* To ensure that the total compensation package is competitive employees must be placed in the correct job codes. *Id.*

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[39] The same basic information can be found in another contemporary compensation training, JX 111 at 12-15, and in a December 2016 manager training, JX 126 at 57. It is also covered in JX 127 at 11-14, an earlier 2012 training, PX 30 at 18-25, and what appears to be a later managing compensation training, PX 141 at 26-33.

[40] JX 113 contains an April 2016 Managing Compensation presentation that is somewhat shorter but covers the same general topics in the same general manner as JX 114. I omit redundant citations to JX 113, since the exhibit adds no additional information. PX 34 is a PDF of the same training in JX 114. I do not include redundant citations to PX 34. PX 152, in turn, is a PDF copy of the slides-only from this same training, without the notes pages. I do not make redundant citation to PX 152. DX 24 is a PowerPoint file of the same training, and is thus identical to JX 114. Ms. Waggoner, whose team creates compensation training, discussed aspects of the training that is JX 114 (in the guise of DX 24) at the hearing. *See* HT at 1201-12. I discuss the content with reference to the training itself, citing to JX 114.

[41] This version is from December 2017. JX 99 and PX 33 contain a July 2018 version of the same page, without any significant changes.

As to job codes:

> To facilitate its global job classification process, Oracle uses a job code structure wherein each employee is assigned a job code. Each global job code represents a unique combination of function/specialty area/career level. This means that every employee assigned to job code 11111 has the same function, specialty area, and career level combination. If required, a product and industry code is assigned directly to an employee's record in the HR database, which allows this to vary by employee.

JX 94 at 2. Employees have a "system title that applies to his or her job code." *Id.* at 1. They also have "a discretionary title" that might be the same or might be more descriptive of the job performed. Lines of business may have rules on discretionary titles. *Id.* Choosing the job code that best matches the role is important because it can impact compensation, including salary range and bonus eligibility. JX 25 at 14; JX 114 at 8-15; *see also* JX 141 at 11 (choice important for overtime eligibility).[42]

Oracle has two career level paths: "M" for management positions and "IC" for individual contributor positions. JX 25 at 13. Individual contributors are line employees who do the "actual line day-to-day work." Other employees are managers. Each line has categories increasing in seniority. HT at 116. There is no mapping between the two paths. *E.g.* JX 25 at 13; *see also id.* at 35. In the U.S., M-level employees must have two or more direct reports. *Id.* at 13. IC levels go from IC0 to IC6 (or IC7), with increasing levels of responsibility. M levels go from M1 to M10. They do not correlate. Mangers primarily manage, individual contributors are everyone else, including team leaders.[43] JX 114 at 5. Oracle expects its managers to play the role of "Leader," "Company Advocate," "Coach," "Business Manager," and "Administrator." They are expected to execute Oracle's operational plans, hold themselves and their teams accountable, and hire, engage, and develop employees. JX 126 at 9-10; *see also* PX 415 at 9, 11.

As summarized in Oracle's Career Level Guidelines Matrix,

> The career levels are a standard set of broad, hierarchical categories related to the level at which a job is performed. The career level structure has two tracks: Management and Individual Contributor. Management is defined as one who is directly responsible for the practice or process of managing two or more employees (with hire/fire authority). Individual contributor is defined as a single incumbent with no management responsibility. In some cases, however, an individual contributor may operate as a team leader or manage one employee.

See JX 124; *see also* JX 148.

[42] PX 159 is the same training as JX 141.

[43] So, for instance, in the Software Developer job family, IC1 to IC6 have job titles of "Software Developer 1" etc. and a series of discretionary titles: Associate Member of Technical Staff, Member of Technical Staff, Senior Member of Technical Staff, Principal Member of Technical Staff, Senior Principal Member of Technical Staff, and Architect. Responsibility and expertise rises by level. JX 114 at 6; *see also id.* at 7 (list for managers).

HR promulgates guidelines for each career level, including title/categorization, level of skill, general experience, and role of the company. These give the following levels:

Career Level	Title
IC0	Trainee, Intern, Clerical
IC1	Entry Level/Associate Professional ("Learning")
IC2	(Intermediate) Professional ("Developing")
IC3	Staff Professional ("Career")
IC4	Senior Professional ("Advanced" or "Mentor")
IC5	Guru ("Internal Expert")
IC6[44]	Architect ("Internal/External Expert")
M1	Supervisor
M2	Manager
M3	Senior Manager
M4	Director
M5	Senior Director
M6	Vice President
M7	Senior Vice President
M8	Executive Vice President
M9	President
M10	CEO & CTO

See JX 124[45]; JX 144 at 10-11; *see also* JX 148; JX 149 at 14-15; PX 153 at 8-9; PX 154 at 5. Generally, higher levels involve more skill, experience, and responsibility. They also have increasing requirements, achievements, and need for recommendations from others. *See* JX 124 (career level guidelines matrix providing descriptions for each level); JX 148 (same); JX 149 at 14-15 (explanatory slides); JX 150[46] at 28-29; JX 151 at 1; PX 173. Oracle provides general position criteria for the different levels, including the amount of experience involved, the scope of the position, and technical ability. So, for instance, moving from IC3 to IC6, an "architect" position, the individual typically has rising levels of experience, broader responsibilities, increased expertise, and a higher profile in and outside of Oracle. JX 1 at 2-3; *see also* PX 292 (criteria for promotion for individual contributors in Product Development); PX 293 (earlier version of similar document).

Ms. Waggoner explained that the matrix for the career levels contain "broad definitions of what we would expect" at the different levels. HT at 1190-91. For example,

> if I look at this staff professional, IC3, so we say that that person is fully competent, the duties and tasks are varied and complex, uses professional concepts, at an IC3 we generally say that's probably around five years of experience. And then it also speaks to—as you'll see—the failure to obtain results could have serious consequences and require expenditure of resources. Then we go to the 4, we say this person is more senior, they are a recognized authority or a leading contributor in that area, they

[44] One tab in JX 124 contains a label for IC7, a "Fellow," but the role is "To be defined" and it does not appear that this categorization is used.

[45] JX 124 and JX 148 also contain guidelines for A1 to A4 levels, which are sub-categories of the IC0 level.

[46] PX 186 is identical to JX 150. I cite only to JX 150.

> usually have about eight years of experience. And it speaks, again, to the impact that it would have, their decisions and their solutions may impact the current or future design. So, it just—these definitions are meant to get—to represent a little higher level of seniority at each step.

Id. at 1191. Within IC-0 there are four levels of administrative positions. "IC-1 is entry level. Like fresh out of college, you don't have any experience, but it's on the professional ranks, like our developers or our programmer analysts or whoever that might be." The table goes through IC-7 in Product Development, which is a guru level, but Oracle has only had one or two people ever in that category. JX 24 at 101.

The same holds for managers:

> [O]ur M1 is supervisor. We don't have a lot of supervisors at Oracle. But then when we get to M2, that's our first-line manager. And you'll see in the M2 and M3 we talk about contributes through others, so our M2 and M3 they have a team underneath them, they manage the work of that team and ensure that things get done. Then we get to direct[or] and senior director, they contribute through leadership and they've got managers under them who make sure the work gets done. And then when we get to the VP and SVP level, we're talking about strategy, and the M8 is talking about vision. So, it just increases the scope and complexity and it explains what we expect in terms of contribution at each of those levels.

HT at 1192; *see also* PX 24 at 102. The matrix provides guidelines. There are exceptions and there aren't any "serious consequences" for deviation. HT at 1192-93.

Differences in global career level

> has to do with years of experience, level of complexity of what they're working on, the scope of what they're working on, the complexity, scope, years, their—the influence of the role, who they interact with, if they interact with C suite levels or most of their interaction is lower levels, there are various things that go into play in determining a career level.

JX 102 at 75. It also involves the "complexity of their role, complexity of the products they work on, the complexity of the duties, the decision-making authority that that person has…." *Id.* at 76. The career levels apply across the company and so the descriptions "essentially talk[] about the level at which the job is done in pretty general terms." *Id.* at 77. Levels involve different "[r]esponsibility, complexity, knowledge, skills, and abilities that the person brings to the table, their scope." PX 22 at 173. At the same level, "[t]he scope of their role or the impact of their role may share certain attributes," but the individuals and their backgrounds "could be vastly different." *Id.* at 229.

The job code impacts many "system elements" (like compensation eligibility, recruitment and offers, employment terms, appraisals, and benefits), making it important to assign the code correctly. JX 144 at 4, 12, 14.[47] There are over 1,000 unique job codes and "[e]very employee with

[47] JX 144 is a training on "Job Classification and [the Global Job Table." In addition to the points discussed in the text, it also covers much of the information discussed above. *See also* HT at 1216; PX 162 (same training in PDF form).

the same Job Code will have the same Job Title, Function, Specialty Area and Global Career Level." *Id.* at 6. "Function" is the type of work performed, which is "not necessarily specific to the employee's LOB." *Id.* at 7. So, for example, "[i]f an employee is working in a financial position for Consulting, then the job code assigned should be part of the Finance function, despite the fact that the employee is working in the Consulting organization." *Id.* Oracle has 15 functions: Administration, Business Practices, Consulting, Development, Facilities, Finance, Human Resources, IT, Legal, Manufacturing & Distribution, Marketing, Pre Sales, Sales, Support, and Training.[48] *Id.* "Speciality" is a sub-category of function, with each function having about 4-8 specialties. It is "more specific" and "describes the work the employee performs within the defined function." *Id.* at 8. There are 77 specialties describing the specialist work within the function. Sales and Pre-Sales employees must also be assigned a product association; other employees do not need this assignment. DX 112 at 11; *see also* PX 22 at 102-03; PX 80 (suggesting that support, at one time required association); PX 252 at 3-4 (same document). Specialties are a "subset" of functions, with 4-8 specialties in a function further classifying what the employee does. Specialty does not affect compensation specifically. PX 22 at 91-92; PX 24 at 134.

Functions contain job families. JX 149 at 9-11. "Job families are a series of progressively higher, related jobs distinguished by levels of knowledge, skills, and abilities and other factors."[49] *Id.* at 9 (emphasis removed). Job family is more specific categorizations of what a person does. PX 22 at 98. The various classifications allow Oracle to put its employees into "buckets" or "general categories of what they do" to provide a general idea of how many employees they have doing various sorts of work in various locations, and for reporting data for pay surveys and applying the market data they receive from those studies. *Id.* at 101. "Global career levels are a set of broad, hierarchical categories related to the level at which a job is performed" and "[r]esponsibilities, contribution and job complexity increase from one job level to the next in the hierarchy." JX 149 at 12.

Three job functions are at issue here: Product Development, Information Technology ("IT"), and Support.[50] Ms. Waggoner explained that those in the Product Development function "work[] to develop the products that Oracle sells." The Information Technology function "works to support our employees on internal IT systems that all of us use in our everyday jobs." The Support function's "main role would be to support our customers, whether they call in to a phone line or send e-mails; just technical support." PX 22 at 46; *see also id.* at 83-84 (description of other functions). Job functions do not define organizations or report up through one person; some are spread "all across the company" in different organizations. *Id.* at 84. Lines of business are organizations led by a person. They are not job functions. So, in Ms. Waggoner's example, Ms. Catz is in charge of the Finance organization, but individuals in the Finance function are in different organizations in the company and might report up through Mr. Ellison or, in July 2018, Mr. Hurd. *Id.* at 85-86.

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[48] Ms. Waggoner testified that Oracle has 16 job functions. *See* HT 1173. It isn't clear if she or the document here was mistaken, or if a function was added. The discrepancy is immaterial to this case and the job functions at issue.

[49] In 2016, Oracle started a multi-year "global review of our functional job families" as part of a "Compensation Initiative." PX 87.

[50] I capitalize "Product Development," "Information Technology," and "Support when referring to the job function, as well as when referring to an organization or line of business that had those titles. When referring to the general work done or "space" I do not capitalize those terms. So an employee in Mr. Kurian's Product Development organization may have performed product development and been categorized as part of the Product Development job function.

Oracle's Global Job Table contains listings for job code, job title, function, specialty, and global career level. It then gives brief descriptions, more detailed descriptions, and job requirements for each job. *See* JX 123; PX 131.[51] Ms. Waggoner estimated that there actually about 1,600 total jobs in the table.[52] It is Oracle's "system way [sic] to identify, in very broad general terms, the areas of work that are performed at Oracle." HT at 1164. Each job is given a code, a unique identifier, and the Global Job Table entry "gives us a very general sense of the duties that that person performs and the roles that exist here at Oracle." *Id.* at 1164-65. The Global Job Table organizes jobs into job families, which are "very high level" groupings of types of jobs, which then have different levels at which the employee works. HT at 1171-72. Each job has one Global Career Level, which "indicates to us the level [at] which that work is performed, with IC1 being entry level to IC6 being like guru, architect, very high level contributor." *Id.* at 1172. Each job also has a single function and specialty. They are a "really high level descriptor of the work being performed by the jobs in that family" or "a very general bucket." A specialty is "a little more fine-tuned" and provides more detail on "the general area of work being performed." *Id.* at 1173.

The Global Job Table lists 71 jobs in the Product Development function, each with a code, title, specialty area, and global career level. There are six specialties and 12 job families. Specialties include software engineering (25 titles), engineering services (2), hardware engineering (8), product management (16), technical qualities assurance (10), and technical writing (9). Job families are in some instances narrow, such as applications developers, product development SVP, release developers, software developers, and user experience developers within the software engineering specialty. The other job families are development systems administrator, hardware developer, product management/strategy, program management, quality assurance, technical writers, and user experience developers. The job titles correspond to different IC and M levels in the job family, though most families have limited levels attached to them. Each job title has a brief description, a detailed description, and job requirements. *See* JX 123.

The IT function has 41 job titles and follows the same organization. There are eight specialties: DCS, EUSUPP, FUNC, GENIT, RISK, NETSERV, TECH, and BUSIMP. There are more families represented: data services support, database administrator, internal customer tech support, IT business implementation analyst, IT security analyst, network/telecom systems analyst, programmer analyst, project manager, systems administrator, systems analyst, and some management positions. *See* JX 123.

The Support function has 30 job titles. It lists the following specialties: PREMSERV, SUPPACC, PRODSUPP, and SOLSUPP. It contains the following families: customer service, business services representative, customer service account management, field support, product support, support SCP, systems analyst, technical account representative, technical analyst, and technical architect. As with the others, various IC and M levels define the jobs within each family, and the Global Job Table provides brief and detailed descriptions, as well as requirements. *See* JX 123.

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[51] JX 123 contains an excel version of the Global Job Table limited to the three functions at issue in this case. PX 131 contains a hard to read printout of a spreadsheet containing this information across the company. DX 120 is a poor-quality printout of the job table, or a version of it at least, for the three functions at issue here. I rely primarily on JX 123 as containing all relevant information in a readable format.

[52] Ms. Waggoner's team is responsible for maintaining the table, including making decisions about whether to add a new job for a role or include it within a job that already exists. *E.g.* PX 22 at 31-32; *see also* PX 24 at 106-07.

The Global Job Table is arranged by job code, the unique identifier for each job. Each job code has a job title, or "official system title." HT at 1166; *see also* PX 24 at 102-03. At Oracle, job titles are "very general and very broad. It's just meant to give a high level oversight into what that person is doing, in general, at Oracle." HT at 1166. Job title/code does not determine particular job duties and responsibilities:

> Because we have these job codes and the titles, like I said, we have close to 140,000 global employees and our job architecture really is only around 1,600 job codes. And they are meant to be very broad buckets to give us a general sense of the duties that that person performs. If we needed to get specific into every single role that exists at Oracle and every individual who does something a little bit different, we would be in the hundreds of thousands of job codes and it just wouldn't be sustainable, it wouldn't be possible for us to keep that up. And so we have this system where—and it's very similar to how our salary surveys work, they are general families. And then we are able to say, in general, this is what you can expect that somebody in this job code would do, but we can't possibly get into the details of what happens in every single case of a person who holds that code.

Id. at 1166-67; *see also* PX 22 at 202-04; PX 24 at 103-04.

In particular, the product that an employee works on and the area of business that an employee works in are factors within a job code/title that will shape the particular duties and responsibilities of a particular employee. HT at 1167. Ms. Waggoner explained:

> the product, and management hierarchy can tell us a little bit about [particular duties and responsibilities], as well. And I know this just because I've worked at Oracle for a long time and I've supported these areas with IT, Product Development and Support, and I know that when I've, say for example, looked at a software developer tree, I need to find out much more about where they work and what they're contributing to in the business, to really get a handle on what their duties are and what they're doing. I know, in a very general sense, kind of like how our mapping is done and surveys. We have a good general idea of what's going on. But in order to really get down to what that means, you have to get down into the product and the management hierarchy and dig into that further.

Id. at 1168.

As part of the Global Job Table, each job is given a brief description, which is "a very short explanation for the high level duties that are performed by someone in that job code." This might be the same across jobs in a family because it only gives a broad overview. *Id.* at 1173-74. Next the table gives a more detailed description that gets a little more specific about the work being performed. *Id.* at 1174. These are used to help benchmark against external surveys and as part of the job posting in the requisition process. *Id.* at 1174-75. Hiring managers, however, will also include further detailed descriptions beyond what is in the Global Job Table. *Id.* at 1175.

The last column on the Global Job Table contains job requirements for posting, which "gives an idea of the background that we're looking for." It would appear on a job posting, but the Hiring Manager would also include more particularized requirements. *Id.* at 1175-76. Ms. Waggoner explained:

> a manager would include a little description of the department that they're in, what that department is responsible for. And then they include much more detailed information around the specific duties that will be performed by this opening—by the person who takes on this particular position on the team. And they would speak that—what the manager can enter is very specific in terms of any coding language they need to know, any products they need to be familiar with. And if they're looking for anything really in particular to say that somebody is qualified for this job, they would mention all of those specifics about—they would go into much more detail around what it is they're looking for, precisely, for this opening. Because the system—what is contained in the system is very general and it doesn't tell an applicant, or anybody interested in looking for a job at Oracle, it doesn't tell them enough to really know what it is they'd be working on or doing. So, the manager goes in and enters a lot more detail that would tell that person what the job is.

Id. at 1176-77. The Global Job Table does not link jobs to products. PX 22 at 226.

In addition to official job titles, Oracle has "discretionary job titles" that are determined within the management hierarchy—rather than by HR in the Global Job Table—or in some cases an employee on his or her own. These titles can provide more detail, and might include the product name. HT at 1169. So, Ms. Waggoner's system job title is "Senior Director of Human Resources" and her discretionary job title is "Senior Director of Global Compensation Programs." There are other senior directors in HR, but their jobs have different duties than Ms. Waggoner. She is the only person with her discretionary job title. *Id.* at 1169-70. Most employees have discretionary job titles. *Id.* at 1183. Discretionary titles are not part of the Global Job Table. JX 102 at 74. They are not controlled by HR, and some employees chose not to have them. *Id.* at 80-81. They are ways an employee might identify their position in a more specific way. It does not change hierarchy, reports, or salary. PX 22 at 139-40. There is no "rigor around discretionary titles" and a manager can approve a discretionary title change. *Id.* at 275-76.

2. *Lines of Business*[53]

Oracle's job classifications are not the same as its internal organization. Oracle's organization is fluid, as is evident in the shifting reporting relationships sketched above for Oracle's executive leadership. Oracle is roughly organized into lines of business. Ms. Waggoner provided a compensation/HR perspective: "we use the term 'Line of Business,' when we're talking about a specific leader. And in general, that leader is usually a direct report of one of our CEOs. So, in this case, it would be a direct report of Larry Ellison or Safra Catz." HT at 1193. So Mr. Kurian was President of Product Development, and his line of business was Product Development. But Mr. Kurian did not lead all of the product development organizations and workers, since other lines of business had some organizations in the product development space. *Id.* at 1193-94. The Product Development function refers to the type of work performed, not "where they sit in the company," so someone with that function might be outside the Product Development line of business. *Id.* at 1194.

Per Mr. Miranda, lines of business are groups within Oracle. HT at 1067. So Mr. Miranda is in the Applications line of business, which has sub-lines of business involving applications for

[53] Oracle provides its description of its organization on this point in DPF at ¶¶ 14-16.

human resource departments, financial applications, customer relationship management applications, and supply chain and manufacturing applications. *Id.* at 1067-68. His group is over 17,000 people, including software engineers, application developers, quality assurance engineers, and products managers. *Id.* at 1069. There are other lines of business within Product Development: "Database, Infrastructure or OCI, Cloud Infrastructure, [Middleware]."[54] *Id.* at 1069-70.

Software developers in Mr. Miranda's line of business do not do the same thing as software developers in other lines of business in product development. Nor are they managed in the same chain of command. HT at 1070. He explained:

> Database is software which specializes in storing and retrieving information quickly, what we called structured and unstructured. [] [A]n application sits on top of a database, or at least our applications do, sit on top of a database, and while it's storing information, it's purpose is to help businesses either, you know, report their financials in financial applications or track their people in Human Resources, or track their sales in Sales.

Id. at 1071. The work differs because "they write in different languages"—both programming languages and the sorts of challenges they face. *Id.*

> So, the database—and I'm simplifying quite a bit—it's storing or retrieving data. It is—the technical challenges there are how do you store lots of data, how do you retrieve data very, very fast, how do you keep data secure so that people who are supposed to see it can see it, but who aren't supposed to see it can't see it. So, that's a set of technical challenges that are there. A financial application is concerned with, you know, whether the rules for tax in, you know, in the United States and Canada, and the U.K., and how do businesses report their tax, and what's the format of those earnings, and how do the end users, the finance people, get that information in and out quickly, kind of the user interface. So, what you might see, you know, on your computer screen as a user of, say, QuickBooks or, you know, TurboTax or things like that. Sometimes it's not only concerned about what it does, like the rules, but also how an end user can use it. So, it's a different technical focus.

Id. at 1071-72.

Computer languages differ in the same way that natural languages differ. They are good for different tasks. Java is good for user interface, C is good for back end security. *Id.* at 1072-73. The languages used in the different teams overlap, though the predominance of the language in a particular varies. *Id.* at 1119-20. Individuals can sometimes transfer between products within Applications, or into other lines of business. *Id.* at 1120.

> The work also differs in Infrastructure and Middleware. HT at 1074-75.
>
> Infrastructure, we essentially rent or lease computing power, so computers, storage and computer processors and certain utilities and services on top of that. And so

[54] In the hearing transcript, "Middleware" is transcribed as "Metalware." I make the correction here. *See, e.g.,* PX 290 at 2.

> what Don [Johnson]'s team does, and the Infrastructure team, is develop software programs that either facilitate the ease of use, allow sharing so that different customers can share, you know, storage or a compute processor, or segregate storage in compute processors, so there are technical challenges to that, a much lower technical level than, you know, tax rules or, you know, SEC reporting rules, et cetera.

Id. at 1074.

> [Middleware] is sort of a tool layer in between the database storage and the end user application. So, its tools to help us build front ends, you know, screens on the web, if you will, or business intelligence reports, or what's called: "Integration Services," like the help, you get data from one database to the other. So, it's a set of tools that sort of sit in between the database layer that sort of sit in between the database layer, the storage, and the end application that we present to users.

Id. at 1074-75. The work here involves "a different technical challenge and a different end user," since the aim here is to make it easier for a developer or engineering to build applications on top of the product. *Id.* at 1075.

The work differs by sub-line of business and product within Applications Development as well. In Financials, the customers are large to medium companies and though there is some end user involvement, it is heavy on back end processing, getting the product to scale over millions of transactions. "A lot is written in C, and [the] technical challenge[s are] speed, scale-ability." HT at 1076-78. The HR applications have some similarities, but it don't have the same scaling needs and the product is designed for more users, the employees who will be viewing paychecks, electing benefits and the like, so the product needs to present in understandable ways. The other big technical challenge is security. *Id.* at 1078-79.

Another group that reports to Mr. Miranda, the "A-Team," isn't associated with an actual product, but is composed of "deep experts" in parts of Middleware that serve as a "go-to expert advisor" internally and get involved in critical customer implementations. They don't code directly and help with all the products the line of business sells. *Id.* at 1079-80; *see also id.* at 1146. In general, someone moving into the line of business will have a learning curve related to the languages used, the product worked on, and some of the background context to the products and what they are doing. *Id.* at 1153-55.

Mr. Loaiza understood a line of business at Oracle to be "basically groups that work on specific products that we sell to customers." HT at 1466. There are both lines of business involving groups of similar products and sub-lines of business involving products. *Id.* Mr. Loaiza is Executive Vice-President of Mission Critical Database, in the Engineering or Development organization and part of the Product Development function. He leads the Mission Critical Database line of business, which includes sub-lines of business related to products Oracle sells, such as "Exadata, Zero Data Last Recovery Appliance, Memory Database, Advance Compression, Golden Gate" and others. HT at 1464-66. In addition to Mission Critical Database, there is a General Database Systems organization, which contains the other part of the database team. The General Database Systems organization is led by Mr. Mendelsohn, another Executive Vice-President. *Id.* at 1467-68.

Employees who work in Mission Critical Database Systems and General Database Systems share job codes. But the skills involved in the work differ. Skills also vary between more particular

lines of business and for different workers in a line of business. *Id.* at 1468. Mr. Loaiza explained:

> So, the primary difference—the way I usually describe to our customers and other people is Mission Critical Database, if you think of a car as a product, my team built kind of the stuff that's under the hood, so the engine, the brakes, the transmission, that kind of stuff. General Database is more kind of what the user sees, so the stuff, you know, the air conditioning system, the seats, the steering wheel, that kind of stuff. So, we kind of break things up between what's under the hood and what's not under the hood. And so I run the part that's under the hood and the skills in that area are quite different, as you can imagine, from the skills of the engineers working in the other area . . . the skills on the General Database is really skills for how a user accesses the database. So, the language that they use, the procedures that they use to access and use the database. What I do is what I described, the things that are under the hood, so it's how the database runs, how it stores data, how it processes data, how it interacts with the computer. We also build computer systems that the database runs on, so it's a much—what we call "lower level," much more inside the guts of the product. Whereas, the other one is really kind of the user visible aspects of the product.

HT at 1468-69. General Database Systems uses some programming languages that Mission Critical Database employees never use. *Id.* at 1470.

Within Mission Critical Database, employees with the same job code have different skills and duties. Mr. Loaiza compared it to variance among doctors as to what part of the body they treat, or among people working on a car who specialize in different components.

> And similarly we have people in my database team that work, for example, on how the data is stored, another team that works on how the data is processed, and another team that works on high visibility, how you recover the database, another one that works on how you back up and restore the database. Another team that works on how you move data between databases. So, those are very different job roles and they're very different specialties within the database.

Id. at 1470-71. Engineers who work on how data is stored do different work than engineers who work on how data is processed. "There's kind of a flow of how data works and the database team is very specialized in exactly what function they perform." *Id.* at 1471-72.

Some of the different skills are in more demand than others:

> So, many of the skills are very specialized. And so for instance—and the market changes over time. Like right now, people that have artificial intelligence skills are in high demand throughout the industry. So, that's a skill that's a very high demand that we use inside our database. Another skill that's in very high demand is Cloud Computing. So, Cloud Computing is very popular, there's a lot of growth in the area. So, engineers with Cloud Computing skills are in very high demand.

Id. at 1472. Job postings for positions in the organization differ by the particular role. "Our job postings are very specific to a position. They outline a very specific set of skills that's required, very specific set of experience that's required for each position. And that's very specialized within my

team." Each position and posting will relate to a particular sub-specialty in a product. *Id.* at 1474-75.

Campbell Webb has been at Oracle for over 25 years and is currently the Senior Vice President of Oracle Managed Services, an IT organization at Oracle. He has 2,500 people in his organization. He is "responsible for managing all the applications and services that our employees use on a daily basis, things like e-mail, calendaring, financial systems, support systems, as well as systems of our customers, again, financial systems." HT at 1391-92. There are a number of different roles within the IT organization, including network administrators, systems administrators, database administrators, and program analysts. *Id.* at 1392. Employees in these roles do different work.

> A network administrator is responsible for running and operating your network. A network is what allows two computer systems to talk to each other. What they do on a daily basis is they make sure that the systems that operate within our network are healthy, operating as required. They install these systems, they install cables to connect these systems together. If they need to be repaired, like a cable breaks, they will repair the cable or the plug.

Id. at 1393.

> On the other hand,
>
> A system administrator is responsible for looking after computer systems, computers, not unlike laptops that we all have, except these computer systems are much larger than laptops and instead of being accessed, typically, by one person, like a laptop, they're typically accessed by hundreds of people making requests of them. And so it's the system administrator who would install those computers physically, who would replace software and install software on those computer systems. If those computer systems have a fault, whether it's a hard drive or memory, they would actually do the physical repair, almost like a mechanic. And they'd also ensure these computer systems are running the latest patches and they're operating at their utmost performance.

Id. at 1393-94.

> A database administrator "looks after the database software" that is used to manage data.
>
> The database administrator's role is to install the software, to start up the database, to shut down the database, to take backups of the database, and also to ensure in the search queries against the database to retrieve data, that the response times are quick and not slow. They also work on how to arrange the data inside the database, to ensure those response times come back effectively.

Id. at 1394. Mr. Webb explained that work on databases and work as a systems administrator "require totally separate skills." He moved between the roles, but had to attain a new set of skills through self-study. *Id.* at 1397-98. Finally, a program analyst "typically writes scripts of very simple code that automates what are typically actions that were performed manually, say be a system administrator or database administrator." *Id.* at 1395.

Oracle starts database administrators at an IC2 role, doing "very rudimentary activities." "As you move up the scale, you will obviously attain more skills." *Id.* at 1398-99. At an IC4 level "[y]ou would then start to move beyond just simple activities like starting up a database, stopping a database, or backing up a database, to designing the internals of a database—how you lay out the data, where best to place the data, how to correlate different items of data." *Id.* at 1399. At the "pinnacle" of a database career typically "you're doing database tuning, that's the hardest skill to acquire. That requires a little experience and being exposed to a lot of different problems, troubleshooting-wise, and a lot of different types of data sets." *Id.*

Job postings for a systems administrator and database administrator will differ in terms of the skills sought. Systems administrators will need skills related to the "Linux Operating System." A database administrator requisition would seek skills related to "the Oracle database." *Id.* at 1401-02. The requisitions would seek levels of experience consistent with the level of the position, with the experience in the particular area of the job. *Id.* at 1402. Some skills command more compensation in the market. "[T]he most common is someone who does performance tuning of the database has a very, very unique set of skills that's in demand in the marketplace." *Id.* at 1404. On the other hand, systems administrators are "more readily available in the marketplace for hiring and recruiting." *Id.*

Balaji Bashyam is Senior Vice President of Customer Support for Database, but his job had just changed and prior to December 2, 2019, he had been Senior Vice President of Customer Support for SaaS Services. HT at 1431-32. In his prior position, he "was responsible for providing customer support for a number of different products that all fall under the Cloud umbrella and Applications, Fusion Applications, Taleo, Marketing Cloud, Service Cloud, et cetera." *Id.* at 1433. In his current position his "responsibilities are to provide support for the Database Cloud, which we generally call as Autonomous Database, and some on-premise strategic products, like Exadata." *Id.*

When Mr. Bashyam was an SVP for SaaS, his job function was Support, and he supported "a bunch of different products, like Fusion Applications, Taleo, Service Cloud, Marketing Cloud, CRM On Demand." *Id.* at 1434. Each of these was a line of business and had its own cost center (discussed below). *Id.*; *see also id.* at 1450-51. Currently he supports two main lines of business, Database Cloud and Exadata. They have their own cost centers. *Id.* Mr. Bashyam explained that in the Support function,

> primarily our job is to make sure that our customers are able to use our services and products well. So, often they may run into, you know, questions, problems, and they log tickets with us and we respond to them and we work with them to solve their problems. We're also responsible, in some ways, to work with Product Development to improve the product, based on our customer usage, to create knowledge articles and so on, so that when people run into issues they can just come online, find the solution, et cetera.

Id. at 1435.

Oracle employees working for him in SaaS and in Database share the same job codes, but "they have different skills." *Id.* "[O]bviously all the Support engineers should have some basic stuff for customer handling skills and all that, and that would be common for every customer support engineer." *Id.* at 1436. On top of that, in SaaS they need knowledge of the product they are supporting. So someone supporting a "general ledger product" would need to be able to understand

the product and its uses and the sorts of issues that the customer might be having. *Id.* at 1436-37. Similarly, if one was supporting an HR recruiting product, "you need to know how the recruiting process works, et. cetera." *Id.* at 1437.

By contrast, in Database,

> you are less concerned about what exactly people are using it for. You're much more concerned about the technical nature of the problem, almost like the infrastructure and the IT portion of it. So, for example, if somebody might say I have a performance problem, you don't particularly care if they're using it for general ledger or accounts payable, or for Human Resources, or—it doesn't matter. It's a problem with the database performance. You're going to be using the database tools, not worrying so much about what exactly they're trying to do, to try to analyze it to see if the problem is in the database storage, hardware, network and so on. And so it's a lot more for computer science type skills as opposed to the functional skills.

Id.

Mr. Bashyam did not view one set of skills as more difficult, he just saw them as "definitely different" sorts of skills. *Id.* He had been able to move between them because in his long career at Oracle he had years where he worked on the Database side and then years on the Applications side. He was working in Support on SaaS and the Database Cloud was a new business. He was selected to work on support for the Database Cloud because of his earlier work in Database. *Id.* at 1438. In his view, both SaaS and Database Cloud skills were in high demand because both are cloud-based rather than on-premises. Some of the SaaS products were older, so those sorts of skills were somewhat easier to find, whereas Database Cloud was a new area, so individuals with the sorts of skills to work in the area without significant training were rarer. *Id.* at 1438-39.

He would "[a]bsolutely" be able to tell from the text of a job requisition if the job was supporting SaaS or supporting Database. Some portions would be the same, but the skills sought would differ:

> [I]f I'm hiring for the Database I would say these are the experiences I'm looking for in the database, like performance troubleshooting, network, storage, because that's the only way the applicant will know which job to apply for, because it's going to be otherwise they didn't stand a chance. The same thing with Applications. We would explain, on top of the generic stuff, experience in let's say HCM implementation, et cetera, will be required.

Id. at 1439-40.

Support engineers need to know how the products they support function and read diagnostics as part of their jobs. If required, they will share information with and work with engineers in Product Development. *Id.* at 1447-48. For both on-premises and cloud products they review and interpret diagnostics, but with cloud products they also need to be able to know what diagnostics to collect. *Id.* at 1448. Product Development engineers would make changes in the code. *Id.* Support engineers are responsible for particular products, either on-premises or on the cloud. *Id.* at 1449. It would be rare that they worked on more than one product. *Id.* at 1450. Support engineers work closely with Product Development engineers, and sometimes workers in

Product Development transfer into Support, though there is a learning curve with these employees. *Id.* at 1449-50.

Oracle also has a separate "Oracle Labs" organization that aims to "[i]dentify, explore, and transfer new technologies that have the potential to substantially improve Oracle's business." DX 253 at 1. It is devoted exclusively to research. *Id.*

> Oracle Labs researchers look for novel approaches and methodologies, often taking on projects with high risk or uncertainty, or that are difficult to tackle within a product development organization. Oracle Labs research is focused on real-world outcomes: our researchers aim to develop technologies that will someday play a significant role in the evolution of technology and society.

Id. It seeks to employ "the best and brightest in their fields" and engages in both directed research in collaboration with product teams, consulting with product organizations, and "incubating" products that result from research but do not yet have a home elsewhere in Oracle. *Id.* at 2.

3. *Cost Centers*

From a finance/accounting standpoint, Oracle is organized by "cost centers." Per a 2014 spreadsheet, Oracle had 3883 cost centers on the books, arranged in a 12-level hierarchy. *See* PX 219. Ms. Westerdahl explained that a cost center is a way to manage budgets and is used for finance purposes. They might change when an employee moved to work for a different manager. PX 26 at 143-44. Per an Oracle Vice-President testifying for OFCCP, a cost center involves "where your budget is designed." There are costs centers for different geographical regions. HT at 123. Another longtime Oracle employee referred to it a cost center as an "accounting bucket" used to account for everything involving, and everyone working on a product. HT at 1016. Ms. Waggoner explained that a cost center is something finance uses and gives "a general indication of the organization in which the person works." A line of business is an organization or organizations under a particular leader and might include many cost centers. JX 102 at 103-04.

As Mr. Miranda understood it, a cost center "is the financial classification to measure cost of profit, as it may be, or revenue, for a particular line of business." Within his line of business, the different sub-lines of business have cost centers. HT at 1068-69. Some products share costs centers. *Id.* at 1144-45. Cost centers are organized around product groups. *Id.* at 1157. According to Mr. Webb, "IT has a cost center, and it's basically a grouping of expenses related to IT." *Id.* at 1400. Mr. Loaiza explained that a cost center is "something that we put individuals in that tracks costs and tracks kind of what area the specific people work in." *Id.* at 1467. There are multiple cost centers with his line of business, with each sub-line of business for the various products having its own cost center. *Id.* Every cost center in his organization is associated with a product. *Id.* at 1491. Given his place in the company, he is responsible for a lot of cost centers. PX 21 at 278.

Though in some lines of business costs centers are associated with products, not all cost centers are associated with products—Ms. Dodson, in HR, has a cost center, but does not work on any particular product. PX 14 at 177-78. Oracle does not keep a central depository tracking which products each employee works on at a given time. *E.g.* PX 207 at 9. Cost center information about an employee, however, is available since cost centers are used for finance and budgeting.

4. *General Human Resource Processes*

Human Resources at Oracle has both topically focused groups and HR business partners who work with client organizations within Oracle, providing the range of HR services, e.g., compensation, recruitment, performance management, and employee development. *See* PX 89 (position description for business partners). The role of business partner is to provide general HR support to management in the organizations they support ranging from "operational HR to strategic HR." PX 10 at 73-74. Within the topical group for compensation, there are organizations for "Global" and different regions: US, Canada, LAD, EMEA, APAC, and GIC.[55] *See* DX 112 at 3.

HR functions in Oracle are run electronically through a cloud-based self-service application that Oracle calls Fusion. PX 26 at 17-22. HR actions occur in "workflows." HR workflows, such as hires, transfers, off-cycle promotions, and off-cycle salary increases, require justifications that are "thorough yet concise" and "based on facts not feelings." JX 114 at 36; *see also* PX 154 at 13. Ms. Holman-Harries explained that

> different workflows that are put in place when a person is hired, a manager sign-off on a—HR signs off on it and the hiring decision is reviewed. And as part of that there is a justification there as to why the person was hired. They talk about the person's skills. And then, also, the proposed starting pay is also part of that.

HT at 371.

Human resources processes at Oracle are subject to a series of approvals. These are outlined in the "Oracle HR Global Approval Matrix," which "is a tool that is used to standardize the level of oversight (or approval) required for HR transactions." PX 419 at 1; *see also* PX 22 at 118-19. So most hiring requires approval up to the Office of the CEO, or in some versions Board of Directors, and by HR. Some assignments and job changes are approved at lower levels, but higher-level managers are approved by the Office of the CEO (or Board). Later versions provide for approval by one of the CEOs or the Chairman/CTO. Salary increases, bonuses, and stock options also require approval up through the Office of the CEO (or Board). The exact level of approval needed varies based on the contours of the HR action and in some instances varies by organization. Some are completed via an automated system, but less standard actions are approved via email or in a similar manner. The process is subject to a number of internal rules and exceptions, as well as specifications about the process for transitioning through mergers. The details, however, are not material to this case.[56] Oracle uses an internal application to track approvals, at least for some of the

[55] As of May 2015, Ms. Waggoner led Global Compensation and Ms. Gordon led US compensation. *See* DX 112 at 3.

[56] *See* JX 2 (June 11, 2012, Global Approval Matrix); JX 3 (August 13, 2012, Global Approval Matrix); JX 4 (February 1, 2013, Global Approval Matrix); PX 36 (same in PDF form) JX 5 (June 20, 2013, Global Approval Matrix); JX 6 (same, but with some information omitted); JX 11 (June 25, 2014, Global Approval Matrix); JX 12 (same absent one tab); JX 16 (November 1, 2014, Global Approval Matrix); JX 17 (same with fewer tabs); JX 36 (June 1, 2015, Global Approval Matrix); JX 27 (same but with fewer tabs); JX 44 (August 12, 2015, Global Approval Matrix); JX 45 (same with fewer tabs); JX 63 (May 12, 2016, Global Approval Matrix); JX 64 (same with fewer tabs); JX 66 (June 1, 2016, Global Approval Matrix); JX 67 (same with fewer tabs); JX 71 (Global Approval Matrix, September 2, 2016); JX 82 (same with fewer tabs); JX 82 (October 28, 2016, Global Approval Matrix); JX 83 (same with less tabs); JX 91 (March 30, 2017, Global Approval Matrix); JX 92 (same, with fewer tabs); PX 35 (same in PDF form); DX 1 (March 13, 2019, Global Approval Matrix); *see also* PX 22 at 118-25, 130-35 (testimony about versions of the matrix).

workflow processes.[57] *See* PX 419 (brief user guide); *see also* PX 22 at 135-136.

HR is in the approval chain for offers, stock grants, and bonuses. HT at 1117-18. Ms. Waggoner explained, however, that HR's role is to check for accuracy, typos, and overall oversight. They check for sanity. PX 22 at 121-22, 124. Similarly, the top-level reviewers on behalf of the Board etc. are conducting sanity checks. *E.g. id.* at 134-35; PX 24 at 161. These top-level reviews are done not by the CEO/CTO/Board, but by a group of three lower-level employees who act as proxies. PX 24 at 161-62; *see also id.* at 167-69. At the levels before this point, the review is a sanity check as well, since there are almost never any rejections and changes. *Id.* at 170-71.

Carolyn Balkenhol testified about some of the approval processes, in particular those involving workflows in the ordinary course of business rather than "global" processes that will be discussed further below. She is a business planning director, who with her reports is responsible for "[p]rimarily reviewing transactions, HR, purchase requisitions, things of that nature, that require approval from our most senior executives." HT at 1286-88. Her team reviews transactions requiring approval from Ms. Catz and Mr. Ellison—"[t]hey could be offer letters or transfers, internal or international transfers, off cycle promotions, stock grants, bonuses, things of that nature." *Id.* at 1288-89. They get the approvals through the "Workflow system." All of the approvals roll up, and those that end with either Mr. Ellison or Ms. Catz get merged into one "transactional queue," which she and her team review as the "highest level approver." *Id.* at 1290. They have proxy authority to make the approvals of Ms. Catz and Mr. Ellison. *Id.* at 1305. Ms. Westerdahl is not involved in their approval process. *Id.* at 1304. Ms. Balkenhol's team is referred to as making approvals on behalf of the Board of Directors, but this is the result of change in the corporate structure when Ms. Catz and Mr. Hurd stopped reporting to Mr. Ellison, so all approvals no longer flowed up to Mr. Ellison. At that point they needed an "overarching" place for the final level of approval that her office conducted, which was done by labelling it "Board of Director" approval. *Id.* at 1315-16.

Some of the HR actions involving review by Ms. Balkenhol's team will be discussed in more detail below, like hiring and off-cycle compensation changes, but they also review other processes. When there are out of cycle equity grants, or equity is part of an initial offer, Ms. Balkenhol's team completes the final review. This process differs, since either Ms. Catz or Mr. Ellison personally approve the offer, unless the offer has already been standardized. Here Ms. Balkenhol will create a summary including some data points about the employee and send it to Ms. Catz or Mr. Ellison, who approve via email. Gender and race information isn't included. Ms. Balkenhol asked questions on equity grants when Oracle transitioned from stock options to RSUs, since this altered the proper scale, but generally does not ask questions often and never rejects proposals. She couldn't think of a time when Mr. Ellison or Ms. Catz asked any questions or rejected a proposal. Their response time varies, from almost immediately to a week or two. Ms. Balkenhol sees the proposing manager as the primary decision-maker on equity. *Id.* at 1297-1300; *see also id.* at 1307-09.

Ms. Balkenhol agreed that within the approval process she had asked about the current base salary and had, at least on one occasion, asked for a reduction in the stock offer. HT at 1317-23. On another occasion, she returned an offer that was mis-processed outside of the college recruitment program. *Id.* at 1323-24. She also agreed that on one occasion she had asked for salary history. *Id.* at 1325-26. On another occasion, she returned what was likely a transfer request for

[57] PX 191 contains what purports to be a spreadsheet of approver actions for HR transactions. It is a technical readout with 12,381 rows of data points.

removal of a sign-on bonus prior to approval. *Id.* at 1327-29. She also asked questions about re-hiring someone who had just been let go. *Id.* at 1329. But she didn't have independent recollection of any of these instances and couldn't tell from the exhibit she was shown what sort of transaction was involved, or what the circumstances might have been. *Id.* at 1336-37.

Under Mr. Kurian, there was a practice of getting informal pre-approvals before entering the workflow, but Ms. Balkenhol never paid attention to notes to that affect and would wait for the formal approvals in the system. *Id.* at 1330-31. When she is doing approvals, she only has the information presented in the workflow. *Id.* at 1335. Ms. Balkenhol's team does not consider race and gender in making approvals, "[a]nd that data isn't even available in the system that we review." *Id.* at 1296-97.

D. Basics of Compensation at Oracle

1. *Types of Compensation and Composition*

Oracle's internal webpage provides the following overview of compensation:

> Total compensation is a summation of base salary, performance-related bonuses, commissions, and other applicable incentives and benefits. When determining the employee's total compensation package, the following factors may be taken into account:
> - the job's salary range which is based on the external market value for the job,
> - the employee's global career level,
> - the salaries of other Oracle employees in the same job and location,
> - the individual employee's performance.
>
> In addition to cash compensation and other benefits, there are other 'intangible' benefits of working at Oracle such as your working environment and career opportunities.

JX 95 at 1[58]; *see also* JX 145 at 1 (same language in "Compensation Guidelines" document).[59]

Oracle's Employee Handbook explains:

> You are compensated and rewarded based on your contributions to Oracle and in accordance with Oracle's business performance and success in the marketplace. Your total cash compensation is comprised of your base salary and performance related bonuses or commissions and other incentives. To determine your salary and total cash compensation package, we take into account market research, your career level, and your individual performance. Market research assists us in assessing what competitive companies pay for comparable jobs. Oracle's goal is to attract, retain, and motivate high caliber, high performing employees. Central to Oracle's compensation philosophy are:

[58] PX 31 contains the same webpage printout. I cite only to JX 95.

[59] The first four pages of PX 32 are identical with JX 145. So is PX 142. The document is also in PX 252 at 6-9. I cite to JX 145.

- recognition and reward for contributions that enhance Oracle's growth, success, and profitability;
- open communications, ensuring you understand what is expected of you, how you can make a significant contribution to Oracle's success, and how you can advance your career;
- competitive analysis, comparing compensation and business performance data with that of competitor companies.

Oracle's approach to compensation is tailored to incorporate the flexibility necessary to excel in various lines of business, retain pre-eminence in the marketplace, and compete for the most talented people.

JX 147 at 42.

Compensation at Oracle is made up of cash (to include base salary, commissions and bonuses, and allowances), stock (options, restricted stock units, and the employee stock purchase plan), and benefits. JX 25 at 6; *see also* JX 22 at 10.[60] Oracle provides a variety of benefits programs, which it values "at approximately 20-25% of an employee's total compensation." JX 95 at 2; *see also* JX 145 at 3. Different jobs have different mixes of pay. PX 153 at 3. Base salary is "[l]inked to employee's skills and competencies in current role, as well as the sustained performance and the local market." JX 25 at 7. It "is designed to compensate employees for performing their job duties and responsibilities, and to reward for individual performance. It provides employees with a rate of pay that is competitive with other companies in Oracle's industry for similar jobs." JX 145 at 1. Commissions and bonuses are short-term incentives to reward performance, with commissions being linked to individual or team performance and bonuses linked to company or line of business performance. JX 25 at 7.

Oracle has both an "Employee Equity Plan" and an "Equity Program." The Equity Plan permits employees to set money aside and purchase discounted stock. The Equity Program is discretionary and dependent on "the strategic direction of the Company." Management decides on individual awards of equity, subject to eligibility requirements. JX 95 at 3. In the relevant period, equity at Oracle was awarded in stock options and restricted stock units ("RSUs"). Stock options are the ability to buy Oracle stock at a pre-set price. They vest over a four-year period, with one quarter each year, and 10 years to exercise the option. RSUs are grants of stock. They also vest over four years. HT at 140-41; *see also, e.g.* JX 25 at 9; JX 143 at 9; JX 146 at 4; PX 145.[61] "Stock options and RSUs are intended to be retention vehicles and tie individual rewards to adding value for shareholders. A very small percentage of employees receive stock options or RSUs." JX 25 at 8. Oracle is generally "conservative" in making stock offers. JX 22 at 10.

[60] The same or similar information is provided in: JX 111 at 7-9; JX 126 at 56; JX 127 at 6-8; JX 143 at 5-11; JX 148 at 4; PX 30 at 9-14; PX 141 at 12-23; PX 154 at 8.

[61] PX 145 contains an FAQ for recipients explaining the differences and similarities between stock options and RSUs. In some years, such as 2016, Oracle gave employees receiving an equity award a choice between stock options and RSUs—a right to buy stock at a price or the right to receive stock—with RSUs given at ¼ of the stock option award. PX 145 at 1-2; *see also* DX 112 at 7.

2. *General Principles or Guidelines*

This is a case primarily about compensation, and the record contains a large mass of (often-redundant) materials going to Oracle's general guidelines or principles about employee compensation. This material collectively indicates that Oracle has some sorts of abstract guidelines, fairly characterized as HR adages or general rules of thumb.

For instance, a "Compensation Review & Oversight" document provides:

> Oracle's compensation policy and philosophy is to pay employees in a fair, and non-discriminatory manner. New Hires are paid and are typically placed within the salary range for the job depending on their background experience, skills, market conditions. A new hire's salary is reviewed at hire to make sure they are being placed in the right job, level and salary based on their experience and skills. The HR staff, may analyze, or may request a manager to explain, the reasons for the pay level to ensure that the pay is warranted and consistent with Oracle's guidelines. Similarly, any pay increase that may be given to incumbent employees is consistent with Oracle's compensation policies and is subject to review as warranted.
>
> As noted above, there are a myriad of specific factors that can affect a new hire or incumbent employee's pay. The above reflects the primary factors although there can be others, as well as other non-compensation circumstances that can affect an employee's pay. For example, a new employee may be hired by Oracle as a result of an acquisition in which case the "acquisition hire" comes to Oracle usually in their same job and salary.
>
> Following are some examples of special circumstances that can affect pay decisions: incumbent employee may take a job that is a "downgrade" from a higher level job; or a highly valued employee has received a job offer from another company and Oracle wishes to incentive the employee to remain at Oracle by increasing that employee's compensation. Some departments or business units may also be subject to budgetary constraints that could affect the level of pay/pay increases available to new hires/employees in that organization.

PX 32 at 5; PX 51 at 1.

A printout from Oracle's internal webpage on "Oracle's Compensation Philosophy" provides:

> Oracle Corporation supports a "pay for performance" philosophy for all employees. Oracle compensates employees based upon their contributions to the Company and Oracle's financial performance. The goal is to attract, retain, and motivate the very best qualified employees. Central to Oracle's total compensation philosophy are:
>
> - Recognition and reward for contributions that enhance the Company's growth, success, and profitability
> - Open communication to ensure that employees understand what is expected of them, how they can make a significant contribution, and how they can advance in their careers

- Market competitiveness to ensure that Oracle can attract and retain high performing employees while managing costs

PX 420; DX 22.

Several concepts are important in Oracle's general compensation guidelines. An Oracle glossary defines "External Equity" as a "[m]easure of employer pay as compared to external market rates." PX 416 at 1.[62] "Internal Equity" is "[p]ay levels of the existing workforce, especially for peers holding the same global career level and same job code/job title within same management hierarchy. A measure used to determine fairness in pay amongst employees." *Id.* "Pay Compression" is

> [a] salary situation that occurs when pay differentials are too small to be considered equitable. Term may apply in one of the following scenarios: (1) pay of supervisors and subordinates, (2) pay of experienced and newly hired employees in the same job, (3) pay of top performers and average performers, and (4) pay of employees of comparable contribution and value.

Id. at 2. "Pay Equity is when "[e]mployees are paid equally for equal work, without regard for race or gender." *Id.*

Oracle publically posts its executive salaries. It does not make non-executive salaries public. PX 26 at 242-43. Managers have access to the salaries of employees who report up through them. Ms Westerdahl, as head of HR, would have universal access. Ms. Catz would not—she would only be able to see the salaries of employees who report up to her. *Id.* at 243-44. Employees are not told that they cannot discuss their salary. *Id.* at 244-45. As a general practice, HR professionals in the United States would not share an employee's salary with other employees. PX 10 at 176.

Ms. Waggoner's team is responsible for creating compensation trainings for managers. HT at 1201; *see also* JX 102 at 25-28; PX 22 at 77-78. They have created multiple versions over the years—seemingly all of which have been submitted—but the changes have mostly been to format, not substance. HT at 1212-13. The compensation trainings are not mandatory. *Id.* at 1213. Her team advertises them through e-mail blasts and the HR business partners are given the trainings to provide to the managers they work with, especially in response to questions. *Id.* at 1213-14. The trainings focus on using the systems, not on policies or guidelines. In Ms. Waggoner's usage, policies provide a rule, whereas guidelines give a "general recommendation of best practices" that a business leader could choose to not follow. To Ms. Waggoner's knowledge, Oracle didn't have policies in this area. JX 102 at 25-26; *see also id.* at 35-36, 68-69, 151-52. Non-discrimination is not a particular part of the compensation training provided by Ms. Waggoner, but Oracle otherwise has mandatory non-discrimination training. *Id.* at 70-71; *see also id.* at 144-46.

At the hearing, Ms. Waggoner reiterated that while Oracle HR has "Compensation Guidelines" it did not have "Compensation Policy," at least until the 2017 directive to not ask about prior pay (discussed below). HT at 1249; *see also* PX 24 at 40-41, 52. As she understood it, "[w]e don't really have a full stated compensation philosophy. We speak to our practice of paying for knowledge, skills, abilities, experience, being market competitive, recognizing people for their

[62] PX 421 is the same document as PX 416.

performance. But I don't—at this point we don't really say it's a compensation philosophy of the pay for performance." HT at 1263. She did recognize a slide describing compensation philosophy, and agreed that "total compensation focus," making decisions based on performance and potential, being "market competitive," and "paying within our means" all "factor into our general overall compensation philosophy at Oracle."[63] *Id.* at 1264-65; *see also* JX 70 at 3.

Ms. Waggoner described job code as a "starting point" that assists in setting pay over a "broad range." "But then we have location and product and skills and experience and knowledge and everything that they bring to the table." JX 102 at 85; PX 23 at 1. Positioning an employee in a range

> has to do with knowledge, skills, abilities, education, what they bring to the table, the internal situation of peers doing the same thing and by doing the same thing, it's not just within that job code, but there are differences by the product you are working on or the location where you sit and do your work. There are lots of different factors that go into play as far as where they would be positioned in a range.

JX 102 at 90. Product matters because the availability of talent differs for an "old legacy product" vs. "a cutting edge new" product, with some skills in higher demand. *Id.* at 91-92; *see also* PX 24 at 178-79. The guidelines don't particularly speak to product, but they refer to skills and competencies, which are what would make someone able to work on particular products. PX 24 at 180-83. Internal equity judgments are made with reference to peers performing similar or the same work at a similar level in the same role on a similar or the same product having similar duties in the same location. "[I]t doesn't come to job code or title because [] those are incredibly general." The determinations are performed by the hiring or line manager. JX 102 at 93-94; *see also id.* at 95-96.

A 2011 compensation training PowerPoint sets forth a collection of general principles:

- Compensation and benefits must be in line with the standard for the job
- Employee's salary should take into account:
  - Comparisons with others in group (peers) - equity
  - Relevant knowledge, skills, abilities and experience
- A promotion does not necessarily require a simultaneous salary increase. This would normally be taken care of during the salary increase process.
- Employees must not undertake a new role until the compensation has been fully approved and the appropriate terms and conditions have been accepted.
- Balance external and internal equity considerations
- Differentiate rewards by performance
- Manage your budget – you will never have enough!
  - Base salaries should be reviewed in a business context, taking account of

[63] The points were discussed elsewhere as well. In a deposition in the *Jewett* matter, Ms. Waggoner, on behalf of Oracle, resisted the proposition that Oracle had "compensation policies, per se." Instead, her team's trainings "outline our guidelines and kind of a framework to kind of help [managers] make their decisions and better understand compensation." PX 22 at 79-80; *see also id.* at 80-81, 165-66, 344. Testifying for Oracle in this matter, Ms. Waggoner explained that Oracle has compensation guidelines and practices about how to make pay decisions, use a salary range, select a proper job code, and handle transfers and rehires. They are "best practices" and "outline the things we want to make sure that people consider when making compensation decisions." PX 24 at 70-72.

what the business can afford
- Be honest and open with communications on rewards and performance
- These principles apply globally, but pay rates differ by country

JX 24 at 5-6; *see also* HT at 1217-20 (Ms. Waggoner discussing same slides from different training).[64]

The notes add that "[m]anaging pay at Oracle is an art, not a science, and there are various factors at play. Compensation and benefits offered to employees should be in line with the Oracle local standard for the job, but managers should also take into account internal equity, as well as the relevant knowledge, skills, abilities and experience of the employee." JX 24 at 5. In addition, "Setting pay for an employee is not a simple exercise. To make the best decision, it is important that you consider all the relevant pieces of the puzzle; namely, balancing internal and external equity, individual performance levels of your employees, and your overall budget." *Id.* at 6. It continues,

> Internal equity is considering how much you pay your employees relative to one another. In addition to salary, variable compensation and stock options are other tools you can use to differentiate pay to give more to your "stars". When you are making pay decisions consider internal equity, and be as fair as possible. Differences need to be based on fair, justifiable and non-discriminatory criteria. Focus on results, which is not always the same as effort. Some employees try really hard, but for whatever reason, do not come through with the desired results. It is important to coach these employees to turn effort into results, where possible, so that they will be rewarded in the future.

Id. The training adds that acquisitions, in particular, can cause short-term equity distortions that cannot be immediately rectified. *Id.* at 7. Pay does and should vary between individuals, but variations must be due to a genuine material difference" such as "[e]xperience, knowledge, skills, performance, etc." *Id.* Later it stresses that "[t]here are no absolute right or wrong or 'one size fits all' answers" and that "[e]ach situation should be reviewed on a case-by-case basis but the principles should be applied as consistently as possible." *Id.* at 21.

A March 2014 training provides the following general guidance on compensation:

> • Oracle compensates employees based upon their contributions to the Company and Oracle's financial performance.
> • The goal is to attract, retain, and motivate the very best qualified employees.
> • Central to Oracle's total compensation philosophy are:
> - Recognition and reward
> - Open communication
> - Market competitiveness

JX 107 at 56; *see also* PX 152 at 2 (same slide, different training); DX 112 at 5 (same). It lists the following as "challenges" for managers:

[64] JX 138 contains the same PowerPoint—or at least one without any appreciable differences. So does DX 258. PX 24 contains a PDF of the PowerPoint along with the email from Ms. Holman-Harries that sent it to OFCCP. PX 163, in turn, contains a PDF of the PowerPoint. PX 141 at 52-55 contains the same discussion in what at least appears to be a later training. So does JX 127 at 22-23.

• Managing the differences in remuneration levels of new hires and current employees
• Autonomy given to different LOB's and therefore the need to manage the differences
• Managing employees' expectations
• May not be able to exert influence on budget allocation
• Striking a balance in rewarding performers & nonperformers

JX 107 at 58.

A 2015 "Managing Compensation" training also sets forth some general principles. One slide addresses "Oracle's Compensation Philosophy and Objectives," stating that "Oracle must attract, retain and motivate highly skilled high performing employees to be successful." JX 25 at 4.

- Provide compensation programs that:
  - Attract and Retain by being Market Competitive
  - Motivate employees to maximize their productivity, but also consider shareholder interests
  - Are legally compliant
  - Are designed to support corporate objectives
- Pay for Performance
  - Company Performance
  - Individual Performance

Id. (emphasis removed); *see also* JX 111 at 5 (same slide in different 2015 compensation training)[65]; JX 127 at 4 (same point); JX 143 at 4 (same with slight modifications)[66]; PX 30 at 6 (same slide in 2012 training); PX 141 at 10-11. It also provides "General Principles of Managing Pay":

- Compensation and benefits must be in line with the standard for the job
- Balance external and internal equity
- Consider the relevant knowledge, skills, abilities and experience of the employee
- A promotion does not necessarily require a simultaneous salary increase
- Employees must not take a new role until the compensation has been fully approved and the appropriate terms and conditions have been accepted
- Differentiate rewards by performance but manage within your budget
- Be honest and open with communications on rewards and performance
- These principles apply globally, but pay rates differ by country

JX 25 at 22-23.[67]

[65] PX 174 is a PDF of the slides (omitting notes) of the training in JX 111. This is also in PX 252 at 11-60. The same PowerPoint is in PX 353. I cite only to JX 111.

[66] PX 161 is a PDF of the training in JX 143. Ms. Waggoner discussed this training briefly at the hearing. *See* HT at 1212-14.

[67] JX 111 at 23-25, JX 127 at 22-23, and PX 30 at 39-42 covers the same material. PX 154 at 12 appears to be an earlier version of the same slide.

As is also stressed elsewhere "[m]anaging pay is an art, not a science." *Id.* at 22.

> It is important to remember that compensation decisions are made on a case-by-case basis and many pieces of information need to be considered in each instance. There is not a "one size fits all" solution for managing pay. As we have reviewed, you should look at the whole picture when making a pay decision, including internal equity, as well as the knowledge, skills and competencies of the employee. You should document the information you used to make your decision. The salary and benefits should be set correctly for the position.

Id. at 43; *see also* JX 111 at 36; JX 114 at 37; JX 127 at 35; PX 30 at 65-66; PX 141 at 82-83.

A July 2016 training on managing compensation provides the following slightly revised statement about general principles:

- Compensation and benefits must be in line with the standard for the job
- Balance external and internal equity
- Consider the relevant knowledge, skills, abilities and experience of the employee
- Differentiate rewards by performance but manage within your budget
- Be honest and open with communications on rewards and performance
- These principles apply globally

JX 114 at 22. The general guidance is the same as in prior trainings. *Id.*

An April 2016 new manager training tells managers that compensation at Oracle is based both on the employee's contribution and Oracle's financial performance. Oracle uses compensation as "a tool to attract, retain and motivate the most qualified employees. It bases is "compensation philosophy" on "[r]ecognition and reward," "[o]pen communication," and "[m]arket competitiveness." PX 415 at 64. It lists the following challenges for managers: "[m]anaging the differences in remuneration levels of new hires and current employees," the autonomy given to each line of business in compensation matters, managing employee expectations, "[l]imitations on ability to exert influence on budget allocation, and "[s]tricking a balance in rewarding performers and non-performers." *Id.* at 64.

An August 2016, PowerPoint contains a brief "Compensation Philosophy" overview, indicating that Oracle seeks to focus on total compensation, to include salary, variable pay, and equity, aims to pay for performance and potential, seeks to remain competitive in the labor market, and wishes to remain "fiscally responsible by managing our compensation spend." JX 70 at 3; *see also* HT at 1263-65. A December 2016 manager training provides the following as Oracle's "Philosophy" related to compensation: "Attracting, retaining and motivating highly skilled, high performing employees is key to Oracle's goal to be the #1 cloud company," and "Oracle's goal is to compensate employees based on their contribution to the company and Oracle's financial performance." JX 126 at 55. Other trainings contain similar statements. *See, e.g.,* JX 149 at 3 (similar slide). Another training on managing compensation begins by stressing the performance of the business overall as the driving force behind compensation-related decisions. PX 141 at 6-9. It then provides familiar compensation principles and objectives—providing compensation that attracts and retains employees competitively, motivates employees and considers shareholder interests, and comply with law, with the aim of paying for both individual and company

performance. *Id.* at 10-11.

In a salary range training managers are told that in establishing pay they should balance external and internal equity, differentiate rewards by performance, and manage their budgets, since "you will never have enough." JX 140 at 15. An earlier, 2011 salary range training makes the same points. PX 28 at 28. The notes elaborate:

> Setting pay for an employee is not a simple exercise. To make the best decision, it is important that you consider all the relevant pieces of the puzzle; namely, balancing internal and external equity, individual performance levels of your employees, and your overall budget. In addition, there are external factors that weigh into recruitment & retention, and internal factors, such as morale issues & internal transfers. Internal equity is considering how much you pay your employees relative to one another. In addition to salary, variable compensation and stock options are other tools you can use to differentiate pay to give more to your "stars". When you are making pay decisions consider internal equity, and be as fair as possible. Differences need to be based on fair, justifiable and non-discriminatory criteria. Focus on results, which is not always the same as effort.

Id. at 29. Managers are cautioned not to make promises or guarantees. *Id.*

In Mr. Miranda's organization, the direct managers are responsible for compensation decisions and making sure that people are being treated equitably. HT at 1100. Oracle has a policy of non-discrimination in compensation decisions and a training that covers that policy. *Id.* at 1101; *see also id.* at 1113-14, 1148. He agreed with counsel's suggestion that Oracle managers make pay equity assessments when making compensation decisions. *Id.* at 1149. He elaborated:

> We try to retain our top talent. So, based on the things I think I described before, the skill set that they have, the competitive job market, the performance within Oracle, we try to ensure that we compensate that person such that they're, you know, that they're more likely to stay at Oracle or you can interpret to be at the market rates that they're not incented to leave because of compensation.

Id. at 1159. Salary compression is "when you are bringing in new people to the organization, and those people have a salary, though maybe with less experience, that is close to or equal to, or slightly above people with more experience." HT at 1129. There are individuals in Mr. Miranda's organization who have salaries lower than the range for their job. *Id.* at 1129-31. Salary compression is an issue with men and women, and people of different races. *Id.* at 1150.

Lisa Gordon was Oracle's compensation director and was interviewed during the compliance review.[68] Per OFCCP's notes, she explained that line managers are responsible for

[68] I cite to JX 22 for the notes. A signed copy of the notes, dated February 11, 2015, is found in PX 43, along with some context provided by Ms. Holman-Harries. Another copy is in PX 56 and in DX 42. PX 57 contains an earlier version with (mostly stylistic or grammatical) alterations suggested. PX 67 contains a copy in an email from Ms. Holman-Harries to OFCCP. PX 255 is the same document. PX 250 at 3 contains responses to interrogatories in the *Jewett* matter related to these notes, which indicate that Ms. Gordon no longer works for Oracle and that although Oracle could not confirm her signature, it believed that it was genuine and would not challenge its authenticity. PX 304 at 3 and PX 305 at 4-5 contain discovery from this case going to the same point. Ms. Dodson discussed the document at PX 14 at 204-214,

compensation decisions, but if they have questions go to HR. Oracle has "general high level guidelines" but organizations have "a lot of autonomy about how to interpret and implement the guidelines." Market condition and budgets vary by lines of business. JX 22 at 4-7. In setting starting salaries:

> Several factors come into play and varies based on position. Look at experience, what the job is. The skillset might be special. Look at the market price for that particular skill set. Depending on the job, weight of one factor over another may change in deciding starting salary. The direct hiring manager is the main person that is involved in determining new salary for new hires. May pull in an HR manager as well.

Id. at 9. The salary ranges provide guidance, but there is flexibility. They can up- or down-level a position by one Global Career level without starting over to make adjustments relative to a hire's qualifications. *Id.* New hire salaries are approved through the management chain, up to the Office of the CEO. *Id.* They might go above range in some circumstances. Negotiations can happen on a case-by-case basis, and prior salary is a factor. *Id.* at 11; *see also id.* at 17. Acquisitions present difficulties in mapping incoming employees onto Oracle's system. Salaries are not usually adjusted, which can lead to people being out of range in the new position, higher or lower. *Id.* at 14. Performance ratings played an uncertain role, since Oracle does not require performance ratings and reviews—it has no formal structure in that regard. *Id.* at 17.

Asked for an explanation of pay differences between individuals:

> No formula, depends on the job. Years of experience can be important. But if we are looking for a very particular skill, we might be honing in on an element of someone's resume. Specific need in an organization and go out looking for a specific skill. High tech moves so quickly, may have someone with 5 years of experience but not the right skill.

Id. at 19.

At several points Ms. Holman-Harries and Ms. Gordon suggested analyzing compensation by looking to supervisor code since that would narrow the individuals to the same product. JX 22 at 6, 15. Similarly, a document titled "Analysis of Pay at Oracle" recommends evaluating pay based on supervisor, since this "typically denotes the different line of business and/or product the employee is working on." PX 52 at 1. It continues:

> Different products and different lines of business typically require employees in those respective areas to have different skill sets. Even in the same job and line of business, employees may not only have different skill sets but different levels of expertise and responsibilities. As a result, even for employees working in the same department, for the same supervisor, and with the same job title, they may not be doing the same level or type of work. Oracle is organized into many small entrepreneurial groups and each group works on different products or may support

though she was not designated to testify on the subject and so added little of evidentiary value. Ms. Holman-Harries was examined about the document at, for instance, PX 16 at 210-14, 216, 217-23, 224-27, 229-37.

> different types of industries, business sectors and/or different lines of business. Frequently, the product worked on, or the business sector for whom the work is being done, can itself be an important indicator of pay.

Id. In addition, Oracle is a high-tech company, and there is steep competition for employees with skills that are "hot" or "cutting-edge." *Id.*

As a result, the job group is "not a factor" and salary range "has little relationship to the analysis of the compensation system." *Id.* These categories are far too broad and do not take into consideration the skills, expertise, and responsibility required to work on different products and technologies." *Id.* Oracle represents that "[a]s a result of how we are organized and the range and varied complexity of our product offerings, we have very few employees, or jobs, at any Oracle location where there are significant numbers of employees doing the same or similar work with the same skill/experience." *Id.* This approach means that there are few incumbent comparators in the same groupings. Oracle thus relies on its managers during focal reviews to make adjustments based on performance and pay equity considerations. *Id.* In-house counsel also reviews compensation to "ensure that the process is fair, unbiased, and that there are no unlawful disparities." *Id.*

3. *Salary Ranges*

Oracle uses salary ranges for jobs, based on surveys it commissions. JX 22 at 13; *see also* JX 25 at 17. A salary range is "[t]he range of salaries, typically includes minimum, midpoint, and maximum[, that] is assigned to a group of jobs that have similar pay rates in the market." PX 416 at 2. They are based on a list of Oracle's competitors for talent, though this can vary from year to year and country to country. JX 25 at 18-19. Each job has a salary range. "The midpoint of the salary range represents the base salary a fully competent employee performing as expected." JX 24 at 8. It is targeted at the 50th percentile of the market based on peer companies. JX 70 at 4.

Salary ranges are given by the "grade" for a job. *E.g.* PX 154 at 4; *see also* PX 18 at 85. Grades generally include multiple jobs, covering different functions, specialties, and global career levels. The jobs in the three job functions in this case fall into 19 different grades. The number of employees in a grade range from a few to over a thousand. *See* PX 171 (summary of distribution of employees); *see also* PX 260 (base data); HT at 651-53, 656-58.

Oracle's HR webpage explains that a "salary range links the external market value of jobs to the internal company value by defining a range of possible salaries comparable to the salaries other companies pay for similar jobs. Salary ranges are a management tool to assist managers with hiring decisions and allocating their salary increase budgets." JX 96 at 2.[69] Ranges have a maximum, minimum, and midpoint. "The minimum and maximum defines the variance that Oracle is willing to pay to recognize individual employee differences." *Id.* "The midpoints of the salary ranges are aligned closely with the market. They represent the average base salary for jobs having a similar scope and similar experience, skills and education requirements." *Id.* They are based on market data for Oracle's competitors in products and labor and designed to keep Oracle competitive and cost-effective. *Id.*

Where you are paid in a salary range will be based on a number of factors including

[69] DX 35 contains the same printout found in JX 96. I cite only to JX 96.

> your background; i.e. knowledge, skills, education, and your performance. Employees learning their job will typically have salaries lower in the range. Employees who are consistently recognized as effective contributors or top contributors and leaders will typically have salaries at the midpoint or higher in the salary range. Salary ranges are guidelines and in the US employees may be paid outside the range under certain circumstances.

Id.

Per one training, salary ranges "guide managers in recruitment and salary adjustment decisions." JX 107 at 57. They are a "tool" for mangers and HR to make decisions about base salaries—either during recruiting or during focal reviews, job changes, or promotions—and "reflect" the market for salaries at competitor companies. PX 28 at 6-7.[70] Ranges are broad so that managers can "account for differences in experience, skills, competencies and performance" within them. *Id.* at 8-9. They are developed by compensation teams using surveys from external consulting companies, looking to the local market at peer companies. *Id.* at 10-13; *see also id.* at 16-19 (more on development).

"Salary range is the link between internal and external equity. All jobs that are considered equal in value to Oracle are grouped into the same local grade level, and have the same salary range." *Id.* at 15. They are based on the external market, and group jobs that are internally of equal value. The minimum of the range is "entry level salary." Midpoint is what "a fully competent employee should earn. The maximum is for the "highest level of performance in a job" and is the "upper limit" and what Oracle will pay. *Id.* The first quartile is for those still learning the job, or who are below the required performance standard. The top quartiles are for those who have "high" contribution or are ready for a promotion. In placing an employee, managers should consider skills, knowledge, and experience, internal equity, performance, the prior compa-ratio, and tenure in the position. *Id.* at 20-21. Ranges fluctuate with the market and overlap with each other, based on market conditions. *Id.* at 18-19. The training cautions that those at the top of the range may be those who are tenured but do not have promotional prospects or those with legacy compensation issues from an acquisition. "Employees in the same job do not necessarily earn the same amount." *Id.* at 22. The training also observes that base salary decisions should be "reviewed in a business context" based on what is affordable, and that "short term internal equity distortions" can arise from acquisitions and cannot be rectified immediately. *Id.* at 26.

Other trainings elaborate on the same themes—ranges are a tool and are intentionally broad so that managers can make differentiations. JX 25 at 16.[71] The U.S. has two sets of salary ranges, Silicon Valley and the rest of the country. *Id.*; *see also, e.g.*, JX 141 at 14. "Salary ranges are the link between internal and external equity. Jobs that have the same local market value are grouped into the same local grade level, and have the same salary range. There are multiple jobs in each grade, often across different [lines of business]." JX 25 at 19. Where the different IC and M levels for

[70] A training from roughly the same period on a broader array of topics contains similar information. *See* PX 30 at 28-37. I do not discuss this independently here, since it adds no additional information.

[71] Again, the same information is found in the training in JX 111 at 17-21. JX 114 at 16-17 contains the same discussion and JX 126 at 58 and JX 127 at 16-19 covers the same material. JX 140 contains a salary range specific training with some more information on how salary ranges are developed, though it does not add any material information except where separately discussed in the text. *See also* HT at 1217. PX 158 is a PDF of the training in JX 140, with what appear to be related handouts attached. PX 141 at 34-47 also contains the same basic discussion of salary ranges.

each job fit in the pay structure, and the range involved varies by function. The values are market driven, resulting in overlap but not correlation. *See* JX 140 at 10.

The salary ranges are divided into quartiles. The first quartile "is for employees still learning their role, or below standard contributions." JX 25 at 19.[72] The midpoint "reflects external market rate for fully experienced, fully competent employee[s]." *Id.* The third and fourth quartiles "are for employees whose contribution is high or ready for a promotion." *Id.* The maximum "is typically the highest salary that should be paid for a job." *Id.* Managers are told to consider the following when positioning an employee in a range:

1. The employee's skills, knowledge, and experience.
2. Position in the range of others in the organization who have similar skill sets for the same role.
3. Sustained performance
4. Tenure in current position – in general, employees who have been in their current role longer tend to be paid higher in the salary range

Id. Training notes warn that "[a]s a manager you may not always have the budget to perfectly place all your employees." *Id.*

One of Ms. Waggoner's responsibilities is to maintain Oracle's salary ranges or grades, which applies to "our general buckets of jobs" in a particular location. HT at 1183.

> Each job code at Oracle is assigned a salary grade. That grade represents a range with a minimum, a midpoint, and a maximum. We aim to put our Oracle internal midpoints right around the 50th percentile of our peer group and that range is what gives managers a general idea for what someone performing that job at the very broadest level with what we might pay them.

Id. at 1183-84. Oracle has 18 exempt grades and 10-12 non-exempt grades. *Id.* at 1184; *see also* PX 24 at 110-11. Each job is assigned a grade, which leads to a range for the relevant locality. HT at 1186; *see also* DX 117; JX 102 at 33-34 (different salary ranges for headquarters and non-headquarters).

Salary ranges change over time based on market data. Both the ranges applied to a grade and the grade assigned to a particular job can change. HT at 1186-87; *see also* PX 26 at 202-03 (Ms. Westerdahl testimony); DX 117 (spreadsheets showing salary range histories from FY14 to FY19 in the job functions at issue here, showing changes in both salary grades for positions and the ranges applicable to a position within a grade). Salary ranges are also broad "to account for the differences in knowledge, skills, abilities, what people bring to the table, essentially." HT at 1187. New hires, for instance, can come in with variant levels of experience and need for "ramp-up time." *Id.* at 1187-88. Product also makes a difference:

> there are—we refer to those as hot skills, so there are things that people could bring to the table. If we're looking, for example, at a Cloud job today, the Cloud skills are

[72] JX 150 at 10, for example, contains essentially the same information about the design of the ranges. So does PX 141 at 46-47 and PX 154 at 7.

> hot skills and the people that are coming to us with Cloud skills can command more in the market. Alternatively, we have people who are still working on PeopleSoft products, that aren't as hot, and they don't command as much in the market, and it's economics, we have to pay more to the people who bring those hot skills to the table, and our broad ranges allow us to account for that.

Id. at 1188.

The breadth of the ranges varies. At lower levels there is less variation because employees in those roles have less experience and there is going to be less variance in what a particular employee can bring. "But as you climb the ranks, you need to make your ranges a little bit broader, because there could be big differentiations." HT at 1188-89; *see also* JX 102 at 87-89; PX 23 at 2; PX 22 at 246-48. Salary ranges are determined based on market research by third-party survey vendors based on anonymous submissions and data gathered from peer companies.[73] Based on the results, adjustments are made to the ranges, and the grading of each job. HT at 1189-90; *see also* JX 102 at 86-90 (discussion of process); PX 24 at 108-10, 126-27 (same); PX 25 at 3 (clarification of PX 24 at 108-09). Salary ranges between jobs overlap. HT at 1189; *see also id.* at 133-34 (testimony from anecdotal witness that salary ranges overlap and Oracle prefers that promotions occur for those in the overlapping ranges, since promotions are generally not accompanied by salary raises). In addition, it is not required to pay an employee within their salary range. *Id.* at 1184. Oracle's salary ranges are not public or available to non-manager employees, but a manager is permitted to share the range with employees if asked. PX 24 at 133; PX 26 at 165-55

Managers are trained in salary ranges and the quartiles generally, and told that those in the higher quartile will have better performance and more experience, knowledge, and skill. There is variance within the ranges because different employees bring different things to the table. HT at 1205-06; *see also* PX 22 at 250-51. Better performance alone might not put someone in a higher end of the range, since there are other factors in play, like the product that they work on and demand for the skills in the labor market. PX 22 at 255-56. Product is not mentioned in the trainings, but Ms. Waggoner averred that it came within experience, knowledge, and skill. She explained that the training applies globally, to all functions, and in many of those not at issue here product will not matter, since employees aren't working in reference to a product (i.e. Legal, HR). HT at 1207-08. The salary ranges provide managers with the "external equity" information, giving them the distilled knowledge of the market. Internal equity, and how the employee compares to others within the team, then provides guidance on where to place employees in the range. *Id.* at 1207-09. She agreed that managers are told to keep in mind the business climate and overall budget for salary increases. That is the background for how managers will be able to position employees. *Id.* at 1266-68.

A "Compa-Ratio is the ratio of the employee's salary to the midpoint of their salary range." JX 25 at 20; *see also, e.g.*, JX 114 at 18; JX 127 at 20; JX 140 at 13; PX 24 at 135; PX 28 at 24-25; PX 141 at 48-49; PX 416 at 1. Some training notes elaborate that "[l]ooking at the compa-ratio of employees in different jobs helps you get a sense of their pay relative to each other. This is helpful when you are managing employees doing different kinds of work, at different levels and in different countries or regions within a country" and "[i]t is important to remember that not everyone has, nor

[73] PX 331 appears to contain a small excerpt from such a survey related to one job title. Absent more context, however, it is impossible to draw any conclusions from the document. PX 332 contains a "2007 Benchmark Survey Report Specifications." It contains a great deal of information and informs the amount of detail that goes into devising ranges, but doesn't contain information pertinent to the disputed issues here.

should they have, the same compa-ratio. The right number for each employee depends on their individual skills, contributions, performance, etc." JX 25 at 20. Cross-border transfers pose special problems, since different salary ranges are used, but compa-ratio can be used to appropriately place the employee in the new salary range. *Id.* at 37.

Ms. Waggoner explained that a compa-ratio "essentially becomes a common language when we're looking at employees. It might be across function, it could be within the same function but across locations. It allows us to take into account how that employee is paid in that particular market." HT at 1209-10. It allows comparisons between Bay-Area and non-Bay Area employees in the United States, and across country lines, enabling managers to see whether they are paying geographically disparate members of the team comparably. *Id.* at 1210; *see also* PX 24 at 135-36, 142-43. A low compa-ratio might be a justification for a pay increase, but Oracle's salary ranges are large and the job codes are "huge buckets" with "very general, high-level groupings" that include employees doing different work on different products and at different levels of performance. In some situations, a low compa-ratio would be entirely appropriate. PX 24 at 144-47; *see also id.* at 172-73. If a compa-ratio was below 50, HR would likely reach out to figure out what was going wrong to clarify. It would suggest that the person might be in the wrong job code. *Id.* at 147-48. If there people or a team that was significantly low, managers would bring it to HR's attention. *Id.* at 149-51.

E. Hiring-Related Processes

1. General Hiring Processes

Requisitions for new job postings are created after a vacancy is identified and approval is given to fill the position.[74] Jobs are posted internally before they are posted externally. The posting must contain title, location, organization name, department description, job description, job requirements, any additional details, and recruiter information.[75] Candidates must provide contact information, employment history, education, and the online application for the job. Resumes and demographic information are optional.[76] Official offers are extended by HR after all of the approvals are provided and the applicant tracking is completed. JX 23 at 21. An April 2016 manager training provides four "Key Principles" for hiring: the mandatory approval processes, checking with regional recruitment policies, using Oracle's recruitment teams instead of an outside agency, and "Oracle Corporation is an Equal Opportunity Employer." PX 415 at 20; *see also* JX 88 at 27.

Oracle uses two internal systems related to hiring. Taleo is used for job postings and applications; iRecruitment is used to submit offers. JX 102 at 133-34. The file for an offer in iRecruitment Administrator contains information about the vacancy and the various details about the candidate and offer, including information about the compensation offer, placement in the salary

[74] Ms. Cheruvu explained that managers are generally given a headcount budget instead of a dollar budget, i.e. the number of people they can hire. PX 12 at 191-92. On at least some occasions, budgetary questions regarding which positions to fill are addressed as part of the approval process. *See* PX 486.

[75] An example of an advertisement as it would appear to the candidate can be found in PX 42. More detailed examples can be found in PX 71 and PX 73. PX 72 contains correspondence between a candidate and recruiter in reference to the advertisement contained within, setting up a time to talk.

[76] The record includes a number of resumes from candidates: DX 267 to DX 289; DX 334; DX 355; DX 357 to DX 374; DX 380 to DX 391; DX 413 to DX 428; and DX 436.

range, and, at a time at least, the candidate's current salary. It also includes a narrative justification of the hire and the approval history, with comments from submitters and approvers. *See, e.g.,* DX 445 at 2-5.

Ms. Waggoner explained that in creating a job requisition, a manager would choose a job code. Some fields are automatically populated, like vacancy ID, and others get populated by the choice of job code. So the brief posting description, detailed description, and job requirements are system generated based on the entries in the Global Job Table. Other fields are "free" and are filled in by the hiring manager. Department description is something that the manager fills in independently, as is an "additional details" section "where the manager can go in and speak specifically to what they're looking for in this, to fill this role." Here the manger would put details on particular skills like coding languages. HT at 1178-79; *see also id.* at 1179-82 (more examples); PX 22 at 221-22, 224 (similar point in deposition). Managers choose the job code that best reflects the role they are hiring for, and depending on the candidate selected can go up or down one level within the same job family. JX 102 at 81-82; *see also* PX 24 at 280-81.

A January 2017 training discusses the hiring process. *See* JX 88.[77] After the available headcount is verified, a manager can have a vacancy opened. At this stage it is important to select the correct job code, since the process will only permit moving the position up or down one level. *Id.* at 3. The job code automatically populates the job description, which cannot be altered. Additional information can be added. *Id.* at 6. Before the job is posted, all approvers must approve. Requisitions cannot be edited after they are fully approved. *Id.* at 8. Oracle's internal system then allows candidate review and the initiation of offers, which requires adding additional information, including, at that time, current job and salary. *See id.* at 9, 14. Proposals for salary and other compensation are part of the offer process. *Id.* at 15-16. Offers must be approved up the chain of command, with those initiating the offer providing comments and business justifications for the offer proposed. *Id.* at 18-19. After all approvals are received, an offer letter and other information are sent to the putative employee. A start-date is generated after the job is accepted. *Id.* at 20-21.

Another training provides more detail and guidance on using iRecruitment. *See* PX 176. Most of these details aren't relevant here, but the training does give some insight on the process. Hiring managers create the offers and write the justifications. They work with talent advisors, who help candidates and confirm start dates, as well as assist in negotiating where that is an option. All offers must go through the approval process. *Id.* at 6-9; *see also* PX 179 at 20-23. Offers submitted for approval must contain basic job information (code, title, level), job category, whether it as a replacement or new headcount, applicable salary range, proposed salary and on target earnings, current base salary and on target earnings, prior employment information for rehires, additional information for revenue generating positions (not at issue here), and a justification for "why candidate is a great hire for Oracle and the best fit for the particular role." PX 176 at 22. Justifications should address work history and education, as well as any non-standard aspects of the offer, including stock, out-of-range salary, rehires with an increase in salary, and large increases in compensation from current compensation. *Id.* at 32-33. Offers can include other sorts of compensation, such as signing bonuses, stock awards, relocation expenses, or a car allowance. *Id.* at 27. Offers then move through the approval chain, concurrent with a background check. After all

[77] This process is discussed elsewhere, sometimes in more detail given the target audience, but without differences meaningful to this case. *See* JX 107 at 10-15; JX 122 at 5-6, 9-11; JX 126 at 17-23; PX 179 at 18-19; PX 180 at 14-17; PX 181 at 15-20; PX 188 at 1-18; PX 415 at 17-21.

approvals are received, the hiring manager can send the offer to the candidate.[78] *Id.* at 30-31; *see also id.* at 38-41.

Special rules apply to rehires. As a matter of policy, an employee who has voluntarily left Oracle twice is ineligible for rehire. If a candidate returns within one year of leaving, salary and level should remain the same. Business justification for the rehire is requested, with details of the prior departure. JX 88 at 24-26; PX 176 at 36-37; PX 188 at 21. A "rehire" is a former employee who voluntarily left the company or was laid off, regardless of the amount of time away from the company. DX 115 at 7. Former employees must be eligible for rehire and have had satisfactory performance at Oracle. In making decisions on rehires, performance information, general work history, and feedback from past managers may be considered. *Id.* at 8. Job categorization is determined by the particular business need and job level, as well as the experience of the candidate and his or her skills and education. *Id.* at 10. Compensation is determined by both the budget and internal pay equity factors. *Id.* at 11. In September 2018, Oracle issued "New Global Rehire Guidelines" in order to "bring simplicity and clarity to the rehire process." JX 100 at 1.[79] Such candidates had to be eligible for rehire and had satisfactory performance in the prior role. In make "Job Assignment" mangers were directed to look at business need, experience, and skills/knowledge and education. *Id.* at 3. Compensation was to be set considering internal pay equity and the budget. *Id.* at 3-4.

Ms. Balkenhol explained that Oracle has a guideline requiring exceptional circumstances before someone is hired for the third time. Validation of those circumstances might be sought before entering the offer into a workflow. HT at 1332-34. In these situations, she has questioned whether the person is coming back to relax and retire, or slack off.[80] *Id.* at 1334; *see also* PX 479 (email exchange). Based on the email exchange in evidence, the manager responded to her concerns and Ms. Balkenhol instructed them to add the rehire info into the approval workflow, since those fields couldn't be skipped. PX 479 at 1. Approvals for another rehire in evidence indicate that they receive some scrutiny and there is some worry about employees being rewarded for leaving Oracle and then returning with a higher salary. *See* DX 173 (rehire prior approval via email for current contractor); *see also* DX 174 (resume); DX 175 (Mr. Kurian approval and approval chain routing).

2. Recruitment

Oracle trains in recruitment, which has some limited relevance to this case.[81] Hiring managers can rely on an internal recruitment team to find external candidates, but are encouraged to hire internally first. They can also encourage current employees to recommended friends through the employee referral program. PX 179 at 10; *see also* DX 21 at 1-7 (policy related to program

[78] Informal compensation offers are discussed with the candidate prior to an official offer being generated after approval. *See* DX 351 (email chain about compensation offer for hire prior to formal offer).

[79] PX 79 has the same document.

[80] Ms. Balkenhol didn't remember the transaction offered as an example or what the outcome was and whether it was approved—she was providing input on questions that would be asked in the approval process. HT at 1337-38.

[81] I discuss the relevant aspects of the training in PX 179. PX 180 contains another, earlier training about Oracle recruitment. Recruitment is peripheral to the case to begin with, and PX 180 doesn't add any new, material information beyond what is in PX 179 or other trainings previously discussed. PX 181 contains a more detailed training designed for recruiters. It does not add any material information given the issues in this case. For instance, though it contains training related to immigration and hiring (at 55-67), I am not presented with any issues related to the way Oracle hires in the immigration context.

including potential bonus for successful referral). They are reminded that Oracle is "an Equal Opportunity Employer—Promote diversity & inclusion. And, always ensure compliance!" PX 179 at 10 (emphasis removed). To assist in recruitment, Oracle maintains an internal "Talent Advisory Organization," with regional Talent Advisors, who work with Hiring Managers and HR Business Partners. *Id.* at 12-17. Talent Advisors focus on recruiting candidates while Hiring Managers focus on the evaluation and hiring of candidates for the position. *Id.* at 24-29.

Mr. Kidder manages recruitment for the product development area. PX 20 at 12-14. He explained that a recruiter is responsible for gathering the job requirements for a position, working with the hiring manager and determining the technical requirements, "going out to the marketplace to contact candidates," and then pre-screening and submitting candidates to the hiring manager. Recruiters also assist "with any further steps necessary in the process." *Id.* at 16. Hiring managers use the iRecruitment form for hiring, but Talent Acquisition does not. *Id.* at 20-22.

3. Formulating Offers

Oracle provides some guidance to managers on formulating offers. A May 2013 "Global Compensation Guidelines Training" for the United States provides that "[o]ffers to external candidates should be competitive enough to attract the employee to the role while taking in to consideration their skills, experience and performance history." JX 106 at 27.[82] "Both external equity (salary ranges) and internal equity (salary of existing incumbents) are key factors when determining an offer." *Id.* (emphasis removed). Current salary "should be reviewed as part of the offer process." But, "this is only one factor to be considered when determining the starting salary." *Id.* at 28. Experience and skills "should be weighed more heavily." *Id.* Another training on managing compensation instructs managers engaging in recruitment and formulating offers to use the salary ranges and focus on the total reward of the position. PX 141 at 56-57.

An internal HR training about compensation for new hires from 2017, frames the challenges as selecting the right job family and career level for the position and candidate, paying for the job even though this might not align with expectations, balancing parity within the organization and market competitiveness, and ensuring consistency as well as good use of resources. JX 150 at 4. In reviewing the global career level placement, HR looks at the experience of the candidate, and how that compares to the job requirements. *Id.* at 6. "Career level placement, whether moving from or within the IC or MGR levels should be determined based on candidate experience and functional responsibility of the role that will be performed." *Id.* at 8. Incorrect choice of career level can impact career progress, benefits, compliance, and skewed perceptions of market value. *Id.* "The Job code selection should be the 'best fit' based on the primary duties and responsibilities performed; at least 70% of the job duties should match." *Id.* at 9. "If the job code is incorrect, there could be an impact to the employee's compensation including pay basis - hourly or annual, short-term incentive eligibility, equity eligibility, etc." *Id.* The offer must then be evaluated in reference to the salary range for the position, looking to both the employee's background, skills, experience, and education in comparison to the job requirements and comparison to the placement of peers in the organization. *Id.* at 10.

In its review, HR is directed to look at internal equity issues, including whether the offer will create compressions issues in the level, or in adjacent levels. JX 150 at 11. "Balance external

[82] The same training is in PX 41. I cite only to JX 106.

competitiveness (candidate's expectations) and internal equity (peer averages)." *Id.* "Avoid pay compression which leads to pay dissatisfaction, employee morale issues, negative perceptions of pay fairness and increased turnover." *Id.* HR also reviews the mix of pay types in comparison to the standard for the role. Signing bonuses "are used on a limited basis" and "RSUs are used on an exception [sic] basis and should be reasonable and justifiable." Other, non-standard elements to the offer must be vetted. *Id.* at 12. HR approvals come with notes containing "concise" justifications addressing internal equity issues and information not covered in prior justifications. *Id.* at 14; *see also id.* at 15-23, 26-27 (more detailed discussion, examples).

The May 2013 training provides that rehires returning in one year typically return at the same salary or compa-ratio, unless there is a different career level. JX 106 at 21. The benchmark for hires within 1-2 years is their current salary, though this can be altered by other factors. *Id.* at 22. Beyond that, they are treated as regular hires. *Id.* Line managers play the role of compensating based on the role performed and giving justifications for the offer proposed. HR provides support and advice, both for the line manager and for the line of business in setting its "strategic workforce initiatives." The US compensation unit provides education and support for complex and unique offers. The Office of the CEO works to ensure consistency throughout the organization and "fiduciary responsibility." *Id.* at 6.

A 2016 training stresses the repeated point that choosing the correct family and career level is important when posting a position, since when making an offer career level can only be lowered and raised by one. In making an offer, managers are told to consider the salary range for the position, and the placement of the salary among the others in the work group. JX 114 at 23. A December 2016 manager training encourages seeking to open a position internally first for transfers. JX 126 at 21-22. It also stresses that "Oracle has a defined hiring and recruiting process with several steps and tool-driven workflow approvals." *Id.* at 23. It is also important to choose the correct job family and career level in making hires, since it impacts the salary range and can only be adjusted one level up or down. In setting salary for new hires, mangers are told to review the salary range for the position and the salaries of "existing incumbents." *Id.* at 59. Yet another training stresses considering the "total reward" of working at Oracle, and not just salary. It warns against recruiting at an artificially low salary when drawing employees from lower paid sectors, since this ends up creating equity issues later. JX 127[83] at 24; *see also* PX 30 at 43-44.

In Ms. Cheruvu's experience, a hiring manager can determine starting salary for an employee without consulting or even notifying HR. PX 12 at 74-75. She does not approve hiring decisions unless it is hiring on her team. *Id.* at 77-78. Hiring managers make decisions about initial compensation. When she does so for her hires, she looks at skills, resume, experience, and background. *Id.* at 177-78, 259. She would also consider how critical the hire is, what the deliverable is, and what sorts of skills that are needed. *Id.* at 191. Hiring managers are not bound by the range, though she would not and wasn't sure if others would go below range. *Id.* at 189-90. She was unaware of one group that would review all offers and wages. *Id.* at 114-15. Immediate managers review to ensure that the hire is within the headcount budget. *Id.* at 193. Hiring managers also make decisions about equity offers. *Id.* at 194. Ms. Holman-Harries also testified that decisions about starting pay and compensation primarily reside with the managers, who are responsible of looking at their group and considering equity. This is part of Oracle's "very entrepreneurial environment." PX 16 at 97-98.

[83] DX 262 contains the same training that is in JX 127. I cite only to JX 127.

Ms. Waggoner also discussed the general process for deciding salary offers at Oracle. Managers decide what the need is on the team and create a requisition with the appropriate job title/code. In that process, the manager will have access to the applicable salary range. HT at 1195-97; *see also* PX 22 at 104; PX 24 at 111-12.

> Then, as people apply, they look into their internal equity, they figure out what the peers truly do similar work to what this person is going to—this new hire is going to be doing, they would look at those peers. They would look at what that candidate brings to the table, whether it's a little more than we need, a little less than they need and they need some grooming, and then they would make their decisions based on their internal equity and the internal approach of what's on that team in terms of salaries, and then factor in what that person will bring individually.

HT at 1196.

Job codes are chosen before candidates apply, but managers can hire one level up or down from the Global Career Level that was posted, based on the candidate. But they cannot change job families. *Id.* at 1197. A manager could go outside the range, but would generally provide more of a justification for doing so. PX 24 at 115. HR business partners might assist a hiring manager in reviewing a resume, or consult on the internal peer group and placement of the new hire on the salary range. PX 22 at 107. In addition, starting pay is shaped by product:

> [T]here are certain skills in the market that can command more. And right now it's about machine learning and AI, and Cloud skills. And so if that manager has a posting for a job that's going to work in AI, they're pretty much guaranteed they're going to have to pay higher in the range than a posting for a manager who has an opening for a PeopleSoft product or any other legacy Oracle product.

HT at 1197.

4. *Approvals*

Once the line manger decides on an offer, the manager puts it into a workflow. It works its way up the chain of command for approvals, and is ultimately approved by the "BOD Office of Approvers," which contains three people who do a "sanity check before it gets committed to the system and the offer is fully generated." HT at 1198-99. They do hundreds of these approvals, since they cover the whole company. *Id.* at 1200; *see also id.* at 1258-59.

> [T]hey are running a sanity check to make sure that there's nothing rather outlandish happening. There have been cases where maybe a zero is missing in a salary and someone would end up with a salary of $10,000.00 instead of $100,000.00. They're doing that sanity check to see where—does it make sense and is the justification for that hire and what they're offering that hire, is that crisp.

Id. at 1201; *see also* PX 22 at 105-09; PX 24 at 113-15, 117-19. Lower level review would be more substantive in that it would look at the resume, the peer group, the salary range, and ask if it made sense to bring the person in at the salary offered. PX 24 at 119-21. Something that was out of the ordinary would receive more scrutiny further along in the process. *Id.* at 121. Mr. Ellison does not personally review offers. Workflows have never gone to him—rather, approvals were made on his

behalf. PX 22 at 108, 115-16. In 2017 the process was changed to eliminate some of the intermediate approval steps in order to accelerate the process. *Id.* at 111; *see also* PX 24 at 117-19.

Approvals proceed to HR and then up through the chain of command for the hiring manager, culminating with "Mr. Ellison's" office. *See, e.g.,* PX 94 at 3-4 (approval chain). A checklist for new hire job classification and compensation review provides a list of questions to consider in classifying the job, including whether the justification matches the job code chosen, the use of the job family on the team, the employees background, and the presence and number of direct reports. In terms of compensation, the list points to consideration of the salary range and the comparison internally to peers, and whether the compensation will create salary compression. PX 417 at 1-2. Ultimately hires are approved in the CEO's (or Board's) office, so managers are instructed to provide concise justifications containing the important points surrounding the overview of the role, the responsibilities and importance of filling the position, the reason for choosing the candidate over others including special skills or experience, and the negative business impact of not filling the roll. *See* PX 39 at 1-2. The record includes a series of justifications for hires, mostly from a pre-official approval process in some organizations. These collectively tend to show that managers provide some detail on the particular skills of and need for a candidate, and explain the basis for the offer. Justifications for offers are often framed in terms of what will be needed to lead the candidate to accept the offer and come to Oracle.[84]

[84] The details are sealed to protect the privacy interests of the individuals involved, so I summarize only generally. *See* PX 496 (justification for IC2 hire for position that was posted as IC3 for former intern who was most junior interviewee but with proven relevant experience stressing both cost savings of leveling down and increase per guidance from intern salary); DX 143 (IC4 hiring at HQ with salary near top of range); DX 144 (interview and reference feedback for hire into unspecified position); DX 145 (hiring justification with interview and reference feedback, position not specified); DX 146 (interview feedback for unspecified position); DX 147 (detailed reference check reports for unspecified position); DX 148 (critical hire with proposed salary well over recorded current salary, along with stock options and a signing bonus for "super star candidate" and "highly specialized engineer" meeting "critical need," stressing the rarity of candidates combination of skills); DX 149 (hiring justification with offer of 1.01 compa-ratio salary and stock options, current salary recorded with offer quite a bit higher based on salary expectations); DX 150 (hiring justification that records current salary and propose significantly more with stock and relocation pointing to expectations, cost of living changes, and high demand for candidate relocating to the Bay Area); DX 151 (email chain of approval with justification for rehire at lower compensation, but with same compa-ratio); DX 152 (justification for rehire at M4 offering somewhat more than current salary and compa-ratio of .94); DX 153 (justification for hire with proposed salary 50% more than current salary and consistent with competitive offer from other company); DX 154 (hiring justification where offer is "substantial increase" from current salary based on candidate expectations and concurrent interviews with competitors); DX 155 (reference feedback and interview comments for unspecified engineering position); DX 156 (interview notes and list of references for candidate for unspecified position); DX 157 (undated hiring justification for rehire of Principal Technical Support Engineer, IC4, with salary offer somewhat more than prior salary at Oracle and resulting in a compa-ratio of 1.121 justified by candidates significant experience); DX 158 (related email chain dating offer to November 2012); DX 159 (February 2012 justification for Principal Member Technical Staff position, current contracting salary recording as hourly rate, offer as yearly salary justified by amount or experience and strong technical background); DX 160 (undated hire justification for User Experience Researcher IC4 with offer falling at range midpoint and somewhat above current salary, with increase justified as "small amount to offer a competitive salary); DX 161 (justification for Senior Application Engineer IC3 position for which "qualified candidates are somewhat hard to find" given combination of skills needed; no prior salary record but reference to competing offers as part of justification); DX 164 (justification for senior engineer hire to support Fusion Application and Fusion Middleware patching due to need for employee with more experience in the area, no compensation information included); DX 165 (justification for Consulting Member of Technical position described as difficult to fill because it requires unique skillset and experience with salary offer equal to current salary and bonus together and justified as amount of a "competitive" offer); DX 166 ("CMTS" justification for "In-Memory Columnar, Exadata Smart Scan, Exadata Hybrid Columnar Compression" project with proposed salary significantly higher than current salary to counter amount of expected promotion salary increase at current employer); DX 167 (internal hire/transfer involving relocation from India to HQ for Principal

Ms. Balkenhol explained that with regards to offer approvals,

> [w]e do a very high-level review. I call it a sanity check, just making sure that there are no gross errors in what has been submitted. We generally will do a check, look at the resume to see if the experience level matches, roughly, what the job level is for the job. And also we look at the compensation range to see if it's wildly out of scope there.

HT at 1289. With resumes, they are making sure that there is one attached and that the level of experience matches the job level proposed. *Id.* They also look at compensation information in reference to the broad salary ranges. If a salary is out of range, they generally ask a question unless the departure is already explained in the comments from the hiring manager. When they ask a question, the hiring manager provides an explanation and it is then "[l]ikely to be approved." *Id.* at

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Member of Technical Staff position with proposed salary falling slightly below midpoint and compa-ratio slightly rising, internal hire justified by complexity of area and anticipated year of training needed for any external candidate); DX 168 (Senior Member of Technical Staff justification for work on Fusion Applications Lifecycle utilities for SaaS operations, prior/current salary not included and offer amount justified as "reasonable"); DX 169 (Senior Member of Technical Staff for In Memory Database justification with proposed salary around midpoint, current salary included but not cited as explicit justification); DX 170 (Senior Principal Product Manager IC5 justification in Exadata Product Management with base salary 50% higher than current based salary and near top of range justified by candidate experience, high cost of living, and anticipated promotion, raise, and bonus in current position); DX 171 (justification for IC5 position as Senior Principal Technical Product Manager in "Big Data, Networking and Security" projects related to cloud computer, with salary offer justified as increase from current compensation and competitive with competing offer); DX 172 (justification for IC5 "senior architect" or "Consulting Member of Technical Staff on Integration Cloud Service team, prior compensation provided with offer based on the minimum the candidate will accept and need to provide an attractive offer); DX 176 (Principal Member of Technical Staff in Oracle Audit Vault and Database Firewall for candidate with experience, patents and awards, proposed salary in third quartile of range with current salary in India recorded but not compared); DX 177 (spreadsheet for hire in DX 176); DX 178 (salary justification for internal transfer candidate for unstated salary justified by comparison to employees in same position within the organization and point that offer is significantly less than candidate has earned in sales consultant role at Oracle); DX 192 (justification for rehire into Consulting Member of Technical Staff IC5 position for candidate to work in Database Cloud who approached Oracle with proposed salary $15K over current salary); DX 193 (email approval chain for hire in DX 192); DX 194 (request for expedited approval of revised offer based on competing offer and candidate statement of minimum to accept); DX 195 (email chain justification for IC3 hire where compensation offer is discussed in reference to competing offer); DX 331 (interview notes for hire in Oracle Database area for applicant with "extremely unique skills"); DX 356 (justification for rehire of employee at M4 with compensation offer explained as 3% more than current salary and including stock options as necessary to recruit candidate away from current employer); DX 369 (hire justification for Principal Solutions Architect hire for "A-team" with current compensation information included and offer for salary 12.6% higher than current salary and incentive pay based on extensive experience and critical, difficult to find skills); DX 375 (critical hire spreadsheet for Principal Member of Technical Staff with current salary recorded but offer 50% increase and pegged to competing offer in same range); DX 376 (salary justification for transfer hire to IC4 Product Manager/Strategy position from field sales consultant team with offer significantly less than earnings in prior three years and justified by reference to two other IC4 employees in the organization); DX 377 (transfer hire to IC4 Principal Member of Technical Staff position with roughly 20% salary increase justified by additional expenses of coming to office vs. working at home); DX 378 (what appears to be a hire justification, though position is unclear); DX 379 (Senior Principal Product Manager IC5 hire for Zero Data Loss Recovery Appliance, current salary recorded and offer significantly higher in base salary but justified as need to match current total compensation, including unvested RSUs); DX 429 (critical hire spreadsheet for rehire of highly regarded and praised architect who left Oracle for personal reasons and was returning to the job market, prior salary recorded, but offer of new salary and equity explained as what was negotiated for candidate to reject competing offer and return to Oracle); DX 430 (critical hire spreadsheet for Contributing Member of Technical Staff position, current compensation not recorded and offer explained as based on minimum expectations and what is needed to make offer attractive); DX 445 (new hire paperwork with resume and iRecruitment printout showing approval chain and comments for IC3 offer, current salary included with offer somewhat higher and place just above midpoint of salary range).

1290-91. The same sort of thing would happen if the experience is not consistent with the proposed global career level. *Id.* at 1291-92.

They do not ask those sorts of questions often and "[a]lmost never" reject an offer. Ms. Balkenhol could not recall an instance when she had rejected an offer. *Id.* at 1292-93. Her team tries to turn around workflows in 24 hours, with hundreds of approvals each day. *Id.* at 1293. In Ms. Balkenhol's view, the primary decision maker regarding the content of the offer is the hiring manager, since they submit the data and are most knowledgeable about the candidate and the specific job. *Id.* 1293-94. When the candidate is a rehire, she will sometimes look to see why they left Oracle and might look at how recently they had left Oracle. *Id.* at 1314-15. When reviewing offers, she will "sometimes" review the current salary information. *Id.* at 1315.

A number of managers outside of HR provided insight on the hiring process in their organizations. In Mr. Miranda's line of business, hiring managers do the hiring. They are located in the sublines of business and they hire for a specific job within that line of business or product. His role is to allocate the budget for the hire and be part of the approval chain. HT at 1080-81. In terms of budgeting for headcounts, Mr. Miranda gets a budget from Mr. Ellison or Ms. Catz and then passes it down to his direct reports, who pass it down further. At some level the managers may continue to pass it to the line managers, or make the decisions themselves. *Id.* at 1087-88.

The hiring manager writes the posting, which will differ based on the sub-line of business either explicitly or by reference to the languages and expertise required, makes the decision about who to hire, and makes the decisions about compensation. HT at 1081-84; *see also* DX 445 (example discussed in testimony). The hiring manager is generally the person who is next most senior in the hierarchy, so line managers will be the hiring managers for individual contributors. HT at 1158.

> [B]efore the offer gets extended it goes up through an approval process, which essentially goes up the management chain. I believe it includes an HR review at some level—I can't remember where the HR review was in. In my group it eventually gets to me and then it goes up to—in my case—it goes up to Mr. Ellison or the Board of Directors for what's called a Board approval.

HT at 1084. At that level, a "Board approver" reviews and approves, not Mr. Ellison. *Id.* at 1085.

Mr. Miranda sees his role as to

> view and approve them. I mean mainly it's—I've already allocated the budget, but at times I confirm that it's within the budget. And then I make sure, you know, that there's nothing let's say egregious on the offer, to make sure that it's within what I would expect for that area, compensation wise and things like make sure we don't, you know, the person is at a location where we actually have an office, we're not like hiring somebody where we don't have an office already, or things like that.

Id. at 1085-86. If there is something egregious, he would not just reject it—he would resubmit it or return for correction with a question in the comments for the hiring manager to address. *Id.* at 1086. Hiring managers also make the decisions on up or down leveling an offer from the global career level in the requisition. *Id.* at 1087. In general with approvals, if Mr. Miranda has an issue, he'll send it back with his question or concern. Sometimes the lower managers will agree and make a change, sometimes they'll provide the explanation, which leads to more questions or approval. Mr.

Miranda has never simply refused to approve. *Id.* at 1150-51.

> In Mr. Miranda's experience, compensation offers differ among software developers
>
> [b]ecause they have different background and experience, they have different job skills. If they're coming from another job they have different, you know, existing pay, where we may have to, you know, convince them to work for Oracle if we need that skill set, offer a different role. Everyone is a different circumstance.

Id. at 1088. The market for skills differs. Sometimes a certain group of skills is needed, and there are fewer people within that set. In other instances a lot of competitors are also utilizing workers with those skills, while other skills are not in as high and broad demand. *Id.* at 1089.

In Mr. Webb's organization, the line manger writes the job postings and makes the hiring decisions. His role is to review the Workflow when it comes for his approval. "I look to make sure that the skills and the experience that the individual has, that's being nominated or selected for a position, matches what was required in the job requisition." HT at 1402-03. If Mr. Webb has questions, he asks the line manager for more information. He has not rejected a decision to hire. *Id.* at 1403. The line manager also decides the compensation offer. Mr. Webb's "role is to review to make sure that any compensation is, obviously, equitable." *Id.* at 1403-04. If he has questions about compensation, he will ask the line manager. *Id.* at 1404-05. Line mangers are also responsible for doing equity assessments for new hires. *Id.* at 1405. After Mr. Webb approves the requisition or offer, there are further reviewers above him, including Ms. Balkenhol. HR is also involved. *Id.* at 1405-06, 1416. Compensation isn't finalized until all approvals are obtained. *Id.* at 1417.

In Mr. Bashyam's SVP role in supporting SaaS, he would get a budget for employees and pass it along to his directors, who would pass it to line managers. The hiring manager/line manager made the decision on who to hire. Mr. Bashyam was one of the approvers. HT at 1440-41. After the hiring manager has made a decision and figured out the offer, they send it for approval.

> I would just kind of like take a quick look at the resume and stuff to make sure that, you know, we are hiring for the right skill and 99.99 percent of the time it's basically what it is and they've done it right. Sometimes we have new managers and I may have some clarifying questions for them, saying, okay, what was the relevant experience here, things like that. And again, most managers kind of come back and say this is the reason, and that's it. It's just more like one more sanity check.

Id. at 1441. Mr. Bashyam didn't recall ever rejecting an offer. *Id.* at 1441-42. The hiring manager makes the compensation decisions and conducted the pay equity assessment in formulating the offer. Mr. Bashyam's role was to review that along with the rest of the information. *Id.* at 1442; *see also id.* at 1459-60.

There are at most four levels below him and levels above him as well. Managers do make comments in the approval process. *Id.* at 1451-52. By a "sanity check" Mr. Bashyam means reviewing to ensure that the priorities haven't changed since the headcount was approved and that they are not going over budget. He also reviews the resume to make sure that the candidate is suitable. *Id.* at 1453. The hiring manager will already have communicated with the candidate and agreed on the compensation before the Workflow is entered, but the formal offer won't get made until all approvals are received. HR is also involved in the process. *Id.* at 1454-55.

In Mr. Loaiza's organization, each manager is responsible for hiring the people who will work on their team. His role is to approve the budget granted to the managers and then approve the hire they decide to make. After a manager makes a decision, they fill out a workflow with information about the hire, the compensation, and comments, which eventually gets to Mr. Loaiza for approval. The hiring managers make the initial decision on compensation. Mr. Loaiza gets the Workflow on his computer and reviews for approval. It is "very rare" that he would not approve a hire, and couldn't remember the last time he had declined to approve. HT at 1472-73; *see also* PX 21 at 35-37, 77-78, 84-87, 87-90. Pay equity assessment is done at the time of hire, or whenever compensation is changed. They look at the external market for an individual in that role with the person's background as well as how the pay compares internally. "[B]ut the primary fact that we look at is what it takes to hire this person, which is really what the market would pay to hire that person." HT at 1473-74. Before a manager can pursue a hire, a headcount budget must be allocated. *Id.* at 1491. Compensation for hires isn't final until the approval process is completed. HR is also involved in some manner. *Id.* at 1492-93.

5. College Hiring Program

The college hiring program functions somewhat differently, with resumes reviewed by Larry Lynn and then candidates assigned to recruiting program managers who make initial contact and gather information. Candidates are then brought to Oracle for a site visit, where they meet with the recruiting program manager to discuss general aspects of working at Oracle and the process, and then have interviews with different groups. Offers are made after there is a "match" based on feedback from the hiring managers and candidates, and the approval process is completed. *See* PX 177 at 2-12 (guide for recruiting program managers); PX 189 at 4-5 (program map).[85] Headcounts for college hires are set by organization, with changes possible subject to approval due to reorganizations. *See* PX 12 at 195-96; PX 90. Mr. Ellison also instituted a Multiple Alternative Program ("MAP") that makes college hires without a particular position, with roles being chosen later after an opportunity to do site visits in various roles. PX 185 at 1-2.

A program overview explains that "College Recruiting identifies and sources the best college graduates from selected top schools to be strategically placed within Product Development to advance Oracle's purpose." PX 337 at 1.[86] It does not seek to fill specific vacancies, but to find "the best and brightest students from top schools" who are then found positions. *Id.* at 9-10. Oracle actively recruits at "core" schools, and considers candidates from a number of others. PX 178 at 3-5; *see also* PX 335 (list of schools); PX 337 at 2-5 (same); PX 349 (list of schools and some requirements); PX 350 (same in a 2014 email exchange). Recruits must meet fairly strict criteria, which can vary by school. Only certain majors are allowed, and particular skills/experience are both sought and forbidden. PX 178 at 6. To obtain top applicants, Oracle engages in a variety of active "sourcing" including maintaining email accounts, obtaining resume books, internet research, and working with career centers. *Id.* at 7-8; *see also id.* at 9-41-45 (detailed sourcing instructions and

[85] PX 189 contains a 2015 instruction manual for using the "Oracle Recruiting Cloud" or Taleo for the program. This is mostly technical guidance. PX 190 contains technical instructions on offers, as well as transitioning to iRecruitment. This is again technical guidance.

[86] PX 338 contains a storyboard template for what would appear to be an internal College Recruiting Web Site. PX 339 is a printout of what seems to be a display of a website about the program. The basic information conveyed in these exhibits is discussed above in reference to other exhibits explaining the program. PX 342 contains an earlier version of the same sort of document in PX 337. PX 351 contains another slightly earlier version. PX 347 contains the same document contained in PX 337.

templates); PX 336 (email regarding "Project Book application" to be used on recruiting website); PX 337 at 8-9 (avenues of outreach); PX 345 (orientation slides for College Recruiting career fair representatives).

Managers can receive resumes from the program and opportunities to interview candidates. Mangers can also refer resumes for full-time opportunities or internships. PX 337 at 1-2. The peak season is September through February, though the program operates throughout the year. Mr. Lynn prescreened and approved all candidates. Interviews and placements are made on a matching basis. All offers are approved by the CEOs office, based on what has been determined to be a competitive offer package. *Id.* at 6-7. The College Recruiting program also runs a summer internship program. *Id.* at 8. Where this is mutual interest, this can lead to permanent positions. *Id.* at 11.

College hire offer guidelines are more tightly defined, with narrower ranges for BS and MS degrees especially. *See* PX 76, PX 147; PX 148; PX 149 at 1; PX 167; PX 168; PX 169; PX 170 at 1; PX 341 at 1; *see also* PX 22 at 114-15; PX 26 at 68-69. Interns are also brought back to Oracle as hires at the highest end of the range. PX 182 at 1; *see also* PX 334 at 1 (later exchanges in chain). Work experience can justify higher offers. *See* PX 183 at 1. At least in 2016, "LJE" approved the basic compensation packages that would be offered for college hires from "top schools." *See* PX 76. Offers in the program are subject to what appears to be more searching approval and modification if they diverge from approved packages. *See* PX 182 at 1; PX 184 at 1; PX 334 at 1. In other instances, approvals move quickly and as a matter of course. *See* PX 487; DX 330; DX 435. Though the program is more centralized, the hiring manager is still responsible for "closing" the offer with the candidate. *See* PX 338 at 5. Successful candidates are sent offer packets containing a variety of paperwork to fill out as part of the employment process. *See* PX 352 (sample packet).

Ms. Balkenhol explained that for college hires the standard compensation package is approved ahead of time. HT at 1310. They are proposed by recruiters and approved by Mr. Ellison. *Id.* at 1313. In November 2013, the compensation package was increased, but this was "mid-season" in the recruitment, with some students already having accepted offers. Since this was atypical, questions arose about increasing the packages for those that were already hired. This led to exchanges and conversations involving Mr. Ellison, Mr. Lynn, and Ms. Catz. *Id.* at 1311-13; *see also* PX 478 (emails); PX 480 (same); PX 489 (same); PX 490 (same); PX 491 (same); PX 492 (same); PX 497 (same).

From Mr. Loaiza's perspective, college recruiting was done in a special organization that did some screening, but then product development groups would interview candidates to see if there was a particular role for them in their organizations.[87] Most college recruits in his organization were for the headquarters facility. HT at 1489-91. Their salaries were generally set by the college recruiting department. PX 21 at 36. Mr. Miranda agreed that college recruiting functioned differently, without applications to specific requisitions. The headcount for college hires was distributed from Mr. Ellison through the chain of command and into the lines of business. Particular groups then made offers to candidates who came for interviews, but the college recruitment group determined the amount of the offer. HT at 1107-09; *see also id.* at 1145, 1153. Oracle recruits only at select schools and considers extremely select candidates, but since college hires generally have no experience, the offers tend to be lower than experienced hires. *Id.* at 1156. A small portion of his organization is composed of college hires. *Id.*

[87] PX 508, PX 509, PX 510, PX 511, and PX 512 contain spreadsheets of college hires (and intern information) in Mr. Kurian's organization in FY13, FY14, FY15, FY16, and FY17, respectively.

6. Consideration of Prior Pay

The role of prior salary in formulating starting compensation is of particular interest in this case. As of October 31, 2017, Oracle adopted a policy such that mangers and HR personnel were forbidden from asking a candidate about current or prior salary. JX 97 at 1; *see also* PX 20 at 33-35, 37-39, 49, 57-58 (Mr. Kidder's recollection of new policy). It did so in response to equal pay laws in some jurisdictions, but made the change company-wide for U.S. hiring, including removing the "current salary" field from its recruitment tools. JX 97 at 1; *see also id.* at 1-3 (Q&A). Given the change, managers were instructed that "As with any prior salary offers, you should consider the experience, skills, knowledge, education (if applicable), internal pay equity, job level, location, salary range, the competitive market, and budget when determining the appropriate offer." *Id.* at 2. Discussions were to focus on salary expectations rather than current salary. *Id.* Managers could record current salary if voluntarily offered, but were not to rely on it. *Id.*

The Q&A states:

> In the past, a candidate's prior salary was just one of many factors considered when determining the appropriate offer. In response to this legislation, Oracle is requiring that you take this one factor out of consideration and rely on the other factors that have always been part of the offer process, including candidate experience, skills, education (if applicable), scope of the job, work location, peers performing the same or similar role, the assigned Global Level, salary range and the budget.

Id. at 2-3. The policy was broadcast to the direct reports of Mr. Ellison, Ms. Catz, and Mr. Hurd on October 23, 2017, and to all managers on October 25, 2017. *See* DX 39 at 1; PX 68 at 1-2.

As part of this policy change, in October 2017, Oracle developed/provided training about US Pay Equity Laws and particularly provisions banning querying and considering prior pay. *See* JX 93[88]; *see also* PX 24 at 53-54. Based on the changes, Oracle decided to adopt one broad approach to recruitment and salary history such that as of October 31, 2017, "No Oracle employee or agent will ask a candidate his/her current or past salary when hiring for a US work location." Compensation conversations were to "[f]ocus on pay expectations, vs. actual pay history." It would also "[r]equire more thorough documentation of job classification and pay decisions (starting pay, pay increases, retention pay increases, bonuses, and equity grants)." JX 93 at 7-8; *see also id.* at 10 (questions forbidden and allowed). The field for current salary in Oracle's "iRecruitment" was accordingly removed. *Id.* at 9; *see also* PX 20 at 21-22 (form modified in fall of 2017 to remove field); PX 24 at 52-53. The training was provided at least to employees in HR. PX 20 at 53-54.

The fields in the Compensation Collection Tool were also changed to comply with the policy. *See* PX 193. Mr. Kidder explained that this is a tool used by some people in Talent Advisory to gather market knowledge about what various positions are paying in the job market, based on information collected from candidates. PX 20 at 40-41. The announcement contained language saying that collective of base salary, hourly wage, bonus/ATV[89] information would not be

[88] PX 69 contains the same training. JX 122 contains another training on the subject from October 2017, though it is less focused and shorter. The same training is in PX 70 and then again in PX 187.

[89] "ATV" appears to stand for "annual target variable." It is a form of compensation applicable in sales contexts and so not pertinent to the jobs at issue in this case.

mandatory, but per Mr. Kidder, they are never necessary to put into the tool since a record could be created solely based on a candidates requested compensation. *Id.* at 42-44.

Oracle subsequently broadcast guidance and FAQ about the change. *See* PX 40 (January 2018 update); PX 194 (same); *see also* HT at 1221-22. The change in October 2017 had derivative effects: in September 2018, Oracle adopted "new global rehire guidelines" that specified that in the United States "prior salary should not be considered in the candidate salary offer." Instead compensation was to be determined by considering internal pay equity factors and the budget. JX 100 at 1, 3-4; *see also* DX 115 at 6-11 (training on new rehire policy).

Ms. Waggoner explained that prior pay is not a factor in making decisions about starting salary since October 2017. Oracle adopted a policy such that mangers shouldn't even have that information. Oracle did not previously have a policy requiring consideration of prior pay. HT at 1198; *see also* PX 22 at 346-49. It is not uncommon for applicants to volunteer that information. *E.g.* PX 22 at 349. Oracle broadcast guidance to all managers of U.S. employees and removed the salary history fields from the form managers used to initiate offers. It did this to make sure that there were no misunderstandings that the prior salary shouldn't be considered. Though the form contained that field previously with an asterisk indicating that it was mandatory, managers were not required to consider prior pay in offers and the form could be, and was, submitted without that information. HT at 1221-23; PX 24 at 55-60; PX 25 at 1 (correction of grammar on PX 24 at 60); *see also* PX 24 at 207-09, 212-13.

The evidence is mixed as to Oracle's practices before October 2017. A "Candidate Offer Information" form from 2008 and 2009 lists "Candidate's previous employer and compensation information" as a mandatory field. *See* PX 95 at 1; PX 96 at 1. Two instances of the same form with dating placing to 2015 have the same field, though in the forms provided it is simply marked "College Hire." PX 97 at 1; PX 98 at 1. A March 2012 job posting contains a proviso that salary verification (among other things) will be required as part of pre-employment screening. *See* JX 71 at 4.[90] Postings from 2013 and 2014 contain the same proviso, as does an undated posting. *See* JX 72 at 4; PX 295 at 2; PX 296 at 2; PX 73 at 4. A candidate profile summary from 2014 contains fields for both "Current Compensation" and "Desired Compensation." *See* PX 74 at 1-2.

Oracle's iRecruitment Administrator application, as of February 2014, contained a field for "Candidates Current Salary/ATV." PX 94 at 2. This was changed in the fall of 2017. PX 20 at 21-22. Mr. Kidder was not sure whether the information was actually collected, or how often it was collected, since he and his recruiting team did not use the form. *Id.* at 23-24. He believed that the information was used to determine if the hiring manager had the budget to hire a particular candidate, but couldn't speak on behalf of hiring managers as to whether it was a factor in setting starting pay. He understood that one reason for the query was to gauge whether there was budget to make an offer for the candidate in that a hiring manager could see if the budget wouldn't permit an offer that would be attractive enough to hire the candidate. *Id.* at 29-31. He did not complete Candidate Offer Information Forms or iRecruitment Job Offer forms. *Id.* at 32.

Previously, New Hire Justification forms contained a field for current salary information, though this changed with the October 2017 change in policy. Information needed to be entered into that field, though the hiring manager could simply enter a zero instead of any actual current

[90] PX 196 is the same requisition.

salary. PX 20 at 59-60. This would happen if a candidate did not provide current salary, perhaps as a negotiating tool, which Mr. Kidder understood happened with many candidates. *Id.* at 60-61.

But there is also evidence indicating that before October 2017 there was no policy. Ms. Holman-Harries was unaware of a policy where managers would ask about prior pay. HT at 376. Chad Kidder declared that there was no policy requiring linking prior pay and the offer, despite the mandatory field in the justification form. PX 289 at 2-4. Ms. Cheruvu did not consider prior pay in hiring. PX 12 at 63, 69. More broadly, it could sometimes be a factor among others. *Id.* at 75-76. It would sometimes be used in 2015, but is no longer considered. *Id.* at 84-85.

In Mr. Miranda's experience, Oracle never required collection of prior pay or had a rule that linked prior pay and compensation offered. HT at 1089. It was sometimes considered, but not always. *Id.* at 1116. The information would be available to a reviewer if it was collected and inputted. *Id.* at 1117. Mr. Webb said that it was never policy at Oracle for a line manager to ask candidates about prior pay. He had not based compensation decisions on prior pay and wasn't aware of it being done. HT at 1411-12. Mr. Loaiza said that review of a candidate's current compensation was not part of the approval process—it didn't generally come to him and he wouldn't have looked at it. PX 21 at 38-39. It might be something he would see in the iRecruitment workflow. *Id.* at 82. It is common for hiring managers to put a narrative justification for subsequent approvers to see, but not frequent that a candidate's current salary would be part of any justification. *Id.* at 84-86.

F. Global Compensation Programs

1. *Global Programs Generally*

Oracle has several "global" compensation programs requiring input from managers—a salary increase or "focal" program, a bonus program, and an equity program. JX 111 at 38; JX 114 at 39; JX 127 at 37; JX 142 at 3[91]; PX 154 at 9. The BOD Office of Approvers handles off-cycle things like new hires or compensation increases submitted in a workflow, but are not involved in the global programs. Ms. Waggoner and her boss administer those programs. HT at 1254-55. Similar processes are used for focal salary increases, bonuses, and equity grants, though eligibility criteria vary. *See, e.g.,* JX 142. In each, budgets are set at top executive levels, with line of business heads then adopting their own allocation methods and defining the timeline. Oracle reminds managers to be careful in lean years to reward "the appropriate people, ie. [sic] top performers with low compa-ratios." PX 153 at 4-5.

Oracle uses a "Workforce Compensation" application to manage compensation during focal reviews, bonuses, and equity grants.[92] *E.g.* PX 24 at 186. It allows a manager to:

- Model and allocate budgets
- Publish (pass down) budgets to subordinate managers

[91] PX 160 is a PDF of the training in JX 142.

[92] JX 116 to JX 120, and DX 25 to DX 31 contain Reference Guides for the application. JX 121 and PX 155 contain an FAQ for the application. A handout with "Helpful Hints" regarding use is in DX 32. PX 99 contains screen shots from a demo video of the application, indicating the information displayed and the manner displayed. PX 106 contains another screenshot showing information available to a manager, including salary range, compa-ratio, and quartile for current and proposed salaries. PX 322 contains a video of "Hints and Tips" for using the tool.

- Rate, Rank and Award individual employees
- Review historical compensation information
- View and download employee information for off-line work for further analysis
- View submission status of subordinate managers

JX 25 at 46.[93] Budgets are communicated to line of business heads and HR, with each line of business then making decisions about the strategy and method of allocations. *Id.* at 47. Timelines are established for making allocations down the line, and then approvals roll up, with nothing final until all approvals are given. *Id.* at 47-48. Budgets for stock "is a fixed amount" and don't vary if employees are added or removed. *Id.* at 49. "Bonus and salary increase budgets are based on eligible salaries." *Id.* The tool does not display race and gender information. PX 24 at 237-38. It includes performance ratings, separate from performance reviews, and allows for ranking employees by the manager, though most organizations do not use the rankings feature. *Id.* at 238-40.

A new manager training from 2011 explains that each line of business follows its own timeline for salary reviews, stock grants, and the corporate bonus program. Managers are cautioned that amounts can change in the review and approval process and nothing should be communicated "until final LJE approval is obtained." JX 105 at 3-4.[94] Budgets are set at top executive levels and each line of business head makes decisions on allocations. Budgets are then pushed down through management. *Id.* at 5. Managers are advised that "[w]hen budget is lean, extra care and attention must be given to awarding the top performers with low compa-ratios." *Id.* At that time, Oracle used the Compensation Workbench application to assist with budgeting, pass budgets to subordinates, rank and rate employees, promote employees, and review compensation history information.[95] *Id.* at 9.

A 2015 training provides general guidance on the focal process together with the bonus and equity grant processes. Each process has eligibility guidelines and budgets set at the top executive levels, with line of business then having their own methods of allocating that budget downwards. Each line of business follows its own timeline. And again, "[w]hen budget is lean, extra care and attention must be given to awarding the appropriate people, ie. [sic] top performers with low compa-ratios." DX 112 at 8; *see also* DX 116 at 5. Another training advises that "[w]hen budget is lean, extra care and attention must be given to awarding the top performers with low compa-ratios." JX 142 at 4.[96] The notes add that "[y]ou most likely will not be able to address all problem areas in your

[93] This information is also in JX111 at 39-42, JX 114 at 40, JX 127 at 38-41, and PX 30 at 70-75. JX 142 at 4-12 also contains an overlapping discussion.

[94] PX 37 contains the same training in PDF form.

[95] Much of this training provides a tutorial in the use of compensation workbench, the application that Oracle used to manage the process. The mechanics of this application aren't relevant to this case, and so are not discussed. Another training on Compensation Workbench indicates that each line of business follows its own timeline and budgeting for compensation processes, with budgets set at the top levels of the company. Changes are not to be communicated until "LJE" approval is provided and should be checked, since the amounts can be altered in the process. DX 116 at 5-6. The Compensation Workbench tool allowed managers to plan, model and allocate budgets across currencies; distribute those budgets to subordinate managers; rate, rank, and award compensation to employees; promote employees; and see compensation history for employees. *Id.* 116 at 13. DX 263 contains the same PowerPoint that is in DX 116. This 2013 training is, for the most part, addressed to operating within the compensation workbench application. Other trainings cover similar material for the tool that replaced Compensation Workbench, and these are discussed in more detail in the text.

[96] PX 141 at 84-85 makes the same point.

organization, so you'll have to prioritize." *Id.*

2. *Focal Reviews*

> Oracle's Employee Handbook describes Focal Salary Reviews as follows:
>
> Oracle management reviews all eligible employees' salaries at one (focal) time. This process facilitates compensation budgeting, accurate competitive analysis, and timely review of all employees. Salary increases are based on your productivity and contributions, company performance, market comparisons with competitor companies, and other factors Oracle may wish to consider at its sole discretion.

JX 147 at 45.

Oracle's "Compensation Guidelines" explain that the salary review or focal review is the point in time when all salaries are reviewed. Not all employees receive increases, and raises are given at managerial discretion, subject to eligibility requirements. JX 145 at 1-2. Sales and non-sales salary increases are separate processes, with variable timing. DX 112 at 7. An internal HR webpage describes this process as management review of all salary and assignments at one point in time, with salary increases not guaranteed but determined by management. Lines of business are given a budget and have "complete discretion" on using that amount to award salary increases within the organization. JX 95 at 1. Focal reviews are for merit increases, and pay equity is also a factor. They are budget dependent, and so do not occur every year. JX 22 at 17; *see also id.* at 20. There is no formula for merit increases. It depends on budget and decisions within each organization. *Id.* at 18.

Per a 2011 compensation training for managers, these reviews are used to make promotions, adjust for promotions that did not come with a salary increase, reward performance and address equity issues where differences are not justified by knowledge, skill, experience, or "[s]ome other measurable non-discriminatory factor." JX 24 at 17.[97] The notes add:

> The salary increase process is the most common time for promoting and giving base salary increases to employees. You should use your salary increase budget wisely and first recognize your top performers and those employees who were promoted without an increase at some other point during the year. You should also use the salary increase process to address issues where differences in salary are not justified on the grounds of knowledge, skills, experience or some other measurable, non-discriminatory factor. A measurable non-descriminatory [sic] factor could include size of quota or target, size or complexity of a project, or span of control.

Id. A 2015 Managing Compensation training makes the same point. *See* JX 25 at 38; *see also* JX 111 at 34; JX 127 at 33.

Another 2015 training provides more details on the process, though much of the information is technical and so of limited relevance. *See* JX 50. Generally, line of business heads decide the method of allocating budgets to their organization and determine timelines. The

[97] A roughly contemporary training makes the same points. *See* PX 30 at 61-62. PX 141 at 74-75 also covers this material.

Workforce Compensation tool was used to pass budgets down and then recommendations on allocations back up for rolling approval by higher levels, closing out the process for lower levels. *Id.* at 3. It allows for budgeting allocation (whether and how to pass budgets to subordinates), modelling according to various parameters, and distributions, rating employees, making and reviewing recommendations, and reviewing compensation history and other employee information. *Id.* at 6; *see also id.* at 7-8, 10-11, 13-18, 22, 24-28, 30-35 (tutorials on using the application). Changes were not to be communicated until after full approval. *Id.* at 4.

Oracle engaged in a focal review during the Fall of 2016. *See* JX 78.[98] Budgets were "set at the top executive level for each organization based on eligible salaries for eligible employees" and "[e]ach LOB head [determining] the method of allocating budgets to their organization." *Id.* at 6. The review included potential job changes and promotions. *Id.* at 7-8. Oracle provided the following guidance for managers making salary recommendations:

- Compare employee to other employees in the work group doing the same job with similar experience, skills and performance
- Avoid using the "peanut butter" approach
- When promoting employees, base salary increases typically can be 8-12%
    - Base salaries should be appropriately placed in the new salary range
    - If proposing an increase greater than 20%, consider giving a portion of the increase now and a portion later based on performance in the role.

Id. at 12. The notes clarify that a "peanut butter" approach is spreading increases evenly across the team. And "[a] manager should be able to explain why employees are paid differently." *Id.*

HR managers were to do the following in their review:

- Review employee's with 1 or 2 ratings that are being proposed for an increase
- Review employees under minimum with ratings of 3 or above
- Review employees rated 4 or 5 with no increase proposed
- Review employees with increases placing the employee over the max of the range
- Review all increases over x%
- Review all job changes and promotions
    - Complete JCRF for changes from OT eligible
    - Complete VP promo template for VP promos
- Review increases less than 2%

Id. at 13. Workforce Compensation was used to allow allocation, modelling, and distribution of budgets, to rate employees, to make and review recommendations, and to view historical employee information.[99] *Id.* at 16.

Ms. Waggoner provided an overview and explanation of the focal process.[100] It is "one point

[98] An almost identical training PowerPoint is in JX 110.

[99] Most of the training is devoted to the mechanics of using Workforce Compensation. *See* JX 78 at 17-61. This is not material to the issues in this case.

[100] She also discussed the process in a deposition at PX 22 at 185-92, 231-35 (at least in portions designated on those pages).

in time where the salaries of eligible employees are reviewed at a company." HT at 1223. The CEOs make decisions about whether and when to conduct focal reviews, based on business conditions and what the company can afford.[101] PX 24 at 192-93. Ms. Waggoner's team is responsible for administering it. They set up the data, script and profiles, and communicate timelines and deadlines. HT at 1224; *see also* PX 24 at 193-94. They do market research, looking at attrition and market conditions, to get a sense of the budget for each country, and then also determine eligibility of employees, and the number of eligible salaries. That leads to a "master budget" at the Board of Director's level. HT at 1224-25; *see also* PX 24 at 250-51.

> From there, I take the budget—the total cost information and have conversations with—it used to be Mark Hurd and Safra Catz, this year it will be just Safra. And we have conversations about how should we take that budget and push it down one level. And there may be areas that get a little more or a little less, but it really starts at the very, very top. And Safra will take a little bit of money for each of their direct reports, for their own increases, and then from there we cascade that next level of budget one level down. And then that is where like a Steve Miranda or Juan Loaiza, they all come in and they get their budget at the top level, and then they take into account their own factors in their business and decide how that budget will be pushed to the next level, and so on and so on.[102]

HT at 1225-26; *see also* PX 24 at 251-54.

Higher-level managers sometimes hold amounts in reserve to address situations that arise where more money is needed. Managers could, and often do, ask for more money in order to take care of multiple employees. More money also might be allocated when there was a promotion that came without a raise, and money is needed in the focal to make the adjustment. These sorts of requests are rarely rejected. PX 24 at 254-57, 260. Next, the "managers—generally it's the direct managers who have the knowledge of the employees and how they're performing and what they're doing, and the managers would go in to make the increases within the tool. And then those would, again, cascade up for final processing in the end." HT at 1226. In the focal process, usually budgets will cascade all the way down to the direct managers, but it does depend based on decisions made in each chain. *Id.* at 1227. However, managers can decide not to cascade budgets down, to restrict lower-level managers from seeing the budget, and prevent lower-level managers from allocating budgets. *Id.* at 1255-56.

Guidelines for making adjustments in a focal review comes from the "compensation training, where we speak specifically to factoring in knowledge, skills, experience, performance and internal pure equity, to look at what everybody else on the team is looking at, and to make sure that any differentiation in what they're making can be explained by anything other than discriminatory factors." *Id.* at 1230-31; *see also* PX 22 at 277-78. Particular attention is generally to be paid to high-performers in the low end of a range, or if there is also a promotion or other job change. PX 22 at 279-80. They also look to internal equity, salary as compared to peers on a team doing similar work

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[101] Ms. Westerdahl added that budgets are set by country. PX 26 at 76, 77-78; *see also id.* at 78-81 (Ms. Westerdahl review of the process). Ms. Waggoner provided far more detail on the process from an HR perspective and I have focused on her account, rather than Ms. Westerdahl's more summary discussion of the same topics.

[102] High-level budgeting is done on the basis of salary pools, and is subject to some negotiation. *See* PX 198 (2013 request for sizable salary pool meant to retain top developers where attrition was an issue/worry, justified by other savings); *see also* PX 485 (same document).

in a similar location at the same level. The comparisons here are "way more specific" than general tasks like writing code and "really depends on the product on which they're working," along with location and performance. *Id.* at 280-82. HR might consult on salary changes, but the manager has the discretion to make the evaluations. *Id.* at 285-86. Oracle has mandatory training for managers covering nondiscrimination, EEO, and ethics so that they exercise their discretion appropriately. *Id.* at 290. Justification with business reasons are also required. *Id.* at 290-92. These would not be scrutinized at higher-levels, but would be reviewed at lower levels of approval. *Id.* at 292-93. Managers can see prior compensation of an employee at Oracle, but not at other companies. *Id.* at 358.

As to the approval process:

> [W]ithin Workforce Compensation, it's set up so it would be approved up the hierarchy. So, the direct manager would submit then to her manager, who then submits to the next manager, and so on, all the way up to the Safra Catz, Mark Hurd, Larry Ellison level. But if a manager anywhere in that hierarchy does not officially click the "submit" button, it can still happen where somebody above submits and then everybody is locked out. So, once you click "submit," you're locked from making any changes and it just works its way up the chain.

HT at 1228-29. Ms. Waggoner monitors the review process and takes the data to the final approvers for review. In her experience, the high levels look at whether managers stayed in their budgets. They look at the general information that Ms. Waggoner provides. "[T]heir review is quick and if it's within budget we proceed." *Id.* at 1230; *see also* JX 102 at 16; PX 24 at 196. Ms. Catz has the approval authority on behalf of Mr. Ellison, and she will conduct the review. HT at 1230.

Managers are told not to communicate results until the final approval is received, which in the older system was referred to as approval by Mr. Ellison. *Id.* at 1250-51. Ms. Waggoner or someone on her team will present the summary to the top-levels, and then Ms. Catz will respond approving or saying "LJE approves," after which someone in HR will "push the button in the system." *Id.* at 1252. Sometimes the approval is given in 10 minutes. She can also see lower level approvals occurring and interacts with business partners, and can see that the process moves quickly. *Id.* at 1253. They also check after the process is completed to make sure the changes are implemented. JX 102 at 12-15.

At a deposition, Ms. Waggoner described the final levels of approvals for HR processes as a "sanity check" or "simply to confirm that everything was within budget…It isn't a review or deep dive into what's been recommended, it is just we have stayed within budget, it is now okay to communicate what you've recommended." JX 102 at 106, 109. Until final approval there are just recommendations that could be changed, since there needs to be a final check that everyone stayed within budget. *Id.* at 112-13. Ms. Waggoner allowed that Oracle has had lean years for salary increases, and as a result some employees can fall behind the market. PX 24 at 243-46. The percentage of employees who do receive a raise during a focal review varies "quite drastically" from between 40% and 80% depending on the budget. *Id.* at 247, 308. When there are lean years with "little to no focal budget," Oracle isn't keeping up with the way that the market was grown. *Id.* at 327-28.

Focal reviews serve an internal equity purpose, but there are indications that Oracle has not been able to keep up with the growing market or address distortions caused by acquisitions. A salary

range training points out that base salaries exist in a business context and must be considered vis-à-vis what Oracle can afford at a given time and "the current business climate." JX 140 at 14. It acknowledges that "[t]here are short term internal equity distortions, for example those caused by M&A activities, which cannot be rectified immediately." *Id.*; *see also* PX 141 at 50-51 An August 2016 PowerPoint reflects that Oracle's spending for salary raises in fiscal year 2015 and 2016 lagged the market, but with stronger market alignment with product development than sales, for instance. JX 70 at 5-7. Voluntary attrition was higher than market rate and rising at the company, though at a slower rate than in prior years. *Id.* at 8. The training further notes that compa-ratios tended to be higher for new hires over incumbents. *Id.* at 9. A focal review was thus proposed, to focus on the "most tenured top talent/critical role employees." *Id.* at 10.

In Ms. Westerdahl's experience, the approval process goes all the way to the top levels of the company, but the amount of review varies, with different manager behaving differently in terms of how deep and detailed the review is. PX 26 at 82-85. When managers are doing their part of the process, they have access to the salaries of people in their particular organizations, but not across their larger organization. *Id.* at 319-21. In HR's decisions about salary increases, race and sex are not considered in determining an increase for a particular employee. *Id.* at 163-64. Ms. Holman-Harries team is not involved in setting budgets for salary increases or providing analyses for those setting budgets or distributing increases. PX 16 at 185-86.

Ms. Cheruvu recalled that in dividing his budget, Mr. Kurian would look at factors like "how critical some groups were; what were they delivering that year; what was the performance of the group; how critical a certain project is." She didn't know everything she considered, but they would have conversations, and then she would go into the tool to make his allocations as directed. PX 12 at 208-09. Once the process rolled back up, she would sometimes run reports for Mr. Kurian to check for things like an employee with a high performance rating but no or only a token salary increase. This was to check for errors, which would be verified with the managers. She limited this to the one or two levels below Mr. Kurian. *Id.* at 218-20. They also checked to see if people stayed in budget. *Id.* at 284. Gender information was not available to view in the tool. *Id.* at 227. She was never asked for a pay analysis or a report that would examine raises by gender, race, or ethnicity. *Id.* at 227-28.

Non-HR managers also provided their perspectives. In Mr. Miranda's experience, focal review budgets are allocated to him with reference to each sub-line of business. He sets aside a reserve and then allocates the budget down to different teams. It is allocated down further until the direct managers make decisions about how to spend the budget. HT at 1090-91. He usually provides guidelines:

> It will be anything from targets to what we call the depth, so how many people we want to receive a focal, or if we want it to be, maybe, 50 percent of the group or 80, you know, some percent of the group. And then sometimes, understanding I receive or would give guidelines so that the teams have a rough sense, at different levels, how much we want to allocate to different levels or really how much the budget will support.

Id. at 1091.

Mr. Miranda has never provided directives for specific awards, though he will have conversations about recommendations in instances where he has had direct experience with an

employee. *Id.* at 1092. After the direct managers make their recommendations, the approvals go back up the line to Mr. Miranda. He has never overruled a recommendation. *Id.* at 1092-93. He has not approved some. *Id.* at 1118. He has never changed the amount. He will send them back, and then changes are made by the front-line or an intervening manager. *Id.* at 1121-23. When he worked for Mr. Kurian, he would be given guidelines, but not strict measures. His organization followed the guidelines. *Id.* at 1118-19; *see also id.* at 1151-52.

In allocating focal budgets—and bonus and equity budgets—Mr. Miranda does not provide equal shares to managers to distribute. *Id.* at 1097.

> [W]ith focal, you look at—well, first of all you look at the geographic distribution of the piece. Then you look at the—let's say the job role that they do and sort of the competitive landscape. We'll consider things like attrition, particularly if we have, you know, attrition that's being caused by one company in that space, you know, recruiting a lot of our top talent. We consider performance of the group, whether that group has been performing well or not well, in terms of the market. And then for focal we'll do things like consider, you know, where we believe maybe there's compression issue or you have maybe people who have been around at Oracle for longer in that group and have been kind of salaried compressioned [sic] to adjust. And so all of those factors weighed in.

Id. Mr. Miranda did not consider race or gender in allocating the budget. *Id.* at 1111-12. He would "consider compression and any disparities there, generally." *Id.* at 1112. He did not consider Affirmative Action Plan requirements in budgeting decisions. *Id.* at 1113. His line of business does not run reports to determine where there is salary compression; instead he relies on his knowledge of the group. *Id.* at 1114-15. In the focal process (and bonus and equity processes), managers are able to see compensation information for those reporting to them, but not for others. *Id.* at 1115.

Mr. Webb receives a budget for a focal review and distributes it to his direct reports, who further distribute it down the line. Line managers make decisions about increases. Mr. Webb becomes involved again in approving the recommendations, after which they go to the next level. His review is limited to checking for anomalies. If there looks like a data entry mistake, an instance where the full budget went to one individual or if the full budget was given to everyone, he would ask questions of his reports or line managers. But if there aren't any anomalies, he simply approves the recommendations and sends them to the next level. HT at 1407-08. The process involves guidelines, such as general statements to reward top talent or instructions to reserve portions of the budget to a particular country where there might be high attrition. *Id.* at 1408-09. There are up to eight levels of managers below him. When he approves, it goes on to others in the chain. HR is involved in reviewing as well. Compensation changes occur after all approvals are received. *Id.* at 1417-18.

In this process (and similar processes requiring his approval) he does not reject recommendations but he will ask questions in the Workflow that the lower managers need to address. *Id.* at 1420-21. In all of these processes, he receives a budget from above and then it funnels downward, dividing and getting smaller. *Id.* at 1421-22. In his experience, the focal budgets vary from year to year. HR will give guidance: "[t]hey provide a percentage of how many employees you should aim to target, in terms of awarding focal, stressing that you need to award your top performers." *Id.* at 1423. He passes the guidance he receives to his direct reports. *Id.* In looking for anomalies, however, he does not check to see if the guidance was followed. *Id.* at 1424.

Mr. Bashyam explained that in a focal review he gets a budget handed down. The budgets will vary by job function. His job is then is "to just make sure that, you know, I understand kind of, obviously, the strategic nature of different products, different lines of businesses, and I assign the budgets down to my directs." Those get distributed to line managers, and they "do the equitable, you know, salary assessments and stuff like that, and they make a recommendation." HT at 1443. Mr. Bashyam is then in the chain of approvers. He checks to see that they followed the general standards and reviews the comments made. He's never rejected a recommendation from a line manager. *Id.* at 1443-44. Focal budgets come with guidelines from the corporate office about which countries are eligible and ratios to consider. *Id.* at 1444. HR is involved in the process and compensation changes are not made until all approvals are received. *Id.* at 1455-56. Though there are guidelines sent out in this (and other) processes, Mr. Bashyam treats them as guidelines and "we get to do what we think is appropriate for our business." *Id.* at 1461.

Mr. Loaiza receives a budget for the focal and then distributes it to his reports, as well as making the adjustments for his reports. Budgets are handed down to the level of management that has direct knowledge of the employee's work. That level could vary by the size of the team. Mr. Loaiza reviews the allocations of the managers below him. In doing this he is looking for anything unusual and will also look at the results for individuals that he knows directly to see if it looks reasonable based on his experience. He also looks to see if the compensation appears to be fairly distributed and balanced across the teams, "so that the teams are treated similarly." HT at 1475-77. This results in "very few changes." If he identifies something, he'll discuss it down the line and ask questions. They will generally lead to a change, but not always. *Id.* at 1477-78.

Focal reviews come with guidelines, the budget being the major guideline. They are also generally told what percentage of employees should receive raises, but they treat this as a guideline and not a rule, in most cases exceeding the guideline. *Id.* at 1478-79. Managers in his organization can see compensation information for employees in their chain of command, but not for employees who report up through different managers. PX 21 at 160-62. Focal reviews do not happen every year and the budget varies from year to year. HT at 1493-95. Managers are not permitted to notify employees of changes until they have been fully approved. PX 21 at 118-19.

When Mr. Loaiza is allocating budgets, his aim is to reward star performers. HT at 1484. When he is making salary adjustments for his own reports, he does not look at compa-ratio. *Id.* He looks at "the individual, their skills, their performance, their experience and their market." Budget is also a factor. PX 21 at 273-74. Compa-ratio and quartile information is too broad and there is "a lot more nuance" in evaluating an employee and salary. *Id.* at 274-75. Mr. Loaiza doesn't look at race or gender in making compensation decisions. *Id.* at 14834-85; *see also* PX 21 at 145, 209. He was unaware of pay analyses or audits by race or gender, and hadn't been told to make changes based on race or gender. PX 21 at 321-25.

In focal reviews and other compensation processes, "[t]he budget is a limiting factor to what we can pay people." HT at 1488; *see also* PX 21 at 274. He "would always like to give my employees higher than" what the budget allows. HT at 1485. They prioritize those who are performing at the highest level and are the most important to the organization. PX 21 at 274. "Salary compression" is when "we feel that the person is underpaid relative to market." PX 21 at 283. At a given time, there are some individuals who are compressed and some who are not. The budget limits for salary increases limits the ability to pay everybody at least what they thought the market rate would be. *Id.* at 283-84. The priority is to pay star performers so that they do not leave Oracle for compensation reasons. *Id.* at 285-86. Given the budget, they "try to balance the top, the middle, the bottom, with

emphasis on the top." *Id.* at 286-87. He estimated that as of June 2019, roughly 40-50% of his organization was below market for compensation. *Id.* at 305-06. In the past he has asked for more money and more often than not received it, but not enough to put everyone at market rate. *Id.* at 306-07.

3. *Bonus Processes*

Per Oracle's Employee Handbook, bonuses are paid annually to eligible employees based on performance through the Global Performance Bonus Plan. JX 147 at 45. Oracle's HR webpage stresses that "[b]onuses are discretionary" and awarded by management, with the bonus plan changing at the company's discretion. JX 95 at 2. "Each [Line of Business] pool is distributed to the [LOB] Head via the Workforce Compensation web tool. The LOB Heads and Executive Management have complete discretion when further allocating budgets and awarding bonuses to individuals within their organization." *Id.* To be eligible, an employee must be a regular employee in a type of position eligible for the plan who meets certain duration/incumbency requirements. In some circumstances bonuses are pro-rated. *Id.*; *see also* JX 22 at 10.

Oracle's "Compensation Guidelines" explain that bonuses are paid on an annual plan. They are discretionary and "designed to reward employees for assisting the company in meeting key strategic company goals and objections; including profitability." JX 145 at 2. "This bonus plan is funded according to performance criteria determined by the Company with individual employee bonuses being ultimately awarded at the discretion of management." *Id.* Budgets are distributed to line of business heads, who then have discretion to further allocate budgets. *Id.* This program is subject to eligibility requirements. *Id.* Separate from the global annual bonus program, Oracle also has consulting bonuses, instructor bonuses, sales bonuses, sales commissions, spot bonuses, and patent bonuses/awards. *Id.* at 3.

Most bonuses at Oracle are awarded via a Global Corporate Bonus Process, and processed through an internal application like the Fusion Workforce Compensation Tool. *See generally* JX 10 (training from June 2014).[103] Bonus budgets are set by the top executive for each organization, with the line of business head allocating the budget through the organization. JX 10 at 5. Bonuses must be approved, and managers are cautioned not to communicate bonus awards until there is approval. *Id.* at 6. The application allows for the allocation and modelling of budgets, rating individual employees, review of compensation history, and other information. *Id.* at 7, 10; *see also id.* at 15-20, 22, 29-31, 35-40 (more detailed instructions). Budgets roll down from the highest managerial levels to the lowest, allocations are made, and then approvals roll up back to the highest levels.

Bonuses are a form of short-term incentive to reward short-term performance.[104] The amount is tied to line of business or company performance. JX 143 at 7. The bonus process

[103] JX 108 contains another June 2014 training on the subject. There are no differences material to the issues in this case. JX 109 contains another, shorter June 2014 training. There are again no material differences. PX 75 contains a PDF of the training in JX 108. PX 77 contains a PDF of the training in JX 109. PX 150 contains another June 2014 training on the subject meant for managers. It contains no material differences or additions. PX 84 contains an email announcing a bonus program and pilot of the Fusion Workforce Compensation tool to replace the Compensation Workbench. PX 157 contains a user guide, which provides technical instructions for using the program. PX 357 contains the same document as PX 157

[104] Commissions are another form of short-term incentive, but they are not part of the compensation packages for the jobs at issue in this case.

generally occurs in July/August, after fiscal year earnings are announced in June. *See* DX 112 at 7. Initial budgeting for bonuses—what will be allocated to a line of business—is done by total salary or career level. *See* PX 164 at 1-2. Budgets can change. *See, e.g.*, PX 165 (request and approval for additional budget).[105]

In awarding bonuses, managers are advised to focus on key contributors and reward completion of critical projects/initiatives. They are also directed to decide on bonus recommendations in the context of total compensation. JX 142 at 8.[106] The notes add that "the bonus pool is never big enough" and so "it is important to spend wisely." *Id.* "Bonuses are discretionary and designed to reward key contributors for assisting the company in meeting strategic goals and objectives. Allocate rewards in proportion to the employee's role and actual contribution to the business and his or her individual performance." *Id.* Managers should communicate with employees to convey the link between performance and reward. *Id.* Recommendations may be changed in the approval process. *Id.*

A later, 2018, training, maintains the same basic principles. *See* JX 153.[107] Oracle used Workforce Compensation as a way to model and distribute budgets to subordinates, rate employees, make and review recommendations, and view historical compensation information. *Id.* at 5. The top executives set budgets, and then line of business heads made decisions about allocating budgets through their organizations. They also set their own timelines. *Id.* at 6. Bonuses could only be awarded to eligible employees, and managers are told not to communicate awards until final approval has been obtained, since amounts could change. *Id.* at 7.

Ms. Waggoner explained that the Corporate Bonus Program functions similarly to the focal and equity programs. In reality, it does not occur in every year. Budgets are passed down and then approvals roll up. Direct managers are primarily responsible for decisions because they are in the best position to make awards based on performance. HT at 1233-34; *see also* PX 22 at 196-97. Only employees who are not eligible for overtime are part of the program, and the guidance is to reward those who have had "a really great year" of performance, either with a project or overall. Whether or not a bonus program occurs is based on budgetary concerns. PX 24 at 263-65. The CEOs determine what the company can afford and then, if bonuses will be given, the budgets are decided at the top and passed down. *Id.* at 265-66. In terms of actual individual bonus decisions, the receipt and amount is discretionary and based on decisions by individual managers who receive guidance to focus on people who have had "outstanding years," especially when there is a lean year. *Id.* at 267-68. In recent years, bonus budgets have been rare and small. *Id.* at 276. There is no centralized mandate to ensure equity and fairness. *Id.* at 268. Managers are told not to communicate bonuses until final approval is received. This, at least at a time, was referred to as Larry Ellison approval, but he was not personally reviewing bonuses. PX 22 at 148-49.

In Mr. Miranda's organization, the bonus process works the same as the focal process. He

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[105] Some top executives are given individual bonus plans, with compensation gauged to particular targets. These are subject to approval going to the Office of the CEO. *See* JX 9 at 1 (submission of plans for executives reporting to Mr. Kurian); PX 85 (same email).

[106] PX 141 at 92-93 makes the same points.

[107] As with many of the training PowerPoints in the record, the bulk of this training is devoted to the mechanics of the use of the Workforce Compensation application. *See* JX 153 at 8-45. The same training is in PX 38, in PDF form. I cite only to JX 153.

gets a budget, sets aside a reserve, and then he allocates the rest to his direct reports, who further allocate it. Line managers make recommendations for allocations to their employees, and then approvals roll back up. HT at 1093-94; *see also id.* at 1136-37. Mr. Webb's organization handles the bonus process like the focal process—he gets a budget and parcels it out to his direct reports, who parcel it out further. He is then involved in the approval process, but he is looking for anomalies, such as the entire budget going to one employee, or a totally even spread. HT at 1409-10. A line of managers reviews bonus decisions before Mr. Webb, and then other managers review it after him. Bonuses are not paid until all approvals are given. *Id.* at 1418-19.

Mr. Bashyam also handles the bonus process in the same manner as the focal review process. He gets a budget and makes judgment calls on how to distribute it among his reports. They pass the budget down, and then he will be in the approval chain once recommendations are made. HT at 1444-45. HR is involved in the bonus process and bonuses are not paid until all of the approvers approve. *Id.* at 1456-57. In Mr. Loaiza's view, the bonus process differs from the focal process because the bonus process looks to what the employee has done in the short term while the focal process looks more at overall performance. HT at 1478. But he follows the same process—he receives a budget, allocates it, and then approves it after checking for anything that looks unusual, such as a high rating with a low bonus or results for people he worked with that are discordant with his experience. *Id.* at 1479-80.

4. *Equity*

In addition to an employee stock purchase plan, Oracle has a global equity compensation program that is annual and discretionary. "Individual grants are ultimately awarded at the discretion of management." JX 145 at 4. Participation is subject to eligibility requirements. *Id.*; *see also* PX 143 (eligibility requirements for FY 2014 focal stock grant); PX 144 (same for FY 2013 program). Since at least 2000, Oracle has issued equity, both stock options and eventually Restricted Stock Units per an equity plan ultimately administered by the Board and in particular the Compensation Committee. *See generally* DX 293 (February 1, 2018, Amended and Restated 2000 Long-Term Equity Incentive Plan). The equity grant process generally occurs in May/June, with the grants made in early July. *See* DX 112 at 7. The equity process is run by the Compensation Committee on the Board, which makes decisions based on the behavior of peer companies. Budgets are received and passed down to managers, and decisions made on a timeline. Approvals are made at higher levels, and then ultimately by the Compensation Committee. *See* PX 151.[108] The aim is to retain top talent and keep senior management focused on delivering for shareholders by giving them an ownership stake. Budgets are generally small and managers are cautioned that stock should not be given to everyone. Instead, they are told to focus on "top, key talent, or those you most want to retain." JX 143 at 10.

According to Ms. Waggoner, the equity process is similar to the focal process, except it is corporate driven and so the budgeting isn't based on as much market research. She works with the CEOs to create a budget. Once it is approved, it is pushed down a level for distribution, and so on. Equity differs in that the decisions tend to get made at higher levels, because the equity awards are predominantly going to the company leadership. HT at 1231-32; *see also* PX 22 at 197-200; PX 24 at 269-74. Oracle now offers RSUs, but use to offer stock options. For several years employees were given a choice. HT at 1233; *see also* PX 22 at 152-53; PX 24 at 269-71. In terms of guidance, "[w]e speak to keeping in mind your top performers and those most critical to the organization. And

[108] PX 151 contains a guide to the process from an internal or mechanical vantage. I have discussed only the points of some relevant here, leaving out the details about how Oracle administers the process.

because equity is used as a retention tool, being mindful of your high performers that are most critical to retain." HT at 1233. Equity awards are ultimately approved by the Compensation Committee of the Board of Directors. PX 22 at 151-52.

The process proceeds with sequential steps in determining who is eligible and how much stock will be distributed. PX 348 at 2-7. As part of this, Oracle creates an analysis for the Compensation Committee, based on the behavior of identified comparator companies. *Id.* at 7-8. Managers are offered training on how to complete the process, and executives are sent emails informing them of their budgets, with any other guidelines that have been decided, and a schedule. *Id.* at 9-12. Once the recommendations have been submitted, approvals roll up to "Larry's level," and once approved the mangers and other interested offices are informed. *Id.* at 12-14. In 2014, many of Oracle's competitors were offering RSUs, and Oracle considered doing the same. PX 493 at 1.

An equity program training explains familiar points—an internal application is used to allocate budgets down through organizations with recommendations then passed back up for approval. Adjustments can happen in the approval process, so managers are told to not communicate the award until it is fully approved. JX 146 at 3-4. Equity can come as stock options, which are the right to purchase Oracle stock at a set price subject to a vesting schedule, and RSUs, which are awards of stock on a vesting schedule. *Id.* at 5. The application allows for budgeting (allocation, modelling, distributing), rating employees, making and reviewing recommendations, and reviewing employee compensation information. *Id.* at 7; *see also id.* at 8-42 (detailed tutorial). As with other forms of compensation, budgets are set at the top executive level and then each line of business decides the method for allocating budgets through the organization and the timeline. *See, e.g.*, JX 139 at 3-4; *see also id.* at 7-43 (review of Workforce Compensation processes). Initial budgeting decisions at the top levels are made on a pool basis—i.e. the amount for a line of business as a whole. *See* PX 166. The budget was set by Mr. Ellison, Mr. Hurd, and Ms. Catz, and taken to the Board's Compensation Committee for approval. PX 26 at 108; *see also id.* at 109-11 (Compensation Committee responsibilities).

In September 2016, Oracle issued confidential guidelines for internal use in determining the amount of equity to offer new hires and various employees. *See* JX 115 at 8-9; *see also* JX 102 at 52-53, 142-43 (Ms. Waggoner discussion).[109] RSUs were offered to new hires, while options were given to existing employees. The training rolling out the guidelines stressed that they were just guidelines, and not rules. JX 115 at 5. Each of the ranges is statistically large, and there is significant overlap with adjacent ranges. *Id.* at 8-9. Guidance is also offered within the yearly process. Guidance for the 2013 process in Mr. Kurian's group emphasized that managers should award equity to key or top performers, since it is a tool to retain top talent. PX 146 at 1-2. Guidelines were provided—in the US a percentage ceiling and minimum award. It was more detailed for other regions. *Id.* at 2. The budget was fixed and the turnaround was about a week. *Id.* at 1-2; *see also* HT at 1138-41.

Equity is a retention tool and is for "key contributors." JX 142 at 10.[110] In making recommendations, managers are advised to review the compensation history of employees, consider stock options as a component of total compensation, align grant size with the local market practice,

[109] The training is also in PX 29 in a slightly different format. PX 156 is, again, the same training, this time in PDF format with slides only.

[110] PX 141 at 94-99 covers the same material.

and focus on high performers. *Id.* The awards are subject to approval by the Compensation Committee and are not to be communicated until approved. *Id.* at 11. For FY 15, Ms. Waggoner prepared a summary of the stock awards in the various organizations headed by Mr. Ellison's direct reports, including statistics on the number of employees receiving and percentage being granted. This was sent to Ms. Catz, who then approved several hours later with "LJE approved." PX 86.

Mr. Miranda handles equity the same way he handles focal reviews and bonuses: he gets a budget, sets aside a reserve, allocates the rest down the line, and then approves after the recommendations roll back up. HT at 1094; *see also id.* at 1137. There are guidelines issued for how to allocate equity. They differ by country. In India, there is much more open sharing about compensation, so they give stricter guidelines to make sure that the distributions are more equitable and don't create any issues. *Id.* at 1094-96; *see also id.* at 1142-43.

Mr. Webb handles the equity distribution process similarly to the focal and bonus processes. He receives a budget and then allocates it to his reports, and so on. He then reviews recommendations for anomalies and approves. Guidelines are given for equity distributions, such as focusing on top performers and critical employees. HT at 1410. Equity decisions are reviewed below and above Mr. Webb, with the equity not awarded until all approvals are received. *Id.* at 1420. Mr. Bashyam also handles equity distributions in the same manner that he handles focal and bonus distributions. HT at 1445. Equity is only distributed after all approvals are received. *Id.* at 1457.

Mr. Loaiza sees equity distributions as different in terms of the goal: salary relates to overall work, bonus relates to short-term reward, and equity is geared towards retention. HT at 1480. But the process of decision-making is the same. He receives a budget and then passes it down. After distributions are made, he reviews and approves in the same way that he does for focal and bonus budgets. *Id.* Management, not HR, provides guidelines on distributions, but they do not function as a "cap" on the percentage of employees who can receive equity. *Id.* at 1495.

G. Off-Cycle Adjustments and Other Processes Relevant to Compensation

1. *Off-Cycle Adjustments*

Changes in compensation can also be made outside of the global compensation programs. Off-cycle salary review and adjustments, according to a 2011 compensation training, can be made for promotion, for a "[c]ompetitve counter offer," "change between commission and bonus based compensation," and changes in job involving changes in the mix of compensation. JX 24 at 18. "Off-cycle reviews are not very common at Oracle, but they do occur." *Id.* "A business justification will need to accompany any request for an off-cycle increase. The justification should include the flight risk of the employee if we don't give an increase, the impact on the business if the employee leaves, any internal equity concerns, and the employee's performance record."[111] *Id.* at 19.

A July 2016 training specifies that off-cycle increases are limited and are used to make a competitive counter offer or where there is a job change to a variable pay plan. Counter offers, or "dive and save," increases require a written offer from a competitor. They require justifications. JX 114 at 35-36. Off-cycle pay adjustments can also be made with promotions. *See, e.g.*, DX 112 at 9. Ms. Waggoner explained that a "dive and save" is

[111] The 2015 Managing Compensation training makes the same points, as does a seemingly later training on the subject. *See* JX 25 at 39-40; PX 141 at 76-79.

> like a counter offer, where an employee has—either has an offer in hand or is on the verge of getting an offer, because they've been seeking [employment] elsewhere, and they would go to their manager to talk to them about potentially leaving Oracle. And the manager might decide that they want to counter that and we refer to it as a "Dive and Save", because we're thinking of these employees as having one foot out the door and the manager is trying to like [dive] and save them from leaving.

HT at 1220; *see also* PX 22 at 278; PX 24 at 286-87.

Other off-cycle adjustments can be made. This could be justified if there is a promotion, increase in responsibilities, if someone has left and more will be asked of an employee, or if "in the review of their own team, they've discovered some sort of internal equity concern that they can't explain on the basis of knowledge, skills, abilities, performance level, they could also propose it in that case to try to close an internal equity gap concern that they have." HT at 1235-36; *see also* JX 102 at 148, 150. The request would be made in a workflow and requires a business justification. It would then get submitted for approval up the chain of command. HT at 1236-37. Each line of business could have its own process, but eventually it would result in a workflow with approval per the approval matrix. PX 24 at 295-96, 300. While in 2011 off-cycle adjustments were not very common at Oracle, since then they have become more common. HT at 1256-57. They would come out of a manager's regular budget. PX 24 at 261, 294. Higher managers, like Mr. Kurian, might limit the number of dive and saves that a subordinate could do in a given year. *Id.* at 297-98

In Ms. Cheruvu's experience, out-of-cycle raises are used to allay a risk of losing employees. PX 12 at 267-68. Per Mr. Miranda, dive and saves/adjustments are used to retain the top talent.

> [T]he direct manager raises an issue to their management chain, and then ultimately to HR, and then it comes to me, either based on an external competitive offer that we feel we need to respond to, to try to keep the person at Oracle, or sometimes proactively where they see somebody in their org and, you know, performance is exceptional, or under circumstances where we don't want that opportunity for somebody to get approached with another offer.

HT at 1099. His role is to approve the request. If there has been a recent focal review and the individual didn't receive a raise, that would be a consideration. *Id.* at 1100, 1123. There is no specific dive and save budget; rather it has to be funded through a more general budget for the organization. *Id.* at 1124. The dive and save request is generally discussed in email or in person before a workflow is created, given the "sudden context" of the request. *Id.* at 1125-26; *see also id.* at 1133-36 (discussion of particular dive and save). Race and gender are not considered in dive and save requests. *Id.* at 1127.

Mr. Webb understood a dive and save to be a change in compensation outside of the focal review. A line manager will usually bring to his attention that an individual is seeking another position or is being pursued for another position. He reviews the situation, inquires about any written offers on the table and the companies approaching the individual, as well as the performance of the individual. He then provides guidance on whether he supported the dive and save or not, though he has never rejected a dive and save recommendation. HT at 1411-12. In Mr. Bashyam's experience, dive and saves are done on the recommendation of the direct manager and usually involve an "at-risk" employee or someone with an offer for another position. He reviews the justifications and is one of the approvers. He has rejected requests for a dive and save based on the

offer they are competing against. But this is rare. HT at 1445-46.

Mr. Loaiza understood a dive and save to be a change in compensation "outside of the normal process." It starts with the direct manager proposing to fix an issue in the current compensation, usually as the result of a competitive offer that Oracle may match to retain the employee. The manager writes up a justification for the dive and save, which he reviews. He rarely withholds approval, but would do so when they have an employee who is not a high performer and a lot of money would be required to retain them. HT at 1481-82. He does not have a budget for dive and saves. They would be funded by "the corporation." His role was to approve them, after which they would get sent to his manager and beyond. *Id.* at 1486-87; *see also* PX 21 at 277-80, 288-90. During the time that he was Senior Vice-President, he estimated that he would review a dive and save about once a month and approved most of them. PX 21 at 293-94.

The record contains numerous dive and save or off-cycle requests/justifications/approvals, only some of which I will discuss. Often they respond to a concrete or impending competitive offer. For instance, in March 2015, Mr. Loaiza requested an off-cycle raise and stock grant for a vice-president leading Exadata development in order to counter a "very aggressive" offer from another technology company. The proposed salary took the individual above the salary range. The request focused on the contributions of the individual. Mr. Kurian approved within about half an hour, and later requested approval from "Larry." Ms. Catz approved "on lje's behalf" that evening. JX 27.[112] A May 2015 dive and save was approved through Mr. Kurian's organization for a female M4 long-time employee being actively recruited by other companies. The significant increase moved the employee from the second to third quartile and was competitive to what other companies were offering. *See* PX 481[113]; *see also* PX 506 (justification narrative).[114]

Based on my review, it is evident that not all off-cycle changes are strictly dive and saves, i.e. responses to a counter-offer, even when they are labeled as such. For instance, in August 2013 Ms. Catz and Mr. Kurian approved two off-cycle compensation changes that were not presented as dive and save requests. One involved making the compensation of one employee comparable to the compensation of another who had recently been given an increase as part as a counter-offer. The rationale for the other was salary compression and Mr. Kurian's general worry that she might leave. It moved the employee from a .9224 compa-ratio to a 1.17 compa-ratio and was supported by comparisons to other individuals in the same job title in the same organization. *See* PX 477.

In December 2013 Mr. Kurian sent an email to Ms. Catz outlining retention issues and requesting compensation adjustments. He explained that there had been recent loss of "senior superstar individual contributors" and engineering managers to other companies and the difficulty of replacing them, as well as the risk of additional employees leaving for other companies. The request was coupled with cost-saving plans and reductions. *See* JX 8.[115] A March 2017 request addresses compensation for 12 engineers who were "at risk/below or low in range." This was approved up through Mr. Kurian. *See* PX 92. Adjustments are also made for non-retention reasons. An email

[112] The same document is in PX 82.

[113] PX 481 and DX 141 contain the same email chain. Two percentages are given—26% and 19%--but the underlying numbers indicated that 19% is correct. The employee was later recommended for promotion to Senior Director. *See* DX 433.

[114] DX 332 and DX 352 contain the same justification narrative.

[115] The same document is in PX 83.

provided to counsel for OFCCP by an employee, showed that in December 2018 Oracle made adjustments to at least that employee's salary after reviewing her duties and responsibilities. *See* PX 488.

In January 2015, Mr. Kurian approved a dive and save request for a female employee involving a 25.9% raise, which would move the employee from below range into the second quartile. Based on the justification, the compression issue was longstanding, and the result of the employee's "lack of 'job-hopping'" and transfers that occurred during re-organization, such that the mangers she had been reporting to during the last focal review knew that she and others were moving out of their organization, and so did not provide more than a nominal increase in salary. The employee did not have an offer, but had complained about compensation and was interested in testing the market. PX 105 at 1-4. The email chain includes another proposed 15.8% raise for a male employee who had told management that he was not willing to accept his current pay. The change brought the employee from the second to third quartile of the salary range. *Id.* at 4-5; *see also* HT at 1132-36 (Mr. Miranda discusses document); PX 21 at 308-14 (Mr. Loaiza questioned on the document).[116]

In June 2015, a manager proposed an out of cycle salary adjustment involving a 25% raise for a subordinate VP who remained below the salary range. The individual had been promoted without a raise, resulting in a low compa-ratio, and since then had received salary increases each year, as well as bonuses and stock, but the compa-ratio remained the same because the manager had difficulty rectifying "such significant salary compression and "face[d] a 'rob Peter to reward Paul for a promotion' situation." Other employees also had salary compression. There was no concrete offer, but the manager worried that the employee would be difficult to replace and that other companies had made inquiries. PX 102 at 1-2. A May 2014 dive and save request seeks a roughly 66% raise for a female employee with an "astonishingly low" salary who was being recruited by other companies and whose "departure would mean a tremendous loss for Oracle Corporation." PX 103 at 1-3.

Off-cycle adjustments can involve a promotion. For instance, Mr. Webb's organization did a dive and save in June 2017 that involved a promotion of a manager accompanied by a 17% salary increase. The dive and save was "pre-emptive" for an employee who was conscious of her marketability and had interest from recruiters. With the promotion, the employee's compa-ratio remained roughly the same and the employee stayed in the lower quartile of the salary range for the new position. *See* PX 473; DX 398 (same document).

The record contains a plethora of other justifications/requests/approvals related to off-cycle adjustments.[117] These generally indicate that in making and evaluating requests, Oracle managers

[116] While Mr. Loaiza was unfamiliar with this situation, he did not think that changing jobs within or outside of Oracle was necessary to get a significant salary increase, since in his experience 'we give people significant compensation changes all the time in the focal process." PX 21 at 313-14.

[117] *See* PX 104 at 1-3 (approval for request involving 22% salary increase for a male employee with multiple patents who had an offer from a competitor, bringing salary from first to second quartile); PX 294 (approval for substantial increase in salary to counter an offer from a competitor for an IC3 who had recently received a "5" performance rating and was considered one of the top designers on the team, with change moving employee from compa-ratio of .93 to 1.18); PX 298 (Mr. Kurian approval of preemptive dive and save for an IC5 software developer involving 22% increase to bring employee from low end of range to near midpoint, justified as needed for a valuable employee with significant salary compression); PX 299 (approval of pre-emptive dive and save for an IC4 software developer with increase bringing employee from .88 compa-ratio to slightly over midpoint); PX 301 at 1-3 (Mr. Kurian approval of proactive dive and save for an M6 employee involving stock and a 15% increase in salary, moving individual from lower part of range closer

look at the performance ratings of the employee, the amount of increase, salary range information along with current and proposed compa-ratios, benchmarks internally for individuals reporting to the same managers in the same position, time in job, group attrition, recent bonuses and salary increases, whether there is a competitive offer, local HR approval, "LOB Priority," and a written justification. In many dive and saves, benchmark data is included providing for salary comparisons for employees with the same job code reporting to the same manager, with several layers included on some occasions. *E.g.* DX 134 (separate benchmark table with three levels).

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to the midpoint; no competing offer, but employee expressed dissatisfaction with his salary and discussed looking outside the company); PX 303 at 1-3 (proactive dive and save in July 2018 for IC5 in lower part of range with 22% increase based on perceived recruitment vulnerability given prior salary); PX 312 (24% increases for "superstar" M4 to bring individual to almost range midpoint); PX 313 (25% increase for "star" IC5 with competitive offer to bring individual into range); PX 314 (15.54% increase coupled with promotion from M3 to M4 without a competitor offer for longtime employee who would remain towards the bottom of the new salary range); PX 315 (proposed 30% increase for IC5 with competitive offer to bring individual from bottom of range to close to the midpoint); PX 316 (proposed 30% increase for M3 "key contributor" with competitive offer to bring her from lower end of range to just above midpoint); PX 317 (proposal for 22% increase and stock grant for M4 with competitive offer to bring her from bottom end of range to close to the midpoint); PX 318 (seeking 22% increase and stock for IC3 without a competitive offer but who was unhappy with her pay and whom management planned to promote soon); PX 321 (proposal for 36% increase for M5 with outstanding ratings who did not have a competitive offer but was unlikely to continue in a demanding role with increasing responsibilities without an increase; increase would bring employee from slightly below range into the second quartile); DX 126 (18% increase for female M5 to increase compa-ratio to 107.58, as well as some equity, based on expressed concern about salary and exposure to the market); DX 128 (26% increase with promotion from IC3 to IC4 for program analyst, no competitive offer); DX 133 (19% increase for IC4 to bring her to above mid-point, employee deemed "cornerstone" and "drastically underpaid", no competing offer, but dissatisfaction with salary and considered flight risk); DX 134 (25% increase for IC5 slightly below range to bring her short of midpoint for range but slightly above average for same job code on team, employee deemed "star" performer and has offer in hand from competitor); DX 135 (25% increase for IC5 to bring him above average for team and range to counter competitive offer); DX 136 (15.54% increase and M3 to M4 promotion for employee near bottom of range upset with her compensation but with no competitive offer, with promotion would remain near bottom of range); DX 137 (30% increase for IC5 with competitive offer to bring her to .95 compa-ratio and slightly above average for benchmark employees) DX 139 (29% increase for M6 without competitive offer to bring her above midpoint for range and above benchmark comparators); DX 140 (36% increase for IC3 to a 1.19 ratio and new max for benchmark comparators for employee who manager believed could command a significantly higher salary in the market but who did not yet have competitive offer); DX 142 (23% increase for IC4 for top ranked employee on team whose loss would be damaging but without competitive offer, moving from .86 to 1.06 compa-ratio); DX 162 (internal transfer justification from India to HQ based in part on competitive counteroffer, with proposed salary justified by reference to amount of other offer and keeping employee at same compa-ratio in new location); DX 163 (dive-save justification related to transfer); DX 182 (dive and save for Software Developer 4 in cloud security engineering with competitive offer involving 8% raise and RSUs, but with employee still below midpoint); PX 484 (approval of DX 182); DX 183 (dive and save for Software Developer 6 with consistent 5 ratings and top ranked engineer in organization involving 7% increase to bring employee above salary range and comparators but with bulk of offer in equity in order to counter offer from competitor with heavy equity component); DX 198 (21% salary increase for female IC5 already above benchmark averages for a 1.22 compa-ratio after she "expressed extreme concerns" that her salary was less than peers at other tech companies, some of whom had less experience); DX 202 (chain of approval for 19% increase for highly ranked IC5 engineer to match competing offer with salary at 1.03 compa-ratio); DX 295 (30% increase for IC3 in core database group to 1.2 compa-ratio along with equity, no competitive offer but in group with high attrition and being recruited heavily by competitors); DX 296 (22% to 1.25 compa-ratio plus equity for IC3 in core database group with high attrition and vulnerable to recruitment by competitors); DX 297 (same increase in same circumstances for different employee); DX 298 (25% increase and equity for IC4 in same group); DX 299 (17% increase and equity for IC3 in same group); DX 335 (55% salary increase with promotion from IC4 IT System Administrator to M4 IT Director position with new compa-ratio of 1.12 and salary over benchmarks in organization, narrative justification explains that change is part of reorganization and consolidation of teams and refers to two offers from competitors and one "new employer" offering same amount as proposed new salary); DX 347 (narrative justification for off-cycle salary increase of unstated amount); DX 348 (same as DX 335); DX 353 (21% increase, equity, and move from M3 to IC5 product manager described as promotion for employee working on Exadata, with new salary well above range, response to offer from a start-up and resignation of employee); DX 354 (approval chain related to DX 353); DX 398 (17% increase and promotion from M5 to M6).

2. *Performance Management*

Oracle recommends, but does not require, performance evaluations as part of the performance management process.[118] JX 147 at 47. A March 2014 manager training defines "performance management" as "a continuous, integrated set of practices designed to align individual accomplishment with the achievement of corporate goals." JX 107 at 24. It follows a yearly appraisal workflow. *Id.* at 25. Performance is measured with respect to a "job competency profile" for the position, with core and functional competencies. *Id.* at 29-30. These are assigned "levels" of increasing proficiency, 1-5. *Id.* at 31. Managers are advised to contact HR about performance issues, and to come prepared to discuss background, including the last performance review and the performance of others. *Id.* at 34.

A December 2016 manager training states that talent management is "a business strategy, a retention strategy, an engagement strategy and a risk mitigation strategy." JX 126 at 30. It emphasizes engaging, setting team and individual goals and objectives, providing coaching and feedback, and conducting performance appraisals in line with the talent management cycle as part of an ongoing process. *Id.* at 32-33. When there are issues, managers are told to identify the issue and talk to the employee, intervene early, involve HR, and be consistent and fair. *Id.* at 35.

A slightly earlier (April 2016) manager training directs managers to set performance objectives as part of the onboarding process, including creating a development plan and scheduling ongoing conversations about performance. PX 415 at 23. It then details ongoing talent management, which if defines as "aligning people to our organizational objections. *Id.* at 31. An online portal facilitates the process, providing trainings, performance tools, and templates. *Id.* at 33-34. The process starts with a development plan, leads into setting goals and objectives to the employee, is followed by coaching and feedback through the year, and culminates with performance appraisals, which can be facilitated by a self-service HR appraisal application. Dates, timelines, and details vary by region and line of business. *Id.* at 35; *see also id.* at 36-37 (further details). Oracle has core and functional competencies, which are "[g]lobal descriptions of knowledge, skills, attitude and behaviors needed to be successful in a role." Individual roles are assigned a set of competencies, and a toolkit defines the different proficiency levels for competencies. Core competencies apply to multiple job codes while functional competencies are specific to a one job code. Competency profiles then give a description of the competencies and proficiency levels, from 1-5, for the competency in question. *Id.* at 38-41. In managing performance, managers are encouraged to use the competency profile tool, set objections, provide regular feedback and coaching, intervene early when it is needed, and use the self-service HR appraisal tool to record performance ratings. *Id.* at 43.

Performance appraisals are an HR assisted process. They are popular, but not mandatory. *See* JX 112 at 2-4. Ratings range from 1-5, with the large majority receiving either a 3 or 4. *Id.* at 6. Ms. Westerdahl said there aren't goals about how many performance evaluations an employee should receive, or if they should be written or verbal. PX 26 at 105. Every line of business has a difference "cadence" about performance reviews. In HR, they are done once a year and factor into salary increase decisions. Other organizations differ. Sales and Support had active programs. Use is

[118] Oracle also provides resources and guidance for employee development, *see, e.g.,* JX 126 at 38-52, but this is not material to the issues in this case. Oracle offers a large number of trainings via Oracle University. *See* PX 14 at 74-78. When an employee moves to work on a different team or different product, a manager might have the employee take additional trainings to fill in gaps. *Id.* at 126-27.

mixed in Product Development. *Id.* at 155-58. In Mr. Miranda's group, they can happen at any time of the year and are not mandatory. The process varies, but sometimes involves having the employee summarize accomplishments and sending this to a manager. HT at 1103. Mr. Loaiza's organization did not do formal performance evaluation. Employees are rated as part of the focal review, but without written justifications. *Id.* at 1488-89; *see also* PX 21 at 112-15.

Ms. Waggoner explained that the performance review system is independent from the compensation programs. JX 102 at 118, 120; *see also id.* at 125-26. Performance reviews are not centrally mandatory, though some organizations might require them. They may or may not involve a formal review and a rating. PX 24 at 226-27. The tool used for compensation purposes includes performance ratings, but these are separate from ratings given in formal performance reviews. *Id.* at 238-39. There is no way to check for high-ratings combined with low-salaries. *Id.* at 243.

Ms. Dodson provided the most detail regarding performance management. Oracle does not mandate performance appraisals or follow formal processes for appraisals. Instead it has a "general framework" involving setting goals and getting feedback. Actual practice varies by organization and manager. PX 14 at 129-31. Outside of the performance appraisal process, performance might be assessed in conversations or emails between employees and managers. *Id.* at 212-13. Individual managers are responsible for performance management and doing so appropriately. *Id.* at 235. If employees feel that the evaluations are unfair, they can go to HR, talk to their manager, or go to their manager's manager. *Id.* at 237-38. That would be the way Oracle would learn that a manager was using inappropriate criteria. *Id.* at 239-40.

If performance appraisals are done and written, a record is retained and an employee would be able to access it, as well as the manager and certain HR employees. *Id.* at 134-36; *see also id.* at 150-51, 198. There are guidelines or recommendations for the process, including guidance on being fair and impartial, focusing on the observable, and following EEO principles. *Id.* at 137; *see also id.* at 239. They are not mandatory and there is not mandatory training in how to do them properly. *Id.* at 137-38. They recommend giving an overall numerical rating. *Id.* at 197-98. The process isn't mandatory, but in FY 17, 63% of employees internationally at least started the formal appraisal process. *Id.* at 140-41, 144. Performance appraisals are done to make sure employees know what is expected of them. They could be a factor in decisions about salary increases. *Id.* at 152-53. Performance is one factor considered, and the appraisal could be a part of that. *Id.* at 154-55, 195-96, 198-99. The same holds for promotions. *Id.* at 196. There is no formal oversight of the performance management process—it is something between a manager and employer. *Id.* at 194.

3. *Transfers*

Oracle has some compensation rules/guidelines related to internal transfers. A transfer occurs at equal career level and salary. Internal applicants must inform current managers before applying. Hiring managers must seek approval from a current manager before encouraging an employee to apply. JX 88 at 22-23; *see also* PX 176 at 42-45; PX 181 at 25-26; PX 188 at 19-20. Oracle's internal HR website encourages transfers in the company for individuals who want to expand their capabilities. But in general, "[e]mployees must be in a position for 12 months before being eligible to transfer." And "there is generally no increase in salary." JX 94 at 1. International transfers are permitted, though they are not properly used to "facilitate a salary increase." *Id.*

Oracle permits transfers within the company, but generally they are not accompanied by increases in salary or other compensation, though that may occur if there is a change in career level

in the new job. JX 147 at 48; *see also* JX 25 at 41. Managers are instructed that lateral transfers should generally not be used to give employees salary increases and promotions, though some adjustments may be necessary depending on the circumstances. JX 126 at 59. Per an internal email among managers and HR in 2013, internal transfers must be consistent with approved headcount and the job must still be posted in iRecruitment, even if the candidate has been identified. Transfers must have been in the current position for a year, and the releasing manager is an approver. PX 344 at 1. According to an email between two employees in 2011, a transfer had to be approved through "Larry Ellison's office," at least in a case where it involved a change of global career level and thus salary grade. *See* PX 499. Relocations are also subject to approval. *See* PX 475.

A May 2013 "Global Compensation Guidelines Training" for the United States provides that, as a general principle, the starting point for an internal transfer should be lateral, not as a means to increase salaries. Adjustment may be needed, and the salary "should be fair and appropriate." JX 106 at 6. Complications arise when the mix of compensation changes. *Id.* at 6-11. International transfers pose other difficulties, but generally Oracle uses compa-ratio to make the adjustment. *Id.* at 13. A 2016 compensation training reinforces that internal transfers are meant to be lateral, retaining salary and career level, not as a way to increase salary. Adjustments are permitted in some circumstances, depending on the change. JX 114 at 31. With international transfers, compa-ratio is kept the same. *Id.* at 34; *see also, e.g.,* JX 127 at 31-32; PX 30 at 57-60. A March 2014 training provides that transfers require 12 months in position, unless both managers agree to an earlier date. JX 107 at 77. Hiring managers must inform current managers and receive approval before approaching a current employee about a transfer. *Id.* at 78. Absent approval by "Larry," base salary and job level do not change with transfers. *Id.*

Ms. Balkenhol's team actually approves internal transfers. The process is similar to the approvals that they do for hiring, except that they wouldn't necessarily have a resume, and involves the same sort of scrutiny. HT at 1294. She doesn't ask questions of internal transfers very often and couldn't think of a time when she had rejected a request. *Id.* at 1295. The hiring manager is the primary decision-maker with transfers, and has the most information about the change. *Id.* at 1295.

In Mr. Webb's experience, relocation or transfers with a promotion involved would bring a review of salary, but where there is a voluntary relocation without promotion there is no change in salary. HT at 1406. Mr. Miranda explained that lateral transfers are possible, but in his organization it is policy to not give raises with transfers because that would lead to different groups competing for employees, which would inflate prices, and they don't want to be competing with themselves in the job market. HT at 1089-90. Mr. Loaiza said that in Product Development a transferee's salary is almost always kept unchanged. *Id.* at 1489; *see also* PX 21 at 105. Kirsten Klagenberg, a longtime manager at Oracle, understood that Oracle has a policy of not allowing pay raises with internal transfers. HT at 122. In Ms. Balkenhol's experience, lateral transfers do not generally involve pay changes since Oracle doesn't want organizations poaching employees from each other, but there are changes of pay in some instances. HT at 1294-95.

Ms. Waggoner explained that the starting point for internal transfers at Oracle is that the career level and salary remain constant. Her team gives that guidance to prevent internal poaching of talent, or internal job-hopping to procure increases in pay. That sort of behavior creates "almost a toxic work environment" that they want to avoid. There are exceptions made, and pay increases can be given after the transfer. HT at 1211-12; *see also* JX 102 at 135-37; PX 22 at 296-98; PX 24 at 310-11, 311-13; PX 25 at 3 (correction of PX 24 at 312).

4. *Promotions*

Oracle's HR webpage indicates that promotions "generally occur during the annual focal process so that the employee's salary can be reviewed to take into account the new duties/responsibilities involved with the promotion." JX 94 at 1. Manager training states that promotions "are not always accompanied by a salary increase," though "[s]alary should be appropriately positioned in [the] new salary range." JX 25 at 27.[119] Practices differ by organization as to when promotions occur. *Id.* A promotion may be appropriate "if there is a business need for a higher level role or an employee is assuming more responsibility in their current role and is ready for promotion." *Id.* at 28. "Consider both the scope of the job and the readiness of the individual for the role when determining if a promotion is appropriate." *Id.*

A new manager training from April 2016 informs managers that promotions should be considered in reference to the responsibilities and performance expectations in the global career level definitions. They generally occur during the focal review process and managers are told to work with HR. PX 415 at 66. Another training explains that although a promotion is "not always" accompanied by a salary increase, promotions may bring increased benefits and different incentive earnings, with increased earning potential. While pay "does and should vary between individuals," "variations must be due to a genuine material difference" such as "[e]xperience, knowledge, skills, performance, etc." PX 141 at 66-67. A later example adds that it is "good practice to increase salaries for significant promotions such as a promotion to management." *Id.* at 70.

Despite the abstract HR principles, the evidence is mixed about whether promotions actually do come with salary increases, reflecting a mixed practice. A May 2013 training explains that when making a promotion, "[s]alary increases should be determined based on the employee's qualifications, experience, skill set, etc. compared to the new peer group." But increases may not be appropriate at all and could be deferred until the next focal review. JX 106 at 19. The notes add that a typical promotion increase is 8-12%.[120] *Id.* According to Ms. Westerdahl, Oracle would "like to see an increase in salary" with a promotion, unless the salary is already positioned in range for the new position. PX 26 at 255-56. Mr. Loaiza clarified that prior to 2018 it was "very rare" for a promotion to come with a salary change, but in 2018 there was a change such that now some promotions come with salary changes and some do not. PX 21 at 217-19.

Ms. Waggoner explained that decisions are made on a case-by-case basis, but promotions might not come with a salary increase because the ranges overlap, and the employee may already be appropriately situated in the range for the new job. Being new to the job, they would generally fit into the lower quartiles. Adjustments, and raises, would then be made at the next focal review, as appropriate. HT at 1219; *see also* PX 24 at 282. This practice was prominent in the Product Development organization under Mr. Kurian. PX 24 at 283-84. In general, promotions could occur when an employee applied for an internal transfer to a higher level, when a manager and employee work out a career path for an employee, or when an employee's job has grown such that a promotion is in order to recognize the role. *Id.* at 282-83. They can happen within a focal, or through a workflow. *Id.* at 284-85. Managers make the decision about promotions, and any

[119] JX 111 at 27-28 covers the same subject. So does JX 114 at 26-27, JX 127 at 26-27, PX 30 at 47-50.

[120] Special rules can apply to high performers in "feeder groups" that involve high investment in training coupled with steep increases in employee market value, leading to high attrition among high performers, with competitors then benefiting from Oracle's training. *See* JX 106 at 32-33.

compensation that would come with it, and it is approved through the Workflow or otherwise, with the amount of review varying by the level of the promotion. *Id.* at 285-86. Ms. Balkenhol's team reviews any off-cycle promotions and engages in the same process and scope of review as they do for other workflows. She rarely asks any questions about the proposed promotion, couldn't think of an instance where she had rejected a proposal, and views the direct manager as the primary decision-maker, since he or she has all of the information and makes the request. HT at 1295-96.

When proposing a promotion for an individual contributor, Oracle uses a template that involves providing background information including salary and performance information, followed by narratives on experience, the scope of the position, technical ability, teamwork and influence within Oracle, leadership and external visibility, and achievement. There are also sections for recommendations from senior management staff, which are required for certain promotions. JX 1 at 1-3; *see also* JX 114 at 29; JX 125; DX 260; PX 300 (position criteria from template); PX 302 (later version of criteria). Management promotions also have a template, requiring input on business need, experience, management skills, the scope of the position, the significant of the position and impact on the company external visibility, and teamwork/influence within Oracle. JX 114 at 30; *see also* DX 261; PX 297 (position criteria from promotion template). The process and approvals required for a promotion appear to have varied, across time, organization, or both. *See, e.g.,* PX 482 (indicating that one organization processed requests internally once each quarter).

The record contains a large number of promotion justification s in different formats.[121] Taken collectively, they tend to show that at Oracle promotions involve a somewhat tedious

[121] PX 117 at 1-5 (promotion into a manager position where current salary is below range for new position); PX 425 (promotion from IC3 to IC4 in Santa Clara office); PX 472 (Mr. Kurian 2013 approval of a promotion from Senior Manager to Director accompanied by a roughly 36% increase in salary where employee was below the salary range for his current position and with raise would be just in range for his new position); PX 474 (Mr. Webb approving January 2017 promotion to M4 position with no salary increase); PX 476 (February 2014 Mr. Kurian approval of M5 promotion with relocation from India to HQ with sizable increase in actual compensation but reduction in compa-ratio); PX 483 (completed promotion template for M3 to M4 promotion, no compensation information included); PX 507 (same document); DX 127 (M3 to M4 promotion for "future star", no change in compensation indicated); DX 129 (Programmer Analyst 3-4 promotion for hourly pay rate employee with current salary below range for new job code); DX 130 (IC4 to IC5 promotion, no compensation information included); DX 131 (IC3 to IC4 promotion without compensation information provided); DX 132 (IC4 to IC5 promotion for employee who would be below range for new position); DX 138 (IC4 to IC5 promotion, only current compensation included); DX 179 (management promotion to Software Development Senior Manager, no compensation information included); DX 180 (promotion justification for move from Contributing Member of Technical Staff position into management as a Director, no compensation information included); DX 181 (promotion from Technical Writer 3 to Technical Writer 4 in Product Development for employee with current salary already in new range); DX 184 (promotion form Principal to Senior Principal Applications Engineer, IC4 to IC5 for employee already in range for new position); DX 185 (IC3 to IC4 promotion for employee in "UI performance, build and infrastructure and Oracle JET" with no compensation information included); DX 186 (IC3 to IC4 promotion for "star developer working on distributed computing and big-data projects" for employee with salary well over minimum for new range); DX 187 (IT manager to IT senior manager in the product development organization with current salary provided but no information on new range); DX 188 (Senior to Principal Member of Technical Staff promotion for employee working in "transaction area," no compensation information provided); DX 189 (Applications Developer 3 to Software Development Manager promotion for employee with current salary already in range for new position); DX 190 (product development IC2 to IC3 position in Zero Data Loss Recovery team with no compensation information included); DX 191 (email approval chain for promotion in DX 190); DX 196 (promotion from Principal to Consulting Member of Technical Staff in Product Development, no compensation information included); DX 197 (IC5 to M3 promotion for employee leading team, current salary in new range); DX 199 (IT Director M4 to IT Senior Director M5 promotion for employee with current salary well into new range); DX 200 (IC5 Senior Principal Engineer to M3 Senior Manager position with current salary and compa-ratio information included); DX 201 (M2 Manager to M3 Senior Manager promotion for employee above minimum for new salary range); DX 333 (extended justification with 17 recommendations for Senior Director to Vice President promotion in product development); DX 346 (IC4 to M3

process, with detailed justifications written addressing various points and giving an explanation of the particular skills and contribution of the employee. It also involves collecting recommendations internally. Compensation does not usually change, and compensation is often not even discussed in the justification. In general, the higher the position in the hierarchy, the more detailed and involved the justifications and recommendations become. Throughout, however, the justifications are individualized, not mere boilerplate, and focus on the particular role of the employee at Oracle.

5. *Patent Bonuses*

Separate and apart from the global bonus program, Oracle has a variety of other types of bonuses, though the only type relevant in this case is the "patent award program" to reward "employee-inventors." JX 95 at 2; *see also* JX 147 at 45. The patent bonus is part of Oracle's defined process for pursing patents, with legal review and review by the Patent Review Committee, which can lead to a filing for a patent working with outside counsel. Inventors then receive monetary awards. *See* PX 422[122] at 14; *see also id.* at 15-17 (more detail on process); PX 438 (FAQ on patents and process); DX 294 (printout of internal webpage on "Patent Legal" with submission instructions/links). At least as of 2014, Oracle offered a $1,500.00 per inventor patent bonus on filing of the patent application, subject to a $4,500.00 cap per application and subject to local law

promotion for employee who will below salary range for new position); DX 350 (IC3 to IC4 promotion for User Experience Developer with current salary slightly below minimum salary for new position); DX 392 (QA Senior Manager to QA Director promotion, current salary recorded but not range for new position); DX 393 (IT Senior Manager to IT Director promotion, no compensation information included); DX 394 (Director to Senior Director promotion working in Fusion testing, no compensation information included); DX 395 (Principal to Consulting Member of Technical Staff promotion for employee working in Fusion Middleware, no compensation information included); DX 396 (promotion from Consulting Member of Technical Staff to Senior Manager, long list of products and projects with work completed but no compensation information included); DX 397 (Principal to Consulting Member of Technical Staff promotion for employee working on Database Cloud, no compensation information included); DX 399 (IC5 to IC6 Product Manager promotion for employee in Exadata with extended justification and recommendations, no compensation information included); DX 400 (spreadsheet for promotion of IC3 to IC4, from "Project Lead" to "Principal Applications Engineer"); DX 401 (Software Development Manager to Senior Manager, M2 to M3, for highly rated employee with high compa-ratio working on Fusion ADF, Exalytics, and XSA Cache, current compensation information included but not range for new position); DX 402 (Systems Analyst 4 to M2 IT Manager in Cloud Operations promotion, current comp included but no information on new range); DX 403 (inter-M6 promotion to "Group Vice President" with no change in organization/reports for employee well over minimum for range); DX 404 (promotion from Principal Member of Technical Staff to M2 Manager of Software Development, no compensation information included); DX 405 (approval emails for Vice-President promotion accompanied by salary increase in recognition of employees recent, unsuccessful recruitment by competitors); DX 406 (IT Senior Consultant to IC4 promotion for employee already over midpoint of new salary range); DX 407 (Development Manager to Senior Manager promotion, no compensation information included); DX 408 (promotion template with justification for M5 to M6 promotion approved in DX 405 indicating that salary change would bring employee to minimum for new range); DX 409 (approval email for M2 promotion accompanied by salary adjustment); DX 410 (promotion template for approval in DX 409 showing promotion from IC3 to M2 with salary increase); DX 411 (further approvals for promotion in DX 409 and DX 410); DX 412 (Senior Principal Product Manager IC5 to Director Cloud Operations M4 promotion justified by level employee is already performing at and way to recognize and retain "talented resource," current compensation included but no information on new range); DX 431 (Principal to Consulting Member of Technical Staff promotion for employee in SQL Execution group, no compensation information included, details about performance on particular projects provided); DX 432 (Principal to Consulting Member of Technical Staff promotion for employee working on Oracle Database, no compensation information included, details of projects and technical skills provided); DX 433 (Director to Senior Director promotion in Software Development in product development and QA for two Oracle Enterprise search products, compensation information not included); DX 434 (Architect to Vice-President promotion for "top industry expert" in particular field who had been performing management role, no compensation information included); DX 437 (IC4 to IC5 promotion with current salary included but not new range information).

[122] DX 292 contains a PowerPoint file of the same training printed as a PDF in PX 422. I cite only to PX 422.

and "Patent department discretion." PX 422 at 18; *see also* PX 437 at 1. Generally, additional awards were not made for further submissions or when the patent was issued.[123] PX 437 at 1.

6. *Acquisitions*

Acquisitions create special issues regarding job classification and, derivatively, compensation. When there is an acquisition, Oracle must engage in a mapping process to align the new employee's job with Oracle's job titles. This is done by considering the external market, the duties and scope of the position, and the existing salary, title, and description. JX 149 at 17-18.[124] The mapping process proceeds with input from line of business leaders and follows sequential steps, determining if and where the employee will fit into Oracle's organization and job classification system. Mappers are told to put new employees in the most comparable job family, and to be mindful of internal equity as compared to current Oracle employees. PX 268 at 3-4, 6-8.[125] Sometimes it may involve the creation of a new job family, if there are no comparable jobs at Oracle. *See* PX 288 at 3. Job codes are selected to most closely correspond to the role of the job in the organization. Choosing an incorrect job code could impact employee compensation in terms of salary range, bonus eligibility, overtime eligibility, and other compensation program eligibility. An error could also impact the offer letter to the incoming employees and provide improper access to the incoming employee to management tools, including compensation program tools. DX 113 at 15.

An undated "playbook" for acquisitions explains the mapping process will likely result in title changes for incoming employees, and in some instances could involve functional reassignment due to differences between how the companies define the functions. DX 121 at 1. Mapping is completed using information provided by the acquisition, and can change as Oracle gets new information about the employee and organization. *Id.* Lines of business are delegated the authority to determine which employees to hire from the acquisition, on a temporary or permanent basis. *Id.* Base salary is kept the same and bonuses and equity grants are not part of the acquisition process. The new employees participating in the next focal, bonus, and equity processes. *Id.* at 1-2. Exceptions, however, may be made in certain circumstances. *Id.* at 2-3.

A later, 2018, playbook contains substantially similar information. *See* DX 122.[126] However, at this point Oracle considered base salary increases as part of the acquisition in certain circumstances, including differences in compensation philosophies or pay mix and to maintain internal equity with similarly situated peers at Oracle, with similarly situated meaning "[c]omparable with respect to skills, knowledge, years of experience and performance." *Id.* at 3. Oracle also permitted substitutions for unvested equity, at least in certain circumstances, and offering retention equity to critical employees. *Id.* at 4. This playbook emphasizes correctly positioning employees with respect to Oracle peers, and provides for transitions when the compensation mix or level is out

[123] Oracle also "may" present employees with a "commemorative plaque" after the patent is issued. PX 437 at 1. Awards can be reversed or disciplinary action taken for actions like including non-inventors to increase the value of the award, omitting an inventor, or submitting "an invention disclosure in bad faith or with deceptive intent." *Id.* at 2.

[124] JX 149 appears to be a template PowerPoint that is individualized when there is an acquisition. DX 113 contains a more particularized version for on acquisition, except that it is missing some slides that are in JX 149. DX 113 contains one additional slide, and I cite to only that slide in the text above. Otherwise the information is fully contained in JX 149.

[125] DX 123 and PX 268 contain the same underlying document.

[126] PX 268 and DX 123 contain a "LOB Mapping Playbook" that focuses more on mechanics and region specific considerations.

of line with Oracle's practices. *See id.* at 4-5. As in the prior playbook, exceptions are possible for "key" or "critical" talent. *Id.* at 5-6.

Ms. Waggoner clarified that there is both a line of business mapping—fitting the new acquisition into Oracle's business—and a compensation system mapping—fitting the incoming employees into Oracle's structure and compensation systems. HT at 1238. The mapping occurs early in the acquisition process. When Ms. Waggoner did it, the individuals were fully anonymized, identified only with a number. The person doing it now gets a little more information. *Id.* at 1238-39. The process has changed over the years. In the past they brought employees over as they were and fit them into Oracle's system, and then made adjustments later after they learned more about the new employees and what they were doing. Oracle now handles things more flexibly and will consider adjustments and buyouts as part of the mapping process. *Id.* at 1239-40; *see also* PX 288 at 3-4; JX 102 at 18-21, 22-25; PX 22 at 167-68, 360-65. Ms. Westerdahl recalled that the exact process of bringing employees into Oracle's classifications has varied by acquisition, but generally they try to keep the incoming employees "whole," even if they are "overtitled" compared to Oracle's classifications. Their goal is to retain the talent, so they try to change as little as necessary. PX 26 at 184-87. The process of integrating an acquisition and making salary decisions is conducted by the M&A group along with the managers in the product line and HR. *Id.* at 189.

H. Oracle's EEO-Related Processes and Programs

1. Policies Related to Equal Employment Opportunity and Harassment

Oracle has both an Equal Employment Opportunity Policy and a Diversity Policy, both of which are in the Employee Handbook. HT at 1364-65. The Handbook contains sections stating a commitment to and commenting on equal employment opportunity, diversity, reasonable accommodations, affirmative action, and anti-harassment. JX 147 at 10-13.

> We believe in treating each employee and applicant for employment fairly and with dignity. We base our employment decisions on merit, experience, and potential, without regard to race, color, national origin, sex, marital status, sexual orientation, gender identity, gender expression, age, religion, religious creed, mental or physical disability, medical conduction, genetic information, ancestry, military and protected veteran status, or any other characteristic prohibited by federal, state or local law. Our Equal Employment Opportunity policy is founded on the philosophy that our employees and applicants for employment must be treated equitably. We do not discriminate based on personal preference or physical characteristics, and our experience confirms that supporting policies and practices with a strong commitment to equal employment opportunity is a good business practice. Our commitment to this policy applies to every phase of the employment relationship, and we make every effort to comply with this policy. If you feel you have not been treated fairly in some way, we encourage you to contact your HR manager or to call Oracle's Integrity Helpline [] for assistance. The company takes such matters very seriously and reporting your claims internally allows us to work with you to investigate and try to resolve your issues.

Id. at 10.

"We seek to build an inclusive workforce and work environment. We make every effort to

attract, invest in, and develop the talents of diverse people who reflect the society and community in which we live. We welcome and support people of all races, ethnicities, cultures, and religions and seek to foster teamwork and effective partnerships among our employees." *Id.* The policy states that "Oracle makes a good-faith effort to increase the number of qualified applicants from protected classes in our employment application pool." *Id.* at 12. And

> Oracle is committed to providing a work environment that is free of discrimination. Oracle does not tolerate harassment of any kind, including harassment based on sex, gender, race, color, religion, age, mental or physical disability, national origin, marital status, protected veteran status, sexual orientation, gender identity, or any other characteristic protected under federal or state law or local ordinance. Unlawful harassment may take many forms, including verbal, visual, or physical conduct that creates an offensive, hostile, or intimidating work environment.

Id. Oracle also states a commitment to various ethical standards, part of which includes compliance training, including sexual harassment training. *Id.* at 24-25.

As to "pay transparency," "Oracle will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant." *Id.* at 11. Those with access to pay information as part of their job may not disclose other individuals' pay except as part of a formal complaint/charge, to further an investigation/proceeding, or consistent with Oracle's legal duties.[127] *Id.* at 11-12. The policy bars discrimination based on discussions of salary. Oracle has never had a policy prohibiting employees from discussing their compensation. HT at 1365-66. It does maintain this information confidentiality. *Id.* at 1378-80, 1388. This policy was a new addition in 2016 or 2017. *Id.* at 1383-84.

Oracle possesses a separate "Code of Ethics and Business Conduct" covering a variety of topics, most of which are not germane to this litigation. *See* JX 152.[128] The code "affirms the principle of equal employment opportunity without regard to any protected characteristics." *Id.* at 65. It also affirms "this principle of freedom from discrimination in all aspects of the employment relationship, from recruitment and hiring, through performance evaluations, compensation, and promotions, to the end of your employment relationship with Oracle." *Id.* It continues: "We base personnel actions strictly on individual ability, performance, experience, and company need. We avoid actions influenced by personal relationships and discriminatory practices of any kind. Our goal is to compensate personnel—with wages, salaries, and other benefits—in relation to their responsibilities, performance, and experience." *Id.* The code also prohibits harassment in any form. *Id.* at 66.

Oracle maintains an "Integrity Helpline" for employees to ask questions or make reports of a variety of unethical conduct. *See* JX 7 at 1-2; *see also* JX 152 at 9-10. It is used to get "information or assistance on a compliance or ethics issue," to request training, to report suspected violations of Oracle's various ethics codes or guidelines, and to make anonymous reports, when that is permitted.

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[127] This section is not present in the earlier version. *See* JX 23 at 32.

[128] The document (in color) is also PX 130 and DX 33 except that these versions do not contain interspersed "Real World Questions and Answers" on various topics and are thus shorter. Ms. Thrasher discussed the document briefly at the hearing. *See* HT at 1371-72, 1382-84.

JX 101 at 1.[129] Concerns can also be reported to managers, to HR, or to regional compliance and ethics officers. *Id.* An FAQ explains that "[t]he Integrity Helpline is a tool you may use at any time either through this Website or over the phone, to request guidance or training with respect to Oracle policies, report suspected violations of law Oracle's Code of Ethics and Business Conduct or related policies, and follow up on an inquiry or report." *Id.* at 2.

It is administered by a third party vendor. Anonymity is allowed unless prohibited by law, but is discouraged. Oracle does not guarantee confidentiality or anonymity. *Id.*

> A report submitted through Oracle's Integrity Helpline is first reviewed by a member of the corporate Compliance and Ethics team in the Oracle Legal department. Where called for, the report is assigned for investigation to an investigation team that may include both internal and external resources. These individuals may be located in the United States or in another country. The information in your report is shared with team members as appropriate and your concerns are investigated promptly thoroughly and discreetly.

Id. Reports are shared as appropriate, but Oracle has a "zero tolerance" policy for retaliation for making reports. *Id.* Employees receive emails from Oracle's General Counsel about the helpline and encouraging them to use it to ask questions or report suspected unethical business conduct. *See* PX 107 at 1-2; PX 418 at 1-2.

2. Diversity Efforts

To support its EEO bona fides, Oracle has submitted a variety of evidence relating to its diversity efforts. Within HR, Oracle has a "Diversity and Inclusion" organization. *See* PX 262. This is led by Victoria Thrasher, Senior Vice President of Human Resources Organization and People Capability at Oracle, who has responsibility over "Talent Development Organization, Top Talent Programs, Diversity Inclusion, Diversity Compliance, the HR Communications and Learning Capabilities." She has been responsible for Diversity and Inclusion Initiatives since June 2015. HT at 1341-43. Oracle also has an "Oracle Women's Leadership" ("OWL") group/program. *See* PX 262. It puts on events, such as an "Inclusive Leadership" program at Oracle OpenWorld in 2016, which included both CEOs. *Id.*

A 2014 presentation summarizes Oracle's Diversity and Inclusion efforts.[130] *See* DX 86; *see also* HT at 1343-51, 1380-81, 1386-87 (Ms. Thrasher's review/elaboration on exhibit). Oracle's efforts proceed in four quadrants: "Workforce," "Oracle Leaders," "Workplace," and outreach to "Customer, Community, Partners, Stakeholders." DX 86 at 3. "Workforce" involves employee resources groups, which are given a budget and executive sponsor. It also involves summer internship and scholarship programs for minority students. HT at 1344-45; *see also id.* at 1348-49 (more on employee resource groups). Employee Resource Groups at Oracle included African American Business Leaders for Excellence, Hispanic Oracle Leadership Association, Oracle Pride Employee Network, Military and Veteran Employee Network, and Oracle Professional Asian Leadership. There are over 60 affinity groups. DX 86 at 4.

[129] The same document is in PX 108 and DX 23.

[130] As with other PowerPoints/presentations, dating is based on the copyright, which may be incorrect since there is a propensity for new presentations to be crafted out of older versions.

Oracle's efforts in the "Workplace" quadrant involve various communications including a monthly newsletter to all employees, communications about policies, internal and external websites, internal branding efforts, "Life at Oracle" videos, and employee surveys. DX 86 at 3; HT at 1347-48. "Oracle Leaders" engages with corporate leaders in executive sponsorship and participation in webinars and events. DX 86 at 4; HT at 1346. Ms. Catz, Mr. Kurian, Don Johnson, and Mr. Loaiza are/were particularly supportive. HT at 1346. "Customer Community Partners and Stakeholders" involves outreach from Oracle to create shared programs or events, or to collective support non-profit efforts. *Id.* at 1346-47; *see also* DX 86 at 5, 7-8. Recruiting and outreach involves efforts by Oracle to reach out to staffing organizations and schools to recruit diverse candidates. HT at 1347. For instance, in 2016, Oracle joined with the White House to invest $3 million in STEM programs for girls, including a USAID project in Vietnam. Volunteers from Oracle help teach girls tech skills. Oracle also provides grants and scholarships through Oracle Giving and Oracle Academy. And it provides support for a MentorNet program. *See* DX 87.

OWL is similar to an employee resource group but differs a little in structure due to its origin in one line of business. HT at 1349-50. Affinity groups differ as well, since they have less organizational structure and can be focused on a wide variety of affinities. *Id.* at 1350. OWL's "mission is to develop, engage, and empower current and future generations of Oracle women leaders to foster an inclusive and innovative workforce." It was formed in 2006 and has over 80 local communities. In addition to various leadership and professional development opportunities and efforts, OWL works to promote inclusion more general as well as attract and retain talent. It also sponsors community outreach events. *See* DX 92; *see also* HT at 1351-55 (Ms. Thrasher discussion of document). Oracle has subsequently increased the number of communities. HT at 1353-54.

The Diversity and Inclusion office's efforts as to women include internal and external components. Internally it supports Employee Resource Groups and OWL. In the community Oracle partners with organizations, such as the Society of Women Engineers and United Professional Women Accelerating Relationships & Development, and supports events, such as the Black Enterprise Women of Power Summit, the Grace Hopper Celebration of Women in Computing event, awards programs for women, and the Women of Color STEM Conference. Oracle further encourages employees to volunteer with organizations and events supporting women and will match donations to eligible groups up to $300. *See* DX 98; *see also* HT at 1355-58 (Ms. Thrasher's related testimony). Since 2015 Oracle has been involved with additional organizations and events. HT at 1356-57. The Product Development organization is a big supporter of the Grace Hopper Celebration of Women in Computing Conference, which involves a gathering of roughly 20,000 women for a yearly conference. Oracle sponsors employees to attend. *Id.* at 1357-58; *see also id.* at 1381-82.

Oracle's Diversity and Inclusion office engages in support efforts for African-Americans, including supporting the internal African-American Business Leaders for Excellence resource group and partnering with outside organizations, like Black Data Processing Associates—which deemed Oracle "Outstanding Corporation of the Year" in 2013—and Blacks on Wall Street. Oracle further encourages employees to volunteer and will match donations up to $300 to qualified organizations. *See* DX 94; *see also* HT at 1358-60. (Ms. Thrasher's related testimony). Oracle has established some new programs in this area, including a relationship with the National Society of Black Engineers and other groups. HT at 1359.

Oracle engages in similar programs and initiatives with respect to Asians. HT at 1360.

> [T]he OPAL Employee Resource Group was formed in like 2016, and has a similar structure to what is described in terms of ERG structure. They receive a budget for activities that they support throughout the year. We also have a strategic sponsorship with—or partnership with the Ascend Organization, which is a Pan-Asian organization for leadership development and career development for Asian employees.

Id. at 1360-61.

The Diversity and Inclusion office devotes resources to supporting STEM education for grades 6-12, as a way to "foster an inclusive environment that leverages the diverse backgrounds and perspectives of all of our employees, supplies, customers and partners to drive a sustainable global competitive advantage." Internally Oracle supports programs to teach children coding languages and supports its Employee Resource Groups. Externally it partners with a number of community organizations. Oracle also encourages employee volunteerism and matches employee donations up to $300 to eligible organizations. *See* DX 88. Ms. Thrasher's team partners with Oracle Academy and other organizations it supports to provide funding and encourage Oracle employees to get involved. The aim is to have an inclusive and diverse workforce in the future, since Oracle will be recruiting individuals who do STEM work. HT at 1361-63.

In addition, Oracle distributes a "Dimensions of Diversity Newsletter" via email to all U.S. employees. *E.g.* PX 261. The newsletter is distributed to on a monthly basis and includes a variety of articles, as well as reminders about upcoming events. *See* DX 89 (August 2016 newsletter); *see also* HT at 1369-70.

3. Affirmative Action Plan

Oracle develops Affirmative Action Plans annually for different locations. *E.g.* PX 16 at 68-69. They are prepared by Ms. Holman Harries' team. *Id.* at 70. Oracle's 2014 HQ Affirmative Action Plan was created consistent with Oracle's obligations as a federal contractor. JX 15 at 6.[131] Oracle adopts a general policy of fair treatment:

> We base our employment decisions on merit, experience, and potential, without regard to race, color, national origin, sex, marital status, sexual orientation, gender identity, age, religion, disability, protected veteran status, or any other characteristic prohibited by federal, state or local law. Oracle's employment philosophy is to provide a working environment that inspires achievement without consideration to any prohibited factor. Oracle emphasizes achievement, self-motivation, and encourages high self-expectations.

Id. at 7. Oracle commits itself "to providing a work environment that is free of discrimination" and "does not tolerate harassment of any kind." *Id.*

Ms. Holman-Harries and Ms. Catz are responsible for implementation. *Id.* at 3; *see also* HT at 337-39; PX 16 at 74. Ms. Catz signs off on policies and the plan and makes communications related to the plan. Ms. Holman-Harries is responsible for changes in the plan and coordinating

[131] The 2014 AAP is also found in PX 46. Excerpts are contained in PX 195.

implementation. PX 16 at 74-79. Others assist with compliance. *Id.* at 81, 82-83. Ms Holman-Harries communicates about the plan with managers and HR representatives, develops trainings, answers queries, and assists OFCCP. *Id.* at 87-89, 91. In 2017, her group completed high-level review of workflows of different HR actions, which provides a second level of HR review. *Id.* at 92-95; *see also id.* at 100-04 (further discussion of review). This does not include review of compensation decisions or compensation analyses, outside of what counsel may request, which is done separately.[132] *Id.* at 96-97, 175-76; *see also, e.g., id.* at 107-10, 112-13, 116-17, 128, 131, 176-77, 243-45, 254. Managers have primary responsibility here for review of compensation, ensuring equitable pay, and compliance with the Affirmative Action Plan, without oversight by Ms. Holman-Harries. *E.g. id.* at 97-100, 111-12, 114-15, 117-18, 126, 173-75, 240-42, 249-51, 258, 262-65, 268-69; *see also* PX 17 at 2 (clarification of PX 16 at 262).

The plan stresses use of internal communications (orientation, job postings, a newsletter), various conferences and sessions, community outreach, "Cultural Awareness Celebrations," as well as reporting and internal auditing. JX 15 at 10-13. It represents that Oracle engages in internal audits of some sort in reference to application tracking, hiring, promotions, terminations, and compensation. *Id.* at 13. It includes a separate narrative plan for individuals with disabilities and protected veterans. *Id.* at 14-17. The plan attaches a workforce analysis of the headquarters facility as of January 1, 2014, which is organized by department and then job title. *See id.* at 19-152. It also attaches a "Job Group Analysis" and "Incumbency vs. Availability" analysis. *See id.* at 153-98. Last, it provides four "Placement Goals." *Id.* at 199.

Oracle takes the position that it complies with its Affirmative Action Plan requirements through a decentralized process, depending on individual managers and decision-makers. *See generally* PX 287 (position statement); *see also* PX 306 at 2-4; PX 307 at 5-7; PX 308 at 2-4. In. Ms. Holman-Harries' understanding, compliance required Oracle to do "a number of things."

> One is to measure the progress of our plan and our efforts under Affirmative Action, and we do that. We look at progress to goals and how well we're doing with regard to that. We also review our hires, promotions and terms. When we review our hires, promotions and terms, the first review is done by HR, and the managers, and also in the case of involuntary terminations Legal would approve that. And then we also do a second review in which we look at adverse impact and indicators, and go in and look at some of the areas where a person from the unfavored pool, when it's larger, could have been not hired and a person from the favored pool was, so we take a look at that. And we pull workflows to make sure everything is correct there, and different things like that.

HT at 335-36.

> They also do work concerning terminations.
>
> We'll go in and look at terminations to see, you know, what the reason was for the termination, to see if we see any trends. We'll go in and look where there indicators there, and look in the files, and take a look at that. We also audit our hires for the

[132] Similarly, Ms. Holman-Harries testified at her 30(b)(6) deposition that any analysis Oracle did of the 2014 snapshot created for OFCCP was done at the direction of attorneys. PX 18 at 105-07

> week, at least 75 hires a week. We go in and we take a look to make sure that all jobs are posted and everything looks as it's supposed to. We provide managers with feedback of their group, we give them the demographics of their group. We give them progress goals by location on some of our higher level managers. And things like that.

Id. at 336.

Ms. Holman-Harries acknowledged that she and her team did not develop internal audit reports to assess performance and compensation as part of Oracle's regulatory compliance. HT at 348. As to compliance with regulations requiring in-depth analyses of compensation systems to assess disparities,

> [e]ach manager is responsible for evaluating the equity as far as fairness in pay within your own organization. So, that part is being done. However, it's very much decentralized and it's done on a manager—managers are responsible for that on their own . . . The analysis that's done is done by managers and they evaluate compensation within their groups to make sure that people are being treated fairly with regard to the quality of their work and contributions to their work. So, they make sure pay—people are paid according to how well they're doing their job.

Id. at 349-50. She added that there might be "other things" that are done to comply. *Id.* at 350.

To comply with the regulations, Oracle relies on managers to consider equity. In terms of training and direction, Ms. Holman-Harries was only aware of a one slide in a compensation training discussing equity. *Id.* at 351. But "I can't attest to what kind of communication goes on between leaders and the managers within their organization. But I do know that managers are told that they are supposed to pay people equitably without regards to any discriminatory factor." *Id.* Ms. Holman-Harries does not receive the results from any analyses the managers may do. *Id.* at 352. She and her team don't track whether any managers find problem areas at Oracle in compensation equity or regulatory compliance. *Id.* at 352-53. She agreed that "your group doesn't do anything to ensure that individual managers have conducted analyses to determine whether there are gender, race and ethnicity based disparities." *Id.* at 353. She also agreed that she "never studied Oracle's compensation system as part of [] AAP regulatory compliance" and that she and her team "did not do any type of data analysis of compensation as part of[] AAP regulatory compliance." *Id.* And they didn't specifically analyze compa-ratio disparities. *Id.* at 354.

Ms. Holman-Harries team did not track problem areas identified in analyses done by the managers to comply with the regulations. *Id.* at 355. They had not studied whether Oracle was relying on prior pay in setting salary or whether there was an adverse impact on a gender or race, or were adverse impacts in the distribution of pay, bonuses, or equity, at least as part of their regulatory compliance. *Id.* at 355-57. Ms. Holman-Harries was not aware of Oracle having any specific budget dedicated to making corrections for disparities identified in is Affirmative Action Plan compliance. *Id.* at 357. They do not conduct a centralized review during a focal review to assess disparities based on race or gender. *Id.* at 357-58. She has not attempted to itemize all of the factors that go into pay determinations. *Id.* at 358. She also did not "demand" that records be maintained by managers documenting all factors considered. *Id.*

Ms. Holman-Harries had not advised Oracle's top management about how effective the

Affirmative Action Plan was as to compensation and she hasn't made recommendations to improve regulatory compliance. *Id.* at 359. She does not see it as her responsibility to implement compensation practices. *Id.* She and her team are not involved in the compensation decisions in the functions at issue here. *Id.* at 359-60. They haven't implemented any policies with respect to ensuring pay equity as part of Affirmative Action Plan compliance. *Id.* at 360. She explained, "[i]t's my understanding that the regulations do not specify exactly how the analysis is supposed to be done and Oracle has chosen to delegate that responsibility to the managers." *Id.* She agreed with Oracle's counsel's suggestion that workflows could reflect analyses in that they would be documentation of the informal compensation process at Oracle. *Id.* at 372.

Ms. Holman-Harries has studied hiring requisitions. *Id.* at 360-61. In 2017, her office started conducting a second-level review of promotion workflows. *Id.* at 362-63. She does not receive or oversee any pay discrimination complaints. *Id.* at 363. Asked what Oracle does do to analyze its employment processes to comply with the relevant compensation-related Affirmative Action Plan regulations, Ms. Holman-Harries replied,

> What Oracle does to analyze its compensation process is done with many different instances of points in time that occur in an employee's—during an employee's employment at Oracle. One of the first things that's done is when a person is brought into Oracle an assessment is done of starting pay in relation to the other employees in the group. That's done by the manager. HR may chime in and help them, but it's done with the manager.

Id. at 383. Focal reviews are also used to assess equity. Managers can also use stock options/RSUs and bonuses to address equity. *Id.* at 384. Promotions can be used to address equity as well, and as a time to consider equity in reference to the new peers. *Id.* In her role as a manager, Ms. Holman-Harries used these various tools through the compensation process to address and consider equity. *Id.* at 384-85.

Oracle has adopted this decentralized approach to compliance because "Oracle is very decentralized. They want to give managers as much responsibility for their group. Oracle has a lot of different products in place and they want to create a very entrepreneurial type of environment." *Id.* at 385. They took the same approach to other aspects of the Affirmative Action Plan regulations—Oracle had programs available for managers to correct pay disparities, and delegating that responsibility to them. *Id.* at 385-86. It also relied on managers to assess the effectiveness of the Affirmative Action Plan, with documentation done in workflows. *Id.* at 386. As Director of Diversity Compliance, Ms. Holman-Harries is more aware of EEO compliance issues, but she maintained that all managers are given training on it and told that it is part of their responsibility. *Id.* at 390.

4. Pay Equity Audits and the Like

Based on Oracle's statement of position, it did not complete centralized compensation analyses or pay equity analyses outside of preparation for litigation. *See* PX 287. This has been a consistent position. In the litigation, Oracle maintained that it did do pay equity analyses, but not as part of its compliance and at the direction of counsel. *See* PX 278; *see also* PX 26 at 221-23. The notes from Ms. Gordon's interview during the compliance review reflect that Ms. Holman-Harries stated that Oracle did compensation audits "under attorney-client privilege." Pay equity studies were done more granularly as part of focal reviews. These were not regular, but ad hoc or periodical,

depending on budget. JX 22 at 16-17.

A June 2, 2015, email from Ms. Holman-Harries states that "pay equity at Oracle, and ensuring fairness and consistency among or between cohorts, is an-going [sic] process, and an integral part of Oracle's evaluation of its compensation systems." It refers to de-centralized processes, with Carolyn Balkenhol and her team providing "quality control" rather than substantive review. "With regard to pay audits to assess legal compliance with Oracle's non-discrimination obligations and to further ensure Oracle's compensation policies and practices are carried out, those are conducted by our outside EEO compliance counsel." JX 38 at 1. Ms. Thrasher has not requested pay equity analyses of Oracle as part of her role leading diversity and inclusion initiatives. HT at 1385-86.

There have been multiple attempts to compel Oracle to perform a centralized pay equity report. In 2017 a qualified shareholder made a proposal for vote at the shareholder meeting that Oracle prepare a pay equity report examining any gender pay gaps and steps to reduce any identified gaps. The Board of Directors unanimously opposed the proposal. PX 264 at 124-26. The same occurred in 2018 and in 2019. *See* PX 450 at 63-64; PX 451 at 91-92.

5. Training

Oracle provides training to employees regarding discrimination, harassment, and the Affirmative Action Plan. Ms. Thrasher highlighted specific trainings on the Affirmative Action Plan, a "Respectful Workplace," anti-harassment, and the Code of Conduct. The Affirmative Action Plan training is mandatory for all managers and HR employees; the others are mandatory for all employees. They are provided every two years. HT at 1366-67. She was not aware of anyone receiving tangible job consequences for not taking the Affirmative Action training. *Id.* at 1384. For Diversity and Inclusion training,

> [w]e offer Unconscious Bias training. We have a Diversity and Inclusion Learning Path set up, which is a number of trainings that are available through LinkedIn Learning, on demand training for all employees. We also have the Managing Within the Law training for managers. And most recently we are rolling out a Micro and Equities training [sic].

Id. at 1367. These trainings are available to and advertised to all employees, but they are not mandatory unless managers decide to make it mandatory in their organization. *Id.* at 1367-68.

A number of employees were asked about Oracle's trainings in this area, with mixed recollection. Ms. Westerdahl remembered taking compliance, harassment, ethics, and public relations training since 2013. She didn't recall the compliance training containing information on OFCCP, affirmative action, or equal opportunity requirements. PX 26 at 36-38. Everyone is required to take compliance training and harassment training. New hires are required to take a series of training. Managers take additional trainings. Some of the trainings cover equal opportunity employment and affirmative action. *Id.* at 62-64; *see also id.* at 306. Ms. Thrasher had taken non-discrimination, Affirmative Action, and Code of Conduct trainings at Oracle. They covered prohibitions of compensation discrimination. HT at 1374-75. Per Anje Dodson, Oracle has required trainings for new employees around the code of conduct, insider training, EEO principles, sexual harassment, and health and safety. PX 14 at 22-23. Ms. Baxter recalled receiving mandatory affirmative action training since "[m]any years ago." She did not recall it including specific

information about compensation discrimination. HT at 497-98; *see also* PX 10 at 115-17. She didn't recall any formal training related to compensation discrimination. HT at 498-99.

Ms. Waggoner had taken mandatory trainings on non-discrimination, affirmative action, and the Code of Conduct, which included material on non-discrimination in compensation. HT at 1242-43. Ms. Balkenhol recalled taking training covering non-discrimination, affirmative action, and Oracle's Code of Conduct. The training was mandatory. HT at 1302-04. Mr. Webb had taken non-discrimination training that discussed pay decisions, as well as affirmative action training. HT at 1405. Mr. Bashyam had taken non-discrimination at Oracle "[m]any times." He had also taken affirmative action training. HT at 1442. Mr. Loaiza has taken affirmative action training and non-discrimination training. He was aware that Oracle had a non-discrimination policy that applied to compensation and all of the different aspects of management. HT at 1482. Ms. Cheruvu did not recall receiving any affirmative action training and didn't see it as part of her responsibility. PX 12 at 240-41 245-46, 250.

Some of the trainings are in the record. A 2018 "Fair Measures" webinar manual on "Managing Within the Law" contains a section on discrimination. *See* JX 158. It warns,

> Almost every decision you make could result in a lawsuit. Whenever you hire, train, evaluate, discipline, demote, lay off or terminate an employee, you are making a decision with legal implications. Talking about sensitive issues with employees can create a hostile environment and lead to sexual or racial harassment lawsuits. An employee's complaint about a co-worker or working conditions can lead to litigation if not addressed properly. Emotional reactions and anger toward complaints can be considered retaliation.

Id. at 8.

The training is meant to prevent lawsuits and manage "in the spirit of the law." *Id.* To that end, its four "key" concepts are to be consistent, have legitimate business reasons, document events (and particularly performance appraisals), and call on the experts. *Id.* at 17-33. Inconsistent treatment should be based on qualifications, performance, employer rules, and business need. *Id.* at 20. The manual goes on to discuss performance management in some detail, a facet not as relevant to this case. *See id.* at 34-51. The discrimination section of the manual overviews protected characteristics and what can be considered discrimination, detailing what is protected and what is permitted. *Id.* at 53-62. It also contains a discussion of affirmative action programs generally. *Id.* at 63. It lists questions that may and may not be asked of candidates, gives general dos and don'ts, and provides rules for references. *Id.* at 64-70. It also gives managers a checklist for "EEO/AA." *Id.* at 78.

Two PDFs containing screenshots from Workplace Harassment Awareness Trainings are in the record, one for U.S. Employees, *see* DX 203, and a considerably longer version for U.S. Managers, *see* DOX 204; *see also* DX 114 (older sexual harassment training course dating to 2008 covering policies as well as scenarios and knowledge checks). The employee training goes through various scenarios with interactive knowledge-checks, and makes reference to a "Harassment Handbook" that provides further guidance. *See generally* DX 203. Before moving to the scenarios, the training lays out Oracle's harassment policy and definition of harassment from the handbook. *Id.* at 15-18. It concludes with a more verbose section on remedies, links to the underlying policies, and directions for asking question or making reports. *Id.* at 193-202. The manager training is more

detailed but takes a similar approach and covers similar material. *See generally* DX 204. The bulk of the added material involves a "Manager Simulation," which address both policy and legal concerns involving potential harassment. *See id.* at 207 *et. seq.* It also includes a 50-state survey of Fair Employment Practices Laws. *Id* at 630-767.

A number of different Affirmative Action Plan trainings have been submitted. An August 2014 PowerPoint provides training on affirmative action for managers. *See* DX 124. It explains the basis for affirmative action, and the federal mandate of affirmative action for contractors. *Id.* at 3. Per the training, affirmative action involves goals rather than quotas, access rather than preferences, and nondiscrimination rather than reverse discrimination. *Id.* Oracle has also submitted an undated PowerPoint touching on affirmative action that is in some manner linked to the Oracle Women in Leadership group. *See* DX 125. It frames the presentation in terms of recruiting qualified women, but stresses the benefits, and obligations of diversity at Oracle. *Id.* at 1-2. It makes a "business case" in this respect, pointing to researching suggesting that diversity correlates with above average financial performance. *Id.* at 4-5. Statistically, Oracle is comparable to other peer employers in terms of minority and women employees and managers, but aims to outperform them. *Id.* at 6. OWL exists "to make sure that there aren't any historical or unconscious barriers inhibiting the construction of innovative and high-performing teams." *Id.* The training then proceeds to cover the Affirmative Action Plan in a similar manner to the 2014 Affirmative Action Training, except that it focuses on OFCCP's role and the source of the legal requirements. *See id.* at 9-17. It also lists a series of outreach and good faith efforts engaged in by Oracle and advocates for OWL's role in the process. *Id.* at 18-19. It concludes by stressing the "compliance is important to Oracle's business" and that "violations can lead to debarment and loss of revenue." *Id.* at 20.

In October 2015, Oracle announced mandatory affirmative action training for all managers and HR personnel in the United States in response to the new regulatory environment, to include new regulations and an increase in audits. JX 49 at 2-4. The training was set to occur in October and November 2015. *Id.* at 6. It educates managers about the components of Oracle's Affirmative Action Plan—a narrative plan, a representation analysis, and setting and communicating goals. The "representation analysis" involves comparing Oracle's representation in particular job categories with availability in the relevant community. *Id.* at 6-9. Implementing the plan involves the Diversity and Compliance Office, recruiters, managers, and human resources. *Id.* at 10-13.

An undated affirmative action course contains similar content. *See* JX 157.[133] It notes that "Affirmative Action is mandated for all companies that choose to do business with the federal government, and that have facilities with more than 50 employees." *Id.* at 2. "Affirmative Action programs set goals for increased diversity in the workplace." *Id.* It provides for "Goals not quotas," "Access not preferences," and "Nondiscrimination not reverse discrimination." *Id.* "Oracle makes a good-faith effort to increase the number of qualified applicants from protected classes in our employment application pool." *Id.*

The Affirmative Action Plan contains a narrative action plan, representation analysis, and goals and communication. *Id.* at 3. "The job group and workforce analysis quantifies employee representation within job categories such as professional, technical, sales, and administrative. Next, the analysis includes the external and internal availability in each job group and compares Oracle's representation against census availability within the local community and recruiting area." *Id.*

[133] PX 265 contains the same document. I cite only to JX 157.

"Diversity and Compliance" produces the plan and communicates it to mangers. It then monitors progress and "promotes inclusion by sponsoring training, diversity recruiting events, mentoring initiatives, and affinity groups within Oracle." *Id.* at 4. In addition, "[r]ecruiters actively participate in diversity recruiting efforts to broaden the candidate pool and ensure Oracle managers have access and opportunity to hire the best." *Id.* at 5. "Oracle managers work closely with [HR] to ensure that employment practices align to Oracle policy and vision. Managers work with HR to implement programs and support actions to address any underutilization." *Id.* at 6. HR "works with managers to communicate organizational AA goals and progress, and to implement action-oriented programs within each organization." *Id.* at 7.

A mandatory 2017 course contains similar content.[134] *See* JX 159. It explains that affirmative action programs are required of government contractors, and that "much of Oracle's business continues to be from government contracts." "Not meeting OFCCP compliance may lead to loss of government contracts and a loss of revenue to Oracle." JX 159 at 5. Per the training,

> Affirmative Action calls for minorities, women, individuals with disabilities, and protected veterans to be given access and consideration in all areas of employment decisions and with subcontracting opportunities. These groups are sometimes referred to as "protected classes" within Affirmative Action Plans. Affirmative Action does not provide for quotas, preference, or reverse discrimination. The intent of Affirmative Action is to address the government's desire to increase employment opportunities and representation of these groups, promoting Equal Opportunity.

Id. at 6. It then discusses the requirements of EO 11246, Section 502 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. *Id.* at 7-8, 11-12.

This training explains that Oracle maintains Affirmative Action Plans for U.S. sites with 50 or more employees. These are communicated to managers, notices relating to EEO and affirmative action are posted, and Oracle's Diversity and Inclusion department works internal and externally to "align" Oracle's practices and the regulations. *Id.* at 9. It states that Oracle makes "good-faith effort to increase the number of qualified applicants from protected classes in our employment application pool" and supports "diverse events." *Id.* at 10. The training then discusses OFCCP compliance reviews, and what they entail, stressing that "all managers with hiring or promotion responsibility be familiar with Oracle's practices and polices related to Equal Opportunity and Affirmative Action." *Id.* at 13-16. This 2017 training delineates four aspects of Oracle's Affirmative Action Plan: a narrative describing the plan, a representation analysis quantifying employees with categories and making representation comparisons to the local community, a set of goals and statements of progress towards those goals, and good faith efforts to include "training, recruiting, and advancement activities targeting minorities, women, protected veterans and individuals with disabilities." *Id.* at 17-19. In then discusses "Affirmative Action Strategy," which involves action by Oracle "Diversity and Compliance," HR, managers, and recruiters. *Id.* at 20-22.

[134] The copyright on the document provided is 2015, though the parties have agreed that it is a 2017 training. The slides appear to refer to a 2017 copyright. The training is also in PX 78.

6. HR Investigations[135]

Oracle's process of conducting HR investigations, at least as it relates to potential compensation discrimination, is also relevant to this case. Ms. Baxter leads the group that conducts Oracle's HR investigations in the United States. HT at 477-79. She hires investigators, who must have a high school diploma and applicable skills and experience, though not necessarily experience investigating discrimination. *Id.* at 481-82. Currently her group has eight investigators who have a variety of backgrounds, including some with legal backgrounds and others with decades of HR experience. *Id.* at 526-28. Before March 2015, investigations were completed by "HR business partners" rather than dedicated investigators. HR business partners continued to handle some investigations. *Id.* at 482-84; *see also* PX 10 at 20-24, 72, 74, 131.

No policy mandates informing Ms. Baxter's team of all complaints about pay discrimination. HT at 484; *see also* PX 10 at 75-76. They wouldn't necessarily receive complaints about pay discrimination from exit interviews. HT at 485-86; *see also* PX 10 at 86. There is an "expectation" but not policy that complaints from an exit interview would get forwarded to HR or the Legal Department, and then her unit would conduct an investigation if directed by Legal. HT at 486-87. An HR business partner could refer a complaint for investigation. PX 10 at 86-88. They are not involved in EEOC complaints unless brought in by Legal when they had already done an investigation. They do not investigate all complaints made to Legal. Rather, they conduct investigations as requested by the Legal Department. HT at 487-89.

Employees are informed of the different ways they can make complaints, starting with the onboarding process training, as well as in annual global compliance training and regular emails from the General Counsel. HT at 538-39, 546; *see also* PX 10 at 36-37, 40-41, 45. Oracle has had an Integrity Helpline since 2010, and something of the same sort before that. HT at 492; *see also* PX 10 at 39, 41-42. If a complaint is made to the helpline that concerns employee relations or is HR related, HR will receive a summary. This would include discrimination complaints. HT at 494-95; *see also id.* at 542-43; PX 10 at 54-55, 56-59, 67-68 (mechanics of system). They receive complaints in a lot of different ways. They start with some sort of intake, in order to make sure they understand the complaint so they can receive advice from the Legal Department. HT at 533-34; *see also* PX 10 at 43-44, 52. The investigation then proceeds based on the advice of counsel. HT at 534; *see also* PX 10 at 89-90, 91, 109. They do not always know the source of the complaint. HT at 539-40.

When Ms. Baxter's group is involved, internal counsel advises the investigators in each investigation. They will sometimes talk about investigations among their team. HT at 491; *see also* PX 10 at 30-34. Ms. Baxter's group uses a case management system and network drive to track investigations and store documents. HT at 495; *see also* PX 10 at 60. Ms. Baxter's case management system allows for the production of reports, including by complaint type. But no reports are provided to Ms. Holman-Harries in relation to Oracle's compliance efforts. HT at 519-20; *see also id.* at 545-48.

Oracle does not have any policies or procedures about how an HR investigation should be conducted, including a compensation discrimination investigation. HT at 507-08; *see also* PX 10 at 92-93. Ms. Baxter was only generally aware of Oracle's Affirmative Action Plan requirements and obligation to conduct compensation analyses. HT at 508-09. In her role, she didn't do

[135] Some information about HR investigations was discussed in Dr. Alexander's testimony and the exhibits underlying her experience with investigations. That information is discussed below in § V.I.8 as part of the anecdotal evidence.

compensation analyses looking at compa-ratios, or statistical analyses of compensation. *Id.* at 509-10. Ms. Westerdahl was aware of complaints about pay equity coming in infrequently and could recall about two instances in which after investigation there was a pay adjustment. PX 26 at 226-27.[136] Ms. Baxter could not think of any investigation in which her team found that gender or another inappropriate factor played a role in setting salary.[137] HT at 517; *see also* PX 10 at 216-18. Ms. Baxter denied that her office uses templates for investigation results, though she allowed that they do share examples with each other. PX 10 at 190-91.

Ms. Baxter resisted agreeing that there were any typical practices for investigations—other than following Legal's advice. But she did allow that in a compensation case the investigator would at least look at the compensation of the complainant. There were no practices beyond that as far as comparators or what else to look at. "We don't have a practice of what we do in any given case. What is done in a case would be based on the facts of that case and would always be done at the director of our internal counsel." HT at 511-12; *see also id.* at 532-33 (same point); PX 10 at 94-97. They would generally talk to the complaining party and to the accused, though there are situations where the complaining party does not want that, and they would discuss what to do with Legal. HT at 544; *see also id.* at 549-50. Sometimes an individual wishes to withdraw a complaint, but once HR has been informed, they are going to take appropriate action. *Id.* at 550.

"The purpose of [a workplace] investigation is to gather whatever concern or complaint is being raised, any facts or evidence to support that, and make a finding about whether there was any, primarily, violations of our policy." HT at 513.

> There's not a specific purpose that my team has as it pertains to discrimination complaints. Our purpose is to investigate any type of concern or complaint, understand what's being raised, review it, partner with our Legal Department on how we're going to investigate it as needed and then the investigator and the internal -- their internal legal partner make a finding.

Id. Investigations are not uniform and vary based on the facts of the case and the advice/direction from Legal. *Id.* at 514. She believed that the basic guidelines would be the same for all investigations, since each investigation was going to vary and the investigator would have to work with counsel to determine how to proceed. *Id.* at 537-38.

When an investigation is concluded the HR investigator prepares some sort of document stating the results. This is communicated to the complaining individual, and generally the accused individual. Action is also supposed to be taken, as specified by the investigation, but Ms. Baxter and her team do not have the authority to adjust pay or any budget to make corrections. HT at 514-16; *see also* PX 10 at 179. Remedial actions are up to management and Ms. Baxter's team is not in charge of monitoring them. HT at 545. Legal is already involved and would review the results and sign off before it was finalized, and so is informed about the result. An HR business partner might also be informed, depending on their level of involvement. HT at 518, 534-35; *see also* PX 10 at 125-26, 158-62. Ms. Holman-Harries would not generally receive results, as Ms. Baxter's team does not "interact

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[136] Ms. Westerdahl continued to discuss the process of handling complaints at PX 26 at 227-34. This information was covered in more detail, and with more first-hand knowledge, by Ms. Baxter.

[137] At her 30(b)(6) deposition, Ms. Baxter thought there might be one instance in which a person's salary increased as a result of an investigation by her team, but she wasn't sure it was at HQ. PX 10 at 204-07; *see also id.* at 238-39.

with her on investigations at all." PX 10 at 162; *see also id.* at 233. Others might be informed in a particular case, if there was a need to know. HT at 519. Ms. Baxter couldn't recall a time when the results of a compensation discrimination investigation did not go to the employee's manager. PX 10 at 238. They do hundreds of investigations every year, but Ms. Baxter didn't have an idea of how many involve compensation discrimination complaints. HT at 522-23. All investigations and findings are reviewed with the Legal Department. *Id.* at 523.

Retaliation for filing a complaint is prohibited. Ms. Baxter and her team would investigate a retaliation complaint if brought to their attention, but do not independently track future employment decisions involving those who file complaints. HT at 523-24. She could not remember an instance where they found that a manager had engaged in retaliation. *Id.* at 525. They do not have any sort of appellate procedure after an investigation, though they will consider objections filed by a complaining party. *Id.* at 525-26; *see also* PX 10 at 226-28.

Regardless of the (non-)existence of any policies or procedures on investigations, Ms. Baxter conducts, with the Legal Department, trainings on investigations. These cover a variety of potential investigations, including compensation complaint investigations. HT at 496-97. An August 2015, training sets forth Oracle's process for conducting HR investigations.[138] *See* JX 43[139]; *see also* HT at 499-502, 530-32, 535-36 (discussion of training); PX 10 at 104-12, 122-23, 128 (same). At the outset, it stresses that it gives only guidelines based on best practices, and that "[e]ach investigation is different and some steps may need to be reordered, omitted, added or modified." JX 43 at 3.

The training explains that HR investigations come from a variety of sources, including employees directly or a helpline. Investigators are told to consider the initial information, formulate questions prior to conducting interviews, and inform "Legal" of the potential investigation and next steps. *Id.* at 5. The legal department is involved throughout, during the investigation process and after the investigation is concluded. Management in the appropriate line of business is also involved. *Id.* at 6. When the investigation is concluded, results are communicated to the complaining individual and the accused, and investigators are told to work with management to implement any action. *Id.* at 7. Notes are to be kept and secured. *Id.* Oracle also provides a set of best practices for interviews. *See id.* at 8-18. Investigators are to be "very cautious" with assurances of confidentiality. *Id.* at 10. Discussions are confidential, except when there is "business need" or the investigation requires sharing information. *Id.* at 17. The policy against retaliation is stressed at several points. *Id.* at 10, 17.

They also developed a mock investigation to go with and assist in the training. HT at 536-37. A handout goes with the mock investigation, taking the trainee through the different stages and giving tips about questioning, planning, engaging in fact-finding, and drawing conclusions. *See* PX 110; *see also* PX 10 at 131-39 (discussion of handout). At several points there are reminders to confer with the Legal Department. *E.g.* PX 110 at 3, 10. Ms. Baxter characterized the document as providing "things to remember" or "think about" in investigations, or tips and helpful hints, rather than advice. *See* PX 10 at 137-39. The trainings are general, geared to apply to any sort of investigations. HT at 500. She was unaware of other trainings. *Id.* at 502. She did not view this training as specifying how investigations were to be done—rather it was about building investigatory

[138] JX 152 at 72-73 discusses investigations under the Code of Ethics and Business Conduct, which is less relevant to this case.

[139] PX 109 contains a PDF of the training.

skills. *Id.* at 530-31. "[E]ach and every investigation is unique and has to be conducted based on the facts of that case." *Id.* at 531.

Ms. Baxter was not aware of trainings or policies addressing the particular documents or data to gather in a compensation discrimination investigation, or on how to conduct a compensation analysis. *Id.* at 501. Her team is not given training on bona fide business factors as a general matter, but instead relies on advice from the Legal Department. *Id.* at 505. She had not taken formal training focused particularly on analyzing compensation. *Id.* at 506-07. She has taken a variety of more general training, as well as anti-discrimination training. This covered compensation discrimination and specified that one couldn't discriminate in employment decisions based on protected categories. *Id.* at 528-29. She had also taken compensation training. *Id.* at 530.

The record contains evidence relating to a number of different HR investigations. In May 2016, a female VP in Customer Support contacted an HR Business Partner to "confirm to me that I am being paid equally for my work per the Equal Pay Act and Title VII of the Civil Rights Act etc." PX 111.[140] In September 2017, the same employee forwarded a message to HR that she had sent to herself in March 2016 regarding "working with the Indian guys," expressing a worry that there was an informal network, and that Mr. Kurian preferred to do business through that informal network. She worried about whether comments she had heard reflected a more general "attitude that is impacting me directly" and felt like she was "struck in a no-win situation." PX 112. On both occasions, the HR Business Partner arranged to discuss further orally. PX 111, PX 112 at 1. This led to an investigation, with findings issued by a "Senior Employee Practices Consultant" concluding that there was "no evidence that your manager has a bias toward Indian employees or that he made inappropriate comments about women." No other evidence of improper conduct was found. PX 113.

In October 2018, the same employee contacted HR re: "hoping I will quit" reporting inappropriate treatment and comments by her manager based on sex and race, as well as pulling her in to present at a meeting at the last minute, depriving her of a chance to prepare. She suggested that this behavior was retaliatory and an attempt to embarrass her further up the chain of command and induce her to leave the company. She noted that she was consistently excluded from key meetings and kept in the dark about their outcomes, and had been undermined in front of others by not being given a seat at the table. PX 114. A December 2018 email from HR to the employee in question recounts a purported "mutual understanding" to the effect that the employee believed that her manager's manager was behaving appropriately and she was withdrawing her complaint because there were no new or ongoing concerns. PX 115.

On December 7, 2017, a "Senior Employment Practices Consultant" issued "Investigation Results" in response to a complaint from a female employee about compensation, including concerns that gender might be the basis for her lower pay. The investigator "found no evidence that your gender (or any inappropriate factors) played a role in decisions regarding your salary or the level of your salary, generally." Instead, the low salary was attributed to

> several bona fide business factors contributing to the level of your salary, including job changes over the course of your tenure with the company, your position when you started with Oracle, your starting salary at Oracle, as well as budgetary

[140] Ms. Baxter discussed this inquiry and investigation at PX 10 at 148-64.

> constraints that impacted the ability to give annual adjustments to make larger adjustments to your salary during focal processes.

HR did indicate that "we will provide recommendations to your management and HR to continue to review your salary and consider other options available to adjust your salary, as appropriate." PX 116.

Another female employee made an inquiry into whether she was paid consistent with the Equal Pay Act and Title VII in April 2017, stating that it seemed that she was on the "very low side" of what someone in her position and with her experience and contributions should be paid. PX 120.[141] The July 7, 2017, investigation results use the same boilerplate: "Our investigation found no evidence that gender or anything else inappropriate factored into the compensation decisions within your department. We did find that there are variations in pay due to legitimate business reasons such as performance levels, job scope and responsibilities, and overall contribution to the business." As to a specific male comparator, HR acknowledged that the individual was paid more, but asserted that this was not improper or gender-related and was instead due to market conditions. PX 121.

In October 2016, a female senior director contracted someone in Oracle HR inquiring about whether she was "being paid equal to others for my position at Oracle" under the California Equal Pay Act. PX 122.[142] HR did some sort of investigation, which at least involved talking to the employee and her managers. In January 2017, it concluded that there was not "any evidence that your gender played a role in decisions that were made with respect to your compensation. Given the nature and scope of your role, which is different than that of your peers, we believe you are being paid appropriately." PX 123 at 1-2. The employee had recently been promoted to a vice president position and given a raise in a focal review, and HR indicated that her compensation would again be reviewed "during focal and at other appropriate times." *Id.* at 2.

The employee replied expressing concern that HR had not provided any data to support the findings, and observing that her current salary was $50,000.00 below the minimum for her job code. She added that "I am confident that there are very few people at Oracle that have 100% identical jobs within the same job code, so I don't think that my situation is unique in this case either." *Id.* at 1. HR responded:

> I am not in a position to share data regarding other employees [sic] salaries with you, as that information is confidential to those employees. I did, however, review the salaries of other employees in this process. As we discussed, we were unable to substantiate your complaint of unlawful pay disparities based on your gender. To the extent that disparities exist, those differences can be explained by legitimate business factors unrelated to gender. If you are unhappy with your salary, please work with your management team on this issue.

Id.

In October 2016, a female employee reached out to HR about her compensation, which she

[141] Ms. Baxter discussed this investigation at PX 10 at 186-92, though the testimony added little.

[142] Ms. Baxter was questioned about this investigation at PX 10 at 192-98, though she did not provide any enlightening elaboration.

believed had not kept pace with the market over the years and was due for a correction. She also noted conversations in Silicon Valley regarding the pay gap between men and women. HR represented that it had "looked into your concerns and did not find any evidence that your gender played a role in the decisions that were made with respect to your compensation. The data I reviewed indicates you are being paid consistently with your peers performing similar work." PX 126.[143] The employee reached out again in November 1, 2018, requesting to discuss compensation in her organization confidentially. PX 127.

This led to some sort of investigation into whether there were disparities between male and female compensation, with findings made in February 2019. HR concluded:

> Based on the evidence gathered, the investigation revealed that you are paid comparably to the majority of your peers who perform substantially similar work. We found no evidence that gender, or any other protected characteristic, was a factor in the determination of your compensation or that of others. Rather, the investigation revealed that to the extent there are differences in compensation, there are legitimate and non-discriminatory reasons for those differences.

PX 128.

In February 2018, a female employee contacted an HR Business Partner seeking check on a former manager's comments that she was in the bottom 20% of the salary range, and to learn what her salary range was. She also asked for information on how to request an increase "to bring me up to standard." Last, she reported learning that women at Oracle had received a salary adjustment and wondered why she was not a part of that. HR responded by setting up a time to talk verbally. PX 124.[144] Some conversations and investigation occurred, culminating in a June 2018 reply from HR. HR denied that there was any salary increase for women exclusively, stating that instead there was a focal review for all employees. "[B]ut because the budget was very limited, your management was not able to award you a salary increase at that time. I reviewed the reasons for this decision and did not find any evidence gender played a role in who received a salary increase in tins cycle or any other." HR did review the employee's 19-year history and performance and, noting the high demand for her skills, increased her salary retroactive to February 27, 2018. PX 125.

I. Anecdotal Evidence Concerning Discrimination

Anecdotal witnesses appeared at the hearing to offer their perspectives on and experiences at Oracle. In some instances, this testimony related to evidence of discrimination, or absence of discrimination. Often the witnesses instead provided evidence of unfair, or perceived to be unfair, treatment at Oracle more generally. They also discussed the nature of their jobs at Oracle. I review their experiences here, as well as some other "anecdotal" evidence found in the record. Conclusions about the evidence are mare in the credibility and discussion sections below (§§ VII.B, VIII.A.4.a).

1. Dr. Kirsten Susanne Hanson Garcia

Dr. Kirsten Susanne Hanson Garcia is a Caucasian female who holds a Ph.D. from the

[143] Ms. Baxter discussed this investigation at PX 10 at 209-16.

[144] This investigation was probed at Ms. Baxter's 30(b)(6) deposition at PX 10 at 198-204, 208-09.

"School of Leadership and Education Sciences, specifically the Leadership Department with a focus in Educational Technology." She currently teaches at the University of San Diego. HT at 61-62. Dr. Hanson Garcia worked at Oracle from March 1998 through the end of July 2014. *Id.* at 62-63.

> I started as an individual contributor when I was hired on, and working in the Oracle Education Certification area, and then continued to just grow in my career, gaining more responsibilities, management responsibilities, moving into what was called, at the time, the Management Professional Development Department, and then it became renamed to incorporate all the different regions, so not only North America, but what we would call EMEA, so Europe, Middle East, Africa, JAPAC, so Japan, Asia, Asia Pacific and the Latin America—so it was named Organization and Talent Development. And that's where I continued to work for the rest of my tenure at Oracle.

Id. at 63. She was at HQ for the first several years, but then worked from San Diego. She travelled some, but was mostly able to work from home. She worked part time and took unpaid leaves of absence while finishing her dissertation. *Id.* at 86-90. She joined HR in 2004 as a Director, M4, and was later promoted to Senior Director, M5. *Id.* at 87-88. Her last job at Oracle was as "[S]enior [D]irector of the Global Organization and Talent Development Department." This was in HR—"strategic HR" focusing on employee development. *Id.* at 63-64.

Dr. Hanson Garcia reported to Ms. Dodson, who reported to Ms. Westerdahl. *Id.* at 64-65. She had about 70 employees reporting to her, including some managers. *Id.* at 66-67. She used the Workbench Compensation tool and could see compensation information for her reports, but not information about other employees, which she thought would have aided her in calibrating salaries. She didn't recall receiving training on how to use the tool in a non-discriminatory manner. *Id.* at 67-68; *see also id.* at 96-97. She didn't recall guidance on pay equity or of the existence of an Affirmative Action Plan. *Id.* at 69.

When other senior directors started reporting to her, Dr. Hanson Garcia learned that some of her reports, both men and women, were being paid more than she was. She learned this in November 2011 and raised it with her managers in March or April 2012. The result was that her salary was raised to the second highest in the group, behind only one female who reported to her. *Id.* at 69-72, 92-93; *see also id.* at 98-99. That was a $33,000.00 increase. In 2010 she had received a $12,000.00 increase and in 2011 a $20,000.00 increase. *Id.* at 93-94.

In Dr. Hanson Garcia's experience, there was not a lot of transparency in HR and it could be an "aggressive" and "intense" environment. She found it "stifling." She was critical of her inability to see a broader range of compensation, and for not being given full explanations for decisions. *Id.* at 73-74. Towards the end of her tenure, there was "intimidating, bullying type of behaviors that were happening," but Oracle was not interested in hearing about those issues. *Id.* at 75. This related to HR, not other job functions. *Id.* at 97. The complaints were not resolved. *Id.* at 99.

The end of Dr. Hanson Garcia's tenure with Oracle was precipitated by her participation in an offsite as one of six Oracle representatives on "Results Based Leadership," which led to further projects on reforming HR over 2013 and 2014. They presented a "forward thinking" approach and a "more incremental" solution. The reforms reorganized HR functions along what Dr. Hanson Garcia believed to be more logical lines, and would have lessened the span of control of Ms. Dodson. Ms. Westerdahl listened to the recommendations, but thought they were "too radical." A

week or two later, Ms. Dodson indicated that it was time for Dr. Hanson Garcia to move on. *Id.* at 75-78.

Dr. Hanson Garcia also testified about a meeting sometime in the mid-2000s at Oracle HQ with Ms. Westerdahl, two other employees, and herself. They were preparing a talent management offsite workshop. As part of the "chitchat" during the meeting, Dr. Hanson Garcia remembered Ms. Westerdahl saying, "Well, if you hire a woman, she'll work harder for less money." *Id.* at 79-80. This shocked Dr. Hanson Garcia, given Ms. Westerdahl's rank. She did not say anything at the time. *Id.* at 80. She never complained about that comment. *Id.* at 96.

2. Kirsten Klagenberg

Kirsten Klagenberg is currently a vice president in the "E Business Suites" group at Oracle. She identifies as female and half-Caucasian and half-Asian. She has been at Oracle 23.5 years and had been in the tech industry for 10 years before joining Oracle. She reports to Cliff Godwin, who reports to Rick Jewell, who reports to Mr. Miranda, who reports to Mr. Ellison. HT at 103-05. She is an M6. *Id.* at 116. She was previously Vice-President of Customer Programs. *Id.* at 106.

> I was hired as a senior manager in the Applications Development Division. I was actually hired to run Manufacturing Maintenance, I never actually got a chance to do that job. I started doing customer escalation work and created, from scratch, a new program for managing escalations from customers. And that included things like executive escalations and making sure the bugs were progressing correctly, working with support to make sure that the service requests that customers called in were progressing correctly. And I created the process for this from scratch. I also impacted things like bug severity, so they were more reflective of what the customer needs were and, you know, just general process, things like that. After I did that for a couple of years, because I was doing this globally I hired a person and he took on Asia. Within a few more years I progressed to director, then senior director, handled things like Y2K escalations around Euro conversions. Then I went from that to VP and by that time I had around 20 people working for me. And I've been doing that, you know, as I said, up until about five months ago.

Id. at 106-07. Ms. Klagenberg has been a VP for 16-17 years. *Id.* at 116-17. She reported to different people through her career, since "Oracle tends to re-org senior management periodically." *Id.* at 107.

> As the Vice-President of Customer Programs, Ms. Klagenberg's responsibilities
>
> were to respond to customer escalations that came in at a very senior level. Then beyond that, for major customers who were doing large implementations, it might be many years, we would also manage that customer's experience so that the bugs and the [service requests] that they needed to get done, to meet milestones in their Project Implementation Plan were met. Oracle is this huge company with hundreds of products, and if you're implementing, you know, 20 products, and you need a bug fixed from everyone for those 20 products and no one at corporate is managing that, it's going to be really hard to make your dates. So, that's kind of the role that we filled, sort of a program management role or project management role. But that was, you know, the other thing is if a customer was screaming because something was killing their business, we would be the people who would dig into the SRs, talk to

> Support, talk to Development, come up with a plan. I mean we didn't come up with the plan ourselves, we made sure the plan was developed and we made sure that people executed to plan.

Id. at 109-10. Depending on the problem, her team might solve it, but they did not do any coding—their role was to develop and coordinate a plan. *Id.* at 150-51.

In this role, she had between 14 and 22 employees working for her. *Id.* at 113-14. If she wanted to hire, she needed approval and then could open a requisition. *Id.* at 114-15. She recalled one instance in 2018 where Mr. Kurian was unhappy with the performance of a team she managed, except that there was no team because she didn't have a headcount. He then yelled at her for not getting a headcount from Mr. Miranda, except Mr. Miranda had yelled at her when she asked for a headcount. *Id.* at 115-16. She did not believe race or gender was a reason for the yelling. *Id.* at 154.

In 2017, Ms. Klagenberg had a Caucasian female join her team on an internal transfer from Oracle Support. That individual was an IC5, but was downgraded to an IC4 in the transfer because Oracle considered Support to be "a lesser job." She had to work to bring the individual in at IC4 rather than IC3. HT at 117-19. Ms. Klagenberg had a long history working with this individual and thought she was excellent. She did not believe the IC4 designation was correct. *Id.* at 120-21. There was no pay increase with the transfer because Ms. Klagenberg was told that Oracle policy doesn't allow raises with transfers. *Id.* at 121-22. This individual was not at Oracle headquarters. HT at 149.

For 7-8 years Mr. Kurian, who led the Product Development organization, was in her chain of command. *Id.* at 109; *see also id.* at 111-13. In Ms. Klagenberg's time at Oracle, she was never told that the product someone works on should affect the amount paid. *Id.* at 123. At one point, she had employees assigned to different cost centers, even though they were doing overlapping work. The employees had the same skills, and the cost center was just a matter of which work they were doing most often. The tasks they performed were essentially the same. HT at 124-27.

Ms. Klagenberg was aware that Oracle had an Affirmative Action Plan, but did not recall receiving any training about it. She did receive employment discrimination training, but no specific compensation discrimination training. HT at 127-28. She was never told that if two employees are doing similar work but have very different pay, she should adjust their pay. *Id.* at 128. She was unaware of a particular budget for this purpose. *Id.* Ms. Klagenberg did recall receiving instructions about distributing raises using the "Comp Workbench" tool. *Id.* at 128-29. During the first part of 2019, Ms. Klagenberg was reporting to Jennifer Briscoe. She gave very detailed instructions for the distribution of the budget for raises and limited the percentage of workers who could be given raises. This determined pretty much everything. *Id.* at 129-30. They included instructions to reward based on merit. *Id.* at 153. When she was reporting to Mr. Miranda, the HR Director reporting to him, Sid Deckah, would also provide detailed instructions about allocating raises. *Id.* at 130-31. These instructions also specified allocation by merit. *Id.* at 155. Raises had to be approved. *Id.* at 131. She did not know the scope of the review. *Id.* at 155. The budget was not always sufficient to keep her employees in the salary ranges. *Id.* at 133.

Ms. Klagenberg related several incidents at Oracle related to compensation and treatment of employees. In 2008, Ms. Klagenberg had a white, male rising star working for her who everybody liked and did good work, but who had "screwed up pretty badly." She took some responsibilities away from him and then took 1000 shares off the normal stock option allocation for that year. Her boss then informed her that she was losing 2000 shares, but they had found 1000 shares for her

subordinate. She complained, but her boss didn't reply and cancelled meetings. She was then re-organized and was working for someone else. *Id.* at 142-44. In the Fall of 2018, Ms. Klagenberg raised a concern to Lisa Hanson, someone in HR, that one employee was so low paid that they could never get her into the salary range. A dive and save was recommended, which would be coupled with a review of the salary of the whole team. After some review she was told that additional money was allocated, but then Ms. Briscoe directed how that money was to be spent on raises. *Id.* at 134-35.

Ms. Klagenberg did not believe that the compensation system at Oracle was "fair" because

> [i]f you stay at Oracle, the raise pools are so low that you will not be compensated at market rate after you've been there a few years. People coming in from the outside, it seems to be easier for them to get higher incoming salaries, because like transfers you can't give them more money when they transfer, so it's way easier to give a new hire from external more money than someone who transfers internally.

Id. at 136. She had heard of complaints that female salaries were lower than male salaries, roughly ten years before the hearing. *Id.* at 137-39. Ms. Klagenberg never complained that any compensation was discriminatory. *Id.* at 154.

3. Donna Kea Ng

Donna Kea Ng worked at Oracle between January 2001 and May 2019. She identifies as an Asian female. She was working in quality assurance ("QA") at the Federal Reserve Bank when she applied, and was hired for a QA job in the EBS XML [Extendable Markup Language] group at Oracle's headquarters. HT at 165-67. She was not aware of global career levels until some years later, when she learned that she was an IC3. *Id.* at 168-69. In 2004, Ms. Ng transferred to quality assurance in "Financial Application." This was the same job with a different product. Her salary did not change. *Id.* at 169-70. She described her general duties in reference to one product she worked on:

> My duty was to understand the features that comes from product management. It's certain business requirements that they put in the features for the modules. And we have to do an analysis and meet with the product team to ensure that we understand—or as a QA, I understand what the feature is supposed to do and what they expected outcome is. So, I create the test plans, with the step-by-step test scripts, so I can execute them and ensure that the result is what is expected. And that, you know, it doesn't break the system along the way. And also, to report any defects, you know, when I go through this process from end to end.

Id. at 176. There are a lot of people in QA because "every product needs a QA." *Id.* at 190-91.

Ms. Ng remained in that area until leaving Oracle. In 2005 she was promoted to "Senior QA." She took a leave of absence in 2006-07 for medical reasons. Between joining and her leave, she received two salary increases. *Id.* at 170-72. In December 2007, Ms. Ng was promoted to a "project lead," but in these promotions she remained an IC3 and she did not receive a raise. *Id.* at 172-73. This bothered her, so she brought it to her manager, who told her that to receive a raise she needed to be promoted to an IC4. He recommended the promotion, but his manager turned it down. In this time, her ratings were consistently a "4," or exceeding expectations. *Id.* at 173-74.

When she returned to work in 2007, Ms. Ng worked on the Fusion Global Financial Product and was then assigned to an Oracle Payments product. *Id.* at 176; *see also id.* at 193-94. She later learned that the man that she replaced in this assignment was an IC4, while she remained an IC3. *Id.* at 176-78. In 2016, there was a re-org and Ms. Ng had to train three QA staff that had been reassigned. She did not receive an increase in salary, and hadn't received any increase in salary or other adjustment since 2007. *Id.* at 179. In general, when people started working on the product that she worked on, they had to be trained because they weren't familiar with the product. *Id.* at 194-96.

Ms. Ng did not think her pay was fair because

> of all the feedbacks and my annual reviews justified that the feedbacks are all positive and they were rated at least a three or a four, which is the "meet" or "exceeded expectation." And I was basically the lead that I have to train whoever wants to know the Fusion payment modules, that includes support people, different customer service reps that needed to know in order to talk to the customers, and management, anybody that needs to know Oracle Fusion, they would come to me to get that cross-training.

Id. at 179-80; *see also id.* at 193. She also didn't think it was fair to not receive a pay raise in a decade. *Id.* at 180. She also thought it was unfair because a white female colleague told her that she was still getting raises. *Id.* at 180-82. This colleague told her that she was being rated a "3" or meeting expectations. *Id.* at 197. Pay information is not made available to other employees, and Ms. Ng had been told not to talk about pay and bonuses. *Id.* at 183-84.

At the start of 2019, Ms. Ng was notified that she was receiving a raise. Her boss, who had tried, unsuccessfully, to promote her, told her that the raise was the result of the California Wage Audit, though she didn't know what this was. *Id.* at 185-86. On March 21, 2019, Ms. Ng was told that she would be laid off as part of restructuring at headquarters because her skills didn't match the requirements. Her performance evaluations at this point remained a "4" and she had just been told that she was a "model employee." *Id.* at 186-88.

4. Mythily Parthasarathy Shah

Mythily Parthasarathy Shah is an Asian female who has worked for Oracle for various periods since 1999: "I started in 1999 and I continued to year 2008. And I left in 2008 and re-joined back in 2011. I left in 2018, again, and re-joined back this April 2019." HT at 200-01. The work was "mostly" at the headquarters facility. *Id.* at 201. In 1999 she was hired as a senior technical analyst, a job she held for three to four years.

> I worked as a team member in the Specialized Support Group. Part of my job responsibilities were doing detailed diagnosis of escalated issues coming from Customer Support, diagnosing the problem by going through the code in detail. I had the code, source code reference. And also attending frequent meetings, like every week, with the Product Development Group in several technologies, to understand which way the product was evolving. And also, give my feedback, based on the problems I saw, to the Product Development Team, so that they would take it into account to see which way the product should evolve.

Id. at 201-02. In this position, she was an IC3. *Id.* at 203.

In 2003 or 2004, Ms. Shah transferred to the "Product Development Group" where she became a "senior member of technical staff." *Id.* "I worked on moderately complex programming and projects, and I specialized in certain areas of server technology products. I fixed core defects and worked closely with the senior product development team to work with the outside expert communities and give them our feedback, and to influence the specification evolution." *Id.* at 203-04. In 2007, she was promoted to "principal member of technical staff," which involved increased responsibilities and a change to an IC4 designation. *Id.* at 204-05. In this job

> there were times when I focused on one specific area which was still evolving and I worked actively with my team and the external expert community, which was writing the specifications for the products that we were implementing or developing. And I was mentoring my team members and working as a lead engineer, and involved in design and also programming for primarily Java server pages in 2008. And this was the time when we were—it was actively changing, the product was actively changing, so I was focused on Java server pages.

Id. at 205. She also did some coding. *Id.*

During this first period at Oracle, Ms. Shah was working every day, 10-14 or more hours a day. This was having an impact on her family and pregnancies, and so she reevaluated whether it was worth it given her compensation and decided to leave. Her manager was understanding and offered her a part time role or working from home. These options wouldn't have addressed the issue, however, since her commute wasn't that long and working part-time would still have meant long hours, but with half the pay and no benefits. *Id.* at 206-07.

Ms. Shah returned to Oracle in 2011 as a "principal member of technical staff," the same IC4 position she held earlier. *Id.* at 208. When she returned,

> I took on the role of a team lead to continue working with various products. I took on ownership of multiple products, one was JSB, which I had helped to build, the others were HTTP Client, Web Services Infrastructure, and an open source project sponsored by Oracle which is called Eclipse Link. So, I was a team leader at Oracle and mentoring other senior team members, and helping them with various other products, as well, but these were the core four products I was working on. And these are the Cloud infrastructure products, and I did product coding for the product and more complex designs at this time.

Id. at 208-09.

Ms. Shah continued in this role until 2018, when she took a principal engineer/team lead position at another tech company. *Id.* at 209-10. This involved work on different products. *Id.* at 210. In April 2019, Ms. Shah returned to Oracle after someone she had worked with approached her about a new position that fit her experience. This led to meetings with a manager about the role, and they were both excited about the job, so she accepted the offer. The process was somewhat informal, and she was given a verbal offer before she submitted the formal application to HR. *Id.* at 210-13. She was hired as a "senior principal applications engineer," an IC5 position. *Id.* at 213. In the group,

> I work with multiple product development teams, I review their code and I find problems proactively in the performance. I review performance data that we gather

> from out Cloud across thousands of customers. And I review the matrix for the performance and I send my feedback to the product development teams on how they can improve their code to enable better performance applications.

Id. at 214. Ms. Shah works on multiple products, but all associated with cloud computing. *Id.* at 215.

Between Ms. Shah's 2011 return to Oracle and her 2018 departure, she received three raises for a total of $8,000.00. She asked for raises every year. Her managers were understanding and would run the request up, but each time she was given only a small bonus or a small raise and told that this was all the budget permitted. *Id.* at 215-16. Her managers told her not to mention her salary. *Id.* at 216. Ms. Shah did not believe that she was being recognized for the amount of work she was putting in. *Id.* She also asked for a promotion twice. In 2015, her mangers were receptive, but there was a change in the chain of command before the request was put in. She asked again in 2017 and again her manager was receptive, but she didn't receive any promotion. At this point she gave up hope. *Id.* at 217-18.

Ms. Shah "strongly felt" that she was underpaid, but didn't look for a job until 2018 because she was busy with work and family responsibilities. She was dissatisfied with her pay and at one point put her dissatisfaction in writing. This was after she accidently saw a co-worker's W-2 and saw that although he was only an IC3, he made more than she did. *Id.* at 218-21. She did not know what exactly he did, but didn't think it was "core," like her work. *Id.* at 234-35. This made her feel "wronged" because "I was not being paid what was due to me." *Id.* at 222. She talked to her manager, who told her that he would try get her a raise, and started looking for a new job because based on her experience, her manager wasn't going to be able to get more than a little bit for her. *Id.* Ms. Shah received bonuses, but that they were small, "probably enough to pay for a fancy dinner." *Id.* at 230-31. She didn't recall the amounts, but did not disagree with evidence that her bonuses were actually in the thousands of dollars. *Id.* at 231-33.

When Ms. Shah got a new job, she requested an exit interview and had HR record that she really liked working at Oracle and the management, but was leaving because of her pay. The HR rep told her that her pay was low for an IC4. The new job paid much better—at Oracle she was paid $123,000.00 per year and the new job paid $170,000.00 per year. *Id.* at 223-25. She returned to Oracle because "I got a promotion, I got a much better salary, and the work, the nature of the work was perfectly in tune with my experience." *Id.* at 224. When she returned, her salary was $190,000.00 per year. *Id.* at 225. She returned to a special role at Oracle as the first engineer on "ERP Cloud." *Id.* at 229-30. Ms. Shah never complained that her compensation was too low because of race or gender, since she would not have known if race or gender was the reason. *Id.* at 236.

5. Diane L. Boross

Diane Boross is a Caucasian female who was employed by Oracle from September 2006 through April 2018. HT at 259-61. After earning an M.S. in E-Business Management she applied to several jobs at Oracle, since it was close to her house and a relevant line of work. She went through an interview process involving several steps and a full day of interviews and then was contacted by a hiring manager. During that call, they discussed a number of things, including her previous salaries. *Id.* at 261-64. Ms. Boross was later offered a job, with the salary offer more than the lowest of her three prior salaries but lower than the two others. She didn't think this was fair, but took the job because she was changing fields. *Id.* at 264-65. She received the job that she applied for and

negotiated the salary up slightly. *Id.* at 288-89. This discussion, and later discussions about pay, were with front-line managers. *Id.* at 290.

Ms. Boross was hired as a "senior interaction designer." When she learned her career level, she believed she had been "low-balled" on account of her 25 years of prior experience, and the lesser experience of others at her level. *Id.* at 265-66. She came in as an IC3 and was later promoted to IC4. *Id.* at 269. Ms. Boross did not feel her pay was fair "[b]ecause I did not get raises regularly. I was promoted without getting a raise. I was promoted two years after I was there. And I asked my manager when would I get the raise to go with the promotion." *Id.* at 266. She raised concerns a couple of times. *Id.* at 266-67. She recollected one conversation with Jeremy Ashley, who was "VP of the entire Oracle Applications, User Experience team." She told him that she believed that she had compromised too much on pay when starting, and asked what he could do. He told her that she "would have to leave Oracle and return." *Id.* at 267-68. This upset and shocked her. *Id.* at 268.

In her time at Oracle, Ms. Boross worked on different products, but remained in the same cost center. HT at 269-71. Two years after starting, she was promoted to a principal interaction designer position, an IC4. She did not receive a raise, but was told that a raise would come over the next few years. However, this didn't happen. *Id.* at 271-72. In her new position, her duties were similar, but she worked on more general and comprehensive assignments. *Id.* at 280. After looking on "Glass Door," she concluded that she was being paid at the bottom of the curve. Her manager told her he couldn't do anything about it, which she understood was based on budgetary limitations. *Id.* at 273-74. Her manager told her not to discuss compensation with co-workers. *Id.* at 274-75. Six years after the promotion she received a raise of $3,000.00, her only raise at Oracle. *Id.* at 276.

In her 11 years at Oracle, Ms. Boross received 4-5 performance evaluations. It was "very involved" and "intense." She did her portion most years, but on some occasions her managers didn't complete their part. *Id.* at 276-78. In 2014, a new manager put her on a performance improvement plan ("PIP"), but it turned out that it wasn't a real PIP and the manager just wanted to know what she could do. *Id.* at 278-79; *see also id.* at 294-95. She received her raise shortly thereafter. *Id.* at 280. Ms. Boross worked on a variety of products at Oracle and her pay did not change. There was some additional training. *Id.* at 281-83. There were 4-5 people in her immediate group at Oracle and 50-60 on the larger team of senior draft designers. They filled in for each other when someone was out. *Id.* at 283-84. They did possess different skills, and so were not wholly fungible. *Id.* at 290-91. In her time at Oracle, Ms. Boross also produced a patent for a pattern she created. The process started in 2011-12, and it was awarded in 2017. *Id.* at 280, 284-86. She received a patent bonus in 2011, but not in 2017. *Id.* at 293-94. Between 2007 and 2017, she received about six bonuses, but she did not recall the amounts. *Id.* at 292-93.

6. Patricia Esteva

Patricia Esteva worked at oracle from October 2011 to June 2019. She earned a degree in Computer Information Systems in 1987 and worked for Nestle and VISA before joining Oracle. She identifies as a Filipino-American female. HT at 299-300. Ms. Esteva was hired by Oracle as a Business Applications Analyst—"I provided support for their Inventory Management and Product Release Group within the Manufacturing and Distribution Group." She worked on the Oracle E-Business Suite product. *Id.* at 301. She did not know her starting IC level. *Id.* at 313-14. She was paid on an hourly basis, which worked out to a regular salary of $68,000.00. *Id.* at 316. After she applied, she had several interviews. At one point she was asked about her pay at VISA. *Id.* at 310-

11. Her offer closely corresponded with her current pay. *Id.* at 311. However, she had not been receiving any benefits, and the Oracle offer came with benefits. *Id.* at 322-23.

After three years, in 2014, Ms. Esteva moved to HR, where she was an IT support analyst, supporting the installation of Taleo, the application Oracle uses for recruitment. *Id.* She moved because she was feeling stuck in her job and had gone three years without a pay increase. *Id.* at 302. The new role permitted her to start charging overtime. HT at 316-17. The new job meant an "exponential" change in her user base. *Id.* at 302-03. There was no increase in pay because she was told it was a lateral transfer, but she was led to believe that there was an opportunity to job growth in the new position. *Id.* at 303-04. In March 2015, Ms. Esteva was made lead of the group, but there was no pay or title change. In August or September she was made an M1. At this point her base pay increased from $68,000.00 to $85,000.00 and she was still allowed overtime. *Id.* at 304-06. She received thee increases in her hourly rate between 2015 and 2018. *Id.* at 317-18.

Based on comments made to her, Ms. Esteva came to believe that she was on the low end of whatever salary range applied to her job. *Id.* at 306. But she was also making overtime on top of her regular salary, which took her over $100,000.00 per year. *Id.* at 321-22. She believed her managers allowed this because of her lower salary. *Id.* at 324. After four years as a manager, Ms. Esteva was made an IC3 as part of a re-organization in the group. She also wanted to move back into that sort of role. Her responsibilities were the same except she did not have direct reports to manage. *Id.* at 306-07. When she became an IC3, they raised her salary to $100,000.00, but removed her overtime eligibility, which resulted in an actual salary cut. *Id.* at 307-08. In conversations, she again learned that her salary was on the low end of the range, which was disappointing but not surprising because she had consistently been kept on the low end of the range. *Id.* at 308-09. In her time at Oracle, Ms. Esteva worked at the headquarters facility. She worked on multiple products: "Oracle E-Business Suite, Taleo, which is called Oracle Recruiting Cloud, Knowledge Management, Oracle Service Cloud, Oracle [] Human Capital Management." Her pay did not change with product. *Id.* at 312. She never complained that she was underpaid due to her race or gender. *Id.* at 325-26.

7. Avinash Pandey

Avinash Pandey has worked in the tech industry since earning his master's degree in Engineering in 1996. He identifies as a male Asian-Indian. HT at 394. He started at Oracle in June 1999 at the headquarters facility, but then left in 2004 to join Siebel Systems. He rejoined Oracle in 2006 when it acquired Siebel. When he first began he was an IC2, applications engineer in Oracle Application Development working on a product called "Oracle Application Implementation Reserve." *Id.* at 395-96. He started at $64,000.00/year. He received a raise in early 2000, which he attributed to having started at a low salary, not knowing the cost of living in California. He was promoted to IC3 in 2000 and IC4 in 2002. The first came with a significant raise, to $85,000.00/year, but there was no raise with the second. His compensation didn't change again before he left in 2004. His big raise came after he received an offer elsewhere and Oracle came back with a counter-offer, which included the promotion to IC3. *Id.* at 396-99.

Mr. Pandey's work was in product development. In 2004 there was a reorganization that would transition his team to India, and he was given a period of time to find a job at Oracle. He found a job in IT on an internal transfer. His work changed, but the compensation did not. *Id.* at 399-401. Six weeks later he was hired by Siebel as an engineering manager. His pay increased and he oversaw roughly 50 people, mostly in India. That continued until March 2006, when Siebel was acquired by Oracle. *Id.* at 401-02. When he returned to Oracle, his compensation remained the

same as it was as Siebel, as did the compensation of those on his team. Oracle did a mapping process onto its job classifications. Ms. Pandey was assigned an M2 designation, as a manager of quality engineering. *Id.* at 402-05. All of his management at Oracle was in product development. *Id.* at 440.

In September 2006, Mr. Pandey was promoted to an M3, Senior Manager, position, but he did not receive additional compensation. *Id.* at 406. In 2008, he was given a "Group Manager" title, but remained an M3. This corresponded with his joining another group. There was no compensation change. *Id.* at 406-07. In July 2010, he was promoted to an M4 position, but his duties didn't really change. There was no change in compensation. He left Oracle in May 2019. *Id.* at 407-08. His compensation did increase during focal reviews. When he returned in 2006 he was paid between $105,000.00 per year and $115,000.00 per year. *Id.* at 408-09. He received what he termed cost of living adjustments periodically, so that when he left his salary was $142,000.00/year. *Id.* at 408-10. In his time at Oracle, Mr. Pandey worked on different products, but his compensation did not change with product. *Id.* at 408. His team size varied considerably and only a portion were at headquarters. *Id.* at 416-17, 442-43. Mr. Pandey thought that his compensation should have risen more given his promotions. He complained to managers, but was told that there wasn't much they could do. The focal budgets were so small that "they really couldn't do much." *Id.* at 409-10. During this period, he also received a series of bonuses, ranging from $2,000.00 to $20,000.00. *Id.* at 434-37. He also received equity grants and exercised and sold stock options into the six figures. *Id.* at 437-40.

Oracle eliminated Mr. Pandey's position in 2019 as part of a reduction in force. He was able to find a new job, which paid 19% more, and possibly over 50% more with the bonus plan. *Id.* at 411-12. From his conversations, he believed that his pay at Oracle was below market value. *Id.* at 412-13. His manager told him that he was well paid in the group, but he suspected from other conversations that this was because some others were hired in the 1990s at very low base pay, and so were even more underpaid. *Id.* at 413-14. In one of his complaints about pay, he brought in an article about a lawsuit against Oracle for underpaying H-1B employees with the intent of suggesting he was underpaid because of his race. *Id.* at 447-49.

Mr. Pandey remembered taking various HR trainings, but not details. He didn't remember pay equity studies or being delegated Affirmative Action Program compliance responsibility. *Id.* at 414-15. As a manager, he could see compensation information for those below him in his hierarchy, as well as other information. He could not see race or gender information. *Id.* at 417-18. He could see the pay of those who reported up through him, but not anyone else. *Id.* at 443-44. He did not consider race or gender in making pay decisions. *Id.* at 445. When people joined his team on transfers, the skills necessary and duties would change, but the compensation would not. This was an Oracle policy. *Id.* at 419-20. People on his team would change products, but their compensation would stay the same. *Id.* at 428. He could only give raises during focal cycles, which happened at inconsistent times. He was sent a guideline from HR or high-level management about the typical raises to give, and departures needed to be justified. In one year it was so detailed that he and others wondered why they didn't just have a computer enter the raises. *Id.* at 421-22. He didn't know who developed the guideline. *Id.* at 445-46. They varied by region. *Id.* at 454. In one year he departed from the guidelines and gave all five employees in a region raises when the directions were to not give raises in that region. He had discussed this with his manager, and it was approved at some levels, but then at a higher level or in HR the raises for the two lowest ranked employees were removed. *Id.* at 422-25.

The time to turn around focal reviews varied, but it was generally short, which Mr. Pandey took as an incentive to follow the guidelines because deviation meant negotiation up the line, which took time. *Id.* at 425-26. The same process and constraints existed for stock grants. *Id.* at 426-27. Mr. Pandey was aware of cost centers as something in the accounting system, and wasn't sure about any relation to compensation. *Id.* at 427-28. Oracle did have an appraisal system, but it wasn't consistently used. Employees could also have different ratings in the Compensation Workbench system and the appraisal system. *Id.* at 428-29. Rating in Compensation Workbench is required, but the appraisals were not. *Id.* at 449-50. In one year, his manager ranked all of the employees below him without consulting him. In another year he was asked to lower an employee rating, he suspected because of HR pressure. He declined to do so and told his manager to change it if he desired, but the manager kept the original rating. *Id.* at 429-31, 450.

8. Dr. Nicole Alexander

Dr. Nicole Alexander is a female African-American. She has a Ph.D. in Geography and is a "geographic information scientist and software developer" specializing in "geo-spatial application development." HT at 553-54. She worked at Oracle from May 2000 through February 2018. She worked in Oracle's Nashua, New Hampshire facility until April 2016, when she relocated to Oracle's HQ. She was laid off in February 2019. *Id.* 554. Dr. Alexander joined Oracle after sending her resume to a contact, not via an application for a specific job. This led to being interviewed and hired for a position in Nashua. *Id.* at 555-56.

Dr. Alexander started as a Senior Member of Technical Staff on the Oracle Spatial Development team in the Product Development group. Her starting pay was $90,000.00. *Id.* at 556-57. In 2005, she became a Principal Member of Technical Staff, a position she held until she was laid off. *Id.* at 557. In this position, "I was involved in software development. Specifically, I was lead developer for the Oracle Geocoder, which is the tool in the Oracle database which takes an address and returns a latitude-longitude value so that you can display location on a map." *Id.* at 558. From 2003 to 2006 she worked on an Oracle Mapper product. From 2006 through 2018 she worked on the Oracle Geocoder product. *Id.* at 560-61. She was the sole developer of work that led to a patent. *Id.* at 559-60. Her work involved the intersection of software development and geography, and how software handles geographic information. This is what she had pursued as a Ph.D. student and the work fit her background. It was new technology and drew on her creativity. To do the work she had to become familiar with the product, since it was new technology. *Id.* at 585-88. Dr. Alexander recalled seeing a posting for an H-1B position in 2005 that sounded like her job, but paid $5,000.00/year more. *Id.* at 558-59. She was granted stock options on two occasions, in 2000 and 2001. She never exercised the first grant because the stock was underwater at the time of the expiration date. She exercised the second grant in two portions starting in 2010. *Id.* at 561-62.

Dr. Alexander moved from California to New Hampshire for the job, and after 15 years she was ready to come back. Oracle agreed to the transfer. Her salary in New Hampshire was $99,700.00, and in anticipation of the move it was increased to about $108,700.00. *Id.* at 562-63. But that salary was insufficient to pay the bills in California, so Dr. Alexander sought a promotion and salary increase a few months after relocating. *Id.* at 563. She and her manger discussed the promotion and what she would need to do. Her manager told her that promotions and salary increases were separate. *Id.* at 564-65. At the time, a white male colleague who joined Oracle about six months before Dr. Alexander had received the same promotion. That individual had not met the requirements as stated by Dr. Alexander's manager and did not have a patent. *Id.* at 565-67. She

put together the requested material for a promotion application, and submitted it to her manager. She was not promoted. *Id.* at 567

In April 2017, Ms. Alexander reached out internally to someone in HR to request a discrete review of her salary, which she believed was over $50,000 less than what comparators were being paid, partly due to a relocation from Nashua to the Bay Area. This was prompted by an article reporting OFCCP's claims in this complaint. The recipient, whose position is not clear, recommended taking the concern to "HRBP." PX 118; *see also* HT 568-69.[145] The $50,000 figure was based on looking up her position on Glass Door. HT at 569. Though she asked for discrete treatment, after the inquiry Dr. Alexander's manager called her and was "really angry" and upset at her persistence, uncharacteristically raising his voice to yell at her and refusing to let her speak. *Id.* at 569-70.

The request led to an HR investigation, which involved 4-6 conversations between Dr. Alexander and someone from HR. She also asked HR to look into whether her salary was reasonable for the Bay Area. She was not provided with information about who HR was speaking to or how they were conducting a salary review. HT at 570-72; *see also id.* at 576-77. On July 3, 2017, HR issued results concluding that there was "no evidence that gender, race or anything else inappropriate factored into the compensation decisions within your department. We did find that there are variations in pay due to legitimate business reasons such as performance levels, job scope and responsibilities, and overall contribution to the business." It continued:

> Our investigation also found that your manager supported your voluntary request to relocate to California, even though there was no business need for you to relocate. We also found that while it is not standard practice to provide pay adjustments for voluntary relocations, your manager did give you an increase in pay, in fact the largest increase during the FY2016 focal process, to help with your voluntary move to a geography with a higher cost of living.

PX 119; *see also* HT at 575-78. Dr. Alexander was disappointed with the result and unsatisfied with the review since HR had not told her if her salary was reasonable for the Bay Area. HT at 577-78.

Dr. Alexander did not receive any formal appraisals at Oracle. She did receive informal feedback. Prior to her request for a salary review, it was uniformly positive. After she inquired about her salary, she received negative feedback for the first time in 17 years. She didn't think the criticisms were fair or accurate. This came 4-6 weeks after her complaint. HT at 572-74. Her manager also then told her that she wouldn't be promoted because she had to do another project first. *Id.* at 574-75. When her manager came to HQ for other meetings, they talked, and he told her that because she had been at Oracle so long, her salary was not increasing with her market value, so that if she wanted to earn more money, she needed to find another job. *Id.* at 575.

Dr. Alexander responded to HR's investigation findings, stating that she was disappointed that her manager had denigrated her performance in order to justify the salary and that he had delayed her promotion. HT at 578-79; *see also id.* at 593-94. The email pointed out that she had just reviewed her first negative performance appraisal in 17 years, and her promotion was thwarted. She also stated that the inquiry hadn't answered her questions, and that her salary situation was the same. PX 291 at 4. The investigator requested to talk on the phone. *Id.* at 3. Dr. Alexander declined,

[145] Ms. Baxter discussed this investigation in her 30(b)(6) deposition at PX 10 at 181-85, though did not offer any insight.

expressing disappointment at the way the matter had been handled. She stated a desire to share her experience with others so that they would know the consequences of making reports to Oracle HR. *Id.* Dr. Alexander believed that she had been subject to reprisal for her report, and wanted to let friends know not to go to Oracle HR with problems because they were unhelpful. HT at 579-80.

Dr. Alexander recalled that HR responded, but simply restated the original findings. HT at 579. The response came in February 2018—long after the July 2017 exchange. HR again requested a call. It summarily defended the investigation as "objective and thorough" and otherwise restated the findings, partly verbatim. PX 291 at 1. Dr. Alexander never received her promotion. HT at 580. She was told it was submitted for further review, but doubted that her manager had actually done that. *Id.* at 596-98. She was given a $6,000.00/year increase in salary at the end of 2017, but then laid off two months later. *Id.* at 580. She was informed in a surprise meeting, without any notice. Other members of the team had been transferred—two white males and a Chinese male—but her manager had opted to lay her off. *Id.* at 580-81. She did not go to HR because they had shown that they were unhelpful. *Id.* at 581-82. Dr. Alexander was able to find a comparable job at Apple, though with better hours. She makes "substantially more" at Apple. *Id.* at 582.

9. Vicky Hardman

Vicky Hardman identifies as a Caucasian female and has been working in the technology industry for over 30 years. She worked for Sun Microsystems for a little over 20 years, until it was acquired by Oracle. She has spent 10 years working for Oracle at the Santa Clara and HQ facilities. She currently works mostly from home, but reports to the HQ facility. HT at 607-08; *see also id.* at 625-26, 643-44. Ms. Hardman works as an "E-Knowledge Program Manager," a position she has held for nine years. This is a discretionary title. Her official title is Software Developer 4, an IC4 position. *Id.* at 608-09. She explained her work:

> So I'm considered a release owner. When Oracle acquired Sun, they brought in a lot of hardware products, so I'm the release owner of various hardware products. I do tape libraries, I do acme switches, I do a lot of the internal cloud products. So as a release owner, I'm responsible for releasing new products or updating sustaining products as they go.

As a release owner she works with teams and coordinates the releases for the products she is responsible for so that they work properly for the customers when the various components are combined. *Id.* at 609-10. Her background is in communications, not computer science, and prior to Oracle she hadn't had any software development positions. *Id.* at 630.

About half of the products she works on are internal cloud products. *Id.* at 610. She started off with 8-10 products, worked on 12-15 when she was an IC3, and now works on about 32, though at one point she had 40. *Id.* at 611. When she took on new products, she did not receive additional training and her compensation did not increase. But everyone on her team has their own products that they work on and are responsible for as the release-holder. They do serve as back-ups for each other in case of absence or other need. No training is provided for this backup role. *Id.* at 612-13. After she started on the team, there was a learning curve of a year or a year and half. Over time she took responsibility for more products and handled a heavier volume. *Id.* at 640.

When Oracle acquired Sun, Ms. Hardman was working on defining best practices for use of the hardware products. She received a letter telling her that Oracle would be offering her a position. It was called "systems web presence" but was a continuation of what she had done at Sun, except

that she was converted from salary to hourly. *Id.* at 614-15. This was reverted after about six weeks. *Id.* at 632. In January 2012, Ms. Hardman transferred into an IC3 role as a software developer, or E-Knowledge Program Manager. *Id.* at 610-11, 618-19. After she came to Oracle she was told that she was maxed out for salary in her job category, so the transfer was a way to be re-classified and get potential for earning growth. This was partly due to reclassification by Oracle of her position. *Id.* at 620-22. She was told that the transfer had to be approved up to Larry Ellison's office, but didn't know if he personally reviewed it or the scope of any review. *Id.* at 622, 636-37; *see also* PX 499.

The transfer did not change Ms. Hardman's pay, but allowed her to get raises in the future. HT at 622. She received a $2,000.00 raise later that year, as well as a bonus. She received a bonus in 2014 as well. *Id.* at 639, 645. The transfer involved a change to configuration engineering management work, similar to the work she did earlier in her career at Sun. *Id.* at 634-35. She learned that it was classified as a Software Developer 3 position, but she does not consider herself to a software developer and she doesn't do any coding. "I coordinate the coding as a program manager." *Id.* at 635-36. In her position now, she doesn't do any coding or software development. *Id.* at 641-42. In June 2019, Ms. Hardman's manager informed her that she had been promoted to IC4 and given a $6,000.00 raise, which was unexpected because it was outside of the usual timeframe. HT at 617-18. Her last raise came in October 2015. *Id.* at 623-24. She received a stock grant that year as well. *Id.* at 640-41, 644-46. When Ms. Hardman was at Sun, she could see Sun's salary ranges. But there was no way she knew of to review this information at Oracle. *Id.* at 624-25.

10. Kuassi Mensah

Kuassi Mensah is a Director of Product Management, an M4 position, at Oracle. HT at 980. He identifies as a Black male. *Id.* Mr. Mensah has been in the tech industry for 35 years. In 1989, he started working for Oracle in France, where he continued through 1999. He started as an engineer in the Center of Expertise ("a group of people who specialize in specific area where the Oracle database and other products needs to be sold, promoted, so we specialize in different areas of either products or environments where we run our products"), and in 1993 became a manager in the group. *Id.* at 981-82. He had up to four direct reports. *Id.* at 982.

In 1999, Mr. Mensah left Oracle France and moved to Oracle headquarters, where he has remained. *Id.* at 982-83. He transferred into an individual contributor role as a Senior Principal Consultant, an IC5 position in Advanced Technology Solutions. *Id.* at 983.

> As a member of the Advanced Technology Solutions, we have to engage with customers who would be using the Oracle faculties, and help them in terms of architecture, in terms of designing the applications, sometimes we will write code with them, make sure they have a good design for the way they will use the database in an optimal way.

Id. at 983-84. He brought his coding skills to the team. *Id.* at 984.

About a year and a half later, he was promoted to a Technical Manager position. His pay did not change. He remained in the position for six months. *Id.* Mr. Mensah moved from consulting into product management, taking a position as a Senior Product Manager. *Id.* at 984-85. The move came after he had a conversation with David Rosenberg, who was the Vice President of the Java product. Mr. Mensah was told that the new position would be one step below Director of Product Management, so an M3 position. But it turned out that he was moved into a Senior Product Manager position as an IC3, which was a demotion from what he thought was his IC5 position he

had at the time. *Id.* at 985-87; *see also id.* at 1023-25. He approached Mr. Rosenberg about this, and was told that he would fix it. But he never did, despite multiple conversations and promises. *Id.* at 988-89. Mr. Rosenberg's replacement fixed it sometime later, converting his position to a Senior Group Product Manager position at the M3 level. *Id.* at 989; *see also id.* at 1025-26.

In that position he and his report "were in charge of all the responsibilities of product management for the Java products in the database." *Id.* at 990. His responsibilities and salary did not change when he moved from IC3 to M3. He kept his single direct report. *Id.* at 990-91. Mr. Mensah remained in this position until 2011. In that time he also became responsible for the Java products in the application server, which was the result of a new strategy. *Id.* at 991-92. In 2007, a vice-president approached him about taking over five additional products beyond Java. This added new programming languages to use and tripled his workload, giving him 10 products total. *Id.* at 992-93. When he was given the additional work, he was promised two additional headcounts. But these were never provided. *Id.* at 993. Mr. Mensah prepared emails requesting the positions to be sent to Andrew Mendelsohn, who was the Senior Vice President and ultimate approver in the Database Product Organization at that time. PX 503; HT at 994-996. He continued to manage all of the products for five years and was never given the additional headcount. HT at 997. At that point, another vice president stepped in and made clear that either another headcount would be provided or Mr. Mensah would not support the products. They refused to provide the headcount, so he stopped working on the additional products. *Id.*; *see also id.* at 1040-42 (detailing corporate frictions underlying roll and loss of headcounts). During this period, he received several raises. *Id.* at 1026-27.

After 2003, Mr. Mensah would go to the vice president he reported to every six months to request a promotion to an M4 Director position. He was told that HR would not accept this, because he didn't have two reports. *Id.* at 998-99. He had started with one report, but then that was taken away in a reorganization. He was given a report again in 2014. At various times, he proposed that doing the work required up to four direct reports. *Id.* at 999-1000. His managers attempted to get him promoted, formally and informally. These were all unsuccessful. He understood that HR and "Corp Comp" were preventing his promotion because he didn't have direct reports. *Id.* at 1000-02; *see also* PX 502; HT at 1002-06. On the last day of a manager supporting the promotion in 2011, Mr. Mensah was told that the promotion could not happen, but that he could take a transfer to an IC5 position. He took the transfer, partly because he was told that he was more likely to be able to keep his office. HT at 1006-07, 1029-30, 1038. He considered this to be a demotion because even though an IC5 was perhaps a little higher than an M3, he had transferred to the U.S. in 1999 as an IC5. *Id.* at 1007. He felt that this was discrimination. *Id.* at 1008.

When he moved to an IC5 position, Mr. Mensah's salary did not change. He was given the discretionary title of "Director of Product Management." *Id.* He did not dispute that in September 2011 he received a $6,000 raise and received several raises thereafter. *Id.* at 1030-31. He continued to seek promotions and applied, as suggested, for an IC6 promotion when that possibility opened up. He did not get the promotion. *Id.* at 1008-09. He complained to his manager and vice president. He wasn't sure why he wasn't being promoted, but in November 2015 expressed to his managers that his treatment had been "unfair and discriminating." He was sad and upset by all the missed opportunities the lack of promotion had brought. PX 505; HT at 1010-11.

He was told that an M4 needed two direct reports, per HR. In 2014, he was assigned one direct report. HT at 1031-32. During this period Mr. Mensah was aware of other employees who were promoted to M4 without any direct reports. He recalled a female colleague who was made M4

with no reports. The people who replaced him as responsible for product management for Java components on the application server were also promoted to M4 without direct reports. They were not Black. HT at 1013-15. He brought this disparity to his managers' attention in 2015 and then again in January 2017 via an email listing three examples. In the email, he wondered why he wasn't being promoted with one report and "if I am being discriminated or not." PX 501; *see also* HT at 1013-13. He didn't "see any other rationale for my situation, compared to my peers." HT at 1014. Of the three individuals, one was an Asian man and another was an Asian woman. The third was a white man. *Id.* at 1033-34, 1037.

Mr. Mensah was thereafter given another direct report, and in June 2017 was promoted to M4, Director of Product Management. His duties did not change and he did not get a salary increase, though it created the opportunity for future raises. HT at 1015-16. He received a salary increase in January 2018. *Id.* at 1035-36. His second direct report did not continue to work for him, but was moved back to the group he came from. *Id.* at 1039-40. In June 2019, Mr. Mensah received more than a 10% raise, which was extraordinary, because he had previously only received raises up to 4.8%. He didn't know why he received the raise. *Id.* at 1018-19, 1036; *see also* PX 504. He also received random bonuses of various amounts. *Id.* at 1019.

Mr. Mensah' cost center, which he understood as an accounting bucket related to products, remained the same throughout his time at Oracle. HT at 1016-17. He worked on ten or more products, and has always worked on more than one product at a time. His compensation did not change with product. *Id.* at 1017. As a manager Mr. Mensah never analyzed the "fairness" of his report's pay. He did not have the ability to change his report's pay. He did not recall affirmative action training. HT at 1017-18. Mr. Mensah did not believe that his pay was fair because he missed opportunities for promotion and that adversely affected his compensation over time. *Id.* at 1019-20.

11. Kow Adjei

Kow Adjei is a Software Developer 4 at Oracle's HQCA facility, though he mostly works remotely. He is in the Database Cloud Recovery and Appliance line of business. He identifies as an African-American male. HT at 1499-1500, 1509. Mr. Adjei was contacted by OFCCP by telephone in this case. He told OFCCP that "I didn't feel I'd been discriminated against." He never heard from OFCCP again. *Id.* at 1499-1500. Mr. Adjei joined Oracle in 2012. He was recruited by a friend, who gave him a requisition number and connected him with a recruiter. He then went through an interview process with the team and hiring managers. *Id.* at 1500-01. He was hired into a Software Developer 3 position working on the Zero Data Loss Recovery Appliance. It fit his expertise because the product was fairly complex and contained a component related to storage area networks, which was something he was working on at his previous company. *Id.* at 1502-04; *see also id.* at 1521.

The product in question provides connectivity between at least five computers networked together so that data that must be securely stored can be handled at scale. The product "provides redundancy and fault tolerance while allowing for extra storage for the customers." *Id.* at 1504-05. There are multiple components to the product: hardware, an operating system, a database component, a grid-computing component, a tape library component, and an automatic storage management component. *Id.* at 1505. Mr. Adjei's job is to integrate all of the components to work together, so he works with the various teams. *Id.* at 1506. Someone working on the database component would have different background and skills. Mr. Adjei did not believe that he could transfer his skills and experiences to do that sort of work at the same level. *Id.* at 1506-07. After he

joined, another Software Developer 3 was brought onto the team, but that individual had expertise on the tape component and some of the programming, so they did different sorts of work. *Id.* at 1508.

In January 2018, Mr. Adjei was promoted to Software Developer 4. In his time at Oracle he had yearly reviews with his manager to go over performance and goals. In one of those meetings his manager told him that his skill set had improved to the Software Developer 4 level, so he would be putting a request in for the promotion. *Id.* at 1508-09. He didn't remember these reviews including entering a self-appraisal into a computer system. *Id.* at 1521. As a Software Developer 3, he "focused more on understanding the different components and learning how they worked." As a Software Developer 4, he does" a lot more of automating that process, so I write code to automate that process, designing new features that go along with that." "The product evolves consistently and so we have to find more efficient ways to make it easily manageable or easily managed." *Id.* at 1510. He also does release management—"working with the different teams to gather the software they create and then get them to integrate and test, so I can deploy to customers, so they can deploy them on their systems." *Id.* And he handles escalations of issues that Support cannot resolve. *Id.* at 1510-11.

When Mr. Adjei started at Oracle he "needed a lot more hand-holding" because the technology was new. He is far more independent now. *Id.* at 1511. There is another Software Developer 4 on his team, but they do different work. His peer works more directly with customers and working with them to get information and try to develop a potential solution. Mr. Adjei spends more time working in the system and doing diagnoses, and then fixing the problem and deploying the solution. *Id.* at 1511-12.

Mr. Adjei earned a Master's Degree while at Oracle. He did this while he was working, and it was something that he discussed with the Director when he was hired, and Oracle agreed to support him. When he worked on the degree he participated in a reimbursement program in which Oracle covered some of the tuition. Oracle also covered the costs of certificates he has earned related to his work. *Id.* at 1512-14. The degree gave him a "stronger basis in software operating systems, networking, and also just IT governance and risk assessment." This assisted in his work and in automating processes and creating more efficiencies. *Id.* at 1514.

While at Oracle, Mr. Adjei has received about five salary increases. A manager informed him that increases are based on merit, individual performance, and company performance. He believed that those criteria were reflected in his raises. *Id.* at 1515. He has also received bonuses and equity. He received equity at hire and "pretty much" every year since then. *Id.* at 1516. Every two years he took HR trainings on non-discrimination, which were mandatory. *Id.* at 1516-17.

Oracle has an organization for African-American employees, the African-American Business Leaders for Excellence. It "supports African-Americans and other minorities to have a sense of community and support each other in the business world." Mr. Adjei did not feel that he had been discriminated against at Oracle, did not think he would be paid more if he were of a difference race, and did not believe that he would be promoted more if he were of a different race. *Id.* at 1517.

12. Janet Chan

Janet Chan is a Senior Director for Program Management and Quality Assurance at Oracle. She identifies as a Chinese female. She has worked at Oracle for 24 years and is affiliated with the Redwood Shores office. HT at 1526-27. After college, she became a software engineer for National

Cash Register, which was acquired by AT&T. With AT&T, she was doing consulting at customer sites, and became tired of the remote work and so applied for a "Program Management position within Development" at Oracle. She was then hired into that job. *Id.* at 1527-29. Ms. Chan's career at Oracle has been in the "Program Management space." She worked in the "Development Organization" but was not doing software development. She started in the "Server Technology Organization," which did work on the Oracle database. She did work as a release manager for "Oracle Database" or "Enterprise Manager." She then started doing work on the "My Oracle Support" application. *Id.* at 1529-30.

While doing this work, Ms. Chan was promoted to a Senior Manager position. Her team's success led her to move to a new project in "Fusion Applications," doing "Fusion Service." My Oracle Support was an application to allow customers to open support service requests with Oracle, and Fusion Service was a product of that sort that Oracle would sell to other companies. In 2015, Ms. Chan started working on this product and changed organizations to lead product management for the Fusion Service product. She was also promoted to Senior Director, an M5 position. *Id.* at 1531-33. In 2017, her boss was put in charge of another product, a sales product, and she became responsible for program management for both lines. She also became responsible for the quality assurance organization for those products. There had been a reorganization slightly before the hearing, but Ms. Chan's job was the same and she was still in Mr. Miranda's organization. *Id.* at 1533-34.

Ms. Chan has received a number or raises, bonuses, and equity grants while at Oracle—about 10 raises, less than 6 bonuses, and 6 to 8 equity grants. *Id.* at 1535. At one point she worked for a manager who gave out bonuses every other year in order to spread the budget among more employees. *Id.* at 1559. In 2015, she received an off-cycle raise of about $35,000.00. She explained that she knew that her salary had become compressed because she had stayed at Oracle for a number of years. She shared this with the development manager/vice-president she had been working with and was starting to work directly for, and he procured her an off-cycle increase without her asking. Though she knew her salary had stagnated, she remained at Oracle because she liked working there, liked the people, and it allowed a good work/life balance and flexibility for her. Ms. Chan did not believe that her salary was compressed because of her race and gender. She no longer believes that her salary is compressed. *Id.* at 1536-38. Before she received the raise, she made complaints to her manager about her pay, but wasn't complaining every week. *Id.* at 1556-57. She did let her manager know about her understanding of how she compared to her friends. *Id.* at 1560. She didn't know where her raise put her in the applicable salary range. *Id.* at 1560-61.

Ms. Chan's current role has three main responsibilities. *Id.* at 1538-39 First, she has a release management role, "which is essentially managing the integration of the code and making sure that it builds and compiles on a daily basis, and that the product is actually cleanly packaged on a regular cadence every day—cleanly." *Id.* at 1539. Second, she has a more traditional program management role and is "responsible for schedules and milestones, and basically corralling the development organization to build new features, fix bugs and deliver products on a regular cadence to the customer." *Id.* Third, she works in quality assurance, "which is making sure that the product is tested and it meets quality criteria before we actually release it to the customer." *Id.*; *see also id.* at 1539-41 (more information on reports and their functions).

Ms. Chan has five direct reports and a team of 30 people. *Id.* at 1539. They are not fungible and could only move from one area to another "over time, with training." *Id.* at 1542. She explained:

> From a release management perspective, which is basically building and compiling the code and making sure that there's clean—you have to understand how the inner workings of the code actually is built. And there's very, very specific tools by which those are actually built, and it's a very specialized kind of skill. And those tools are actually Oracle homegrown, too, not necessarily like third party. So, that's a very specialized skill [ ]. The general program management, in terms of milestones and schedules, that's a little bit more fungible, I guess—if that's the word you want to use. But from a QA perspective you actually have to know what the inner workings of the functional product does, in order to be able to do testing. So, my program managers, my general program managers know how things are kind of put together, they know what the working—like the working parts are, in order to be able to package and to actually be able to read bugs and know like which team owns it and try to kind of drive closure to them, but they don't really, necessarily -- they know conceptually about the product, but they don't, necessarily, know the detail workings of the products, such that they could actually test it themselves or utilize the automated tools to actually run the testing, as well. So, it's a different function.

Id. at 1542-43. People in her organization share job codes but have different jobs. One report has the same job code as Ms. Chan, but they have different responsibilities. Two Senior Development Managers who work for her have the same job code, but do different work and could not do the work of the other because they don't have the right skill set. *Id.* at 1543-44.

Ms. Chan also discussed her experience conducting focal reviews. Her direct manager gives her a budget and she gets instructions from HR about what needs to be entered into the systems. When her team was about 180 people, she would push her budget down to her direct reports and they would do the allocations. Now that her team is 30 people, she knows them and will do the initial allocation itself. *Id.* at 1545-46. She considers, "what they got last year, obviously the budget, what their rating is, where they are in terms of their salary scale and also, sort of the comparison between, you know, employees that are doing the same thing." *Id.* at 1546. She then sends that to her direct reports to review and so they can make recommendations for changes. She "of course" makes changes based on recommendations. When she and her direct reports agree on the allocations, she submits it in the system for her manager to review. HR also conducts an "audit to see if there's any discrepancies," but HR does not make changes. *Id.* at 1546-47. One discrepancy that will come up is when an employee is getting a raise but the manager is not. This is something that Ms. Chan and her manager will discuss. *Id.* at 1547-48. In her experience, she and her manager will also discuss changes, since her manager will have retained some "padding" to add to raises for certain employees and she is able to get a little more than what she was allocated. *Id.* at 1548. Her manager has never changed her decisions except to add more increases for some individuals. *Id.* at 1550. Once the recommendations are finalized, they go further up the line for approval. *Id.* at 1548-49.

Ms. Chan sees herself as the primary decision maker in the focal allocation, along with the input she gets from her directs: "it's my budget and they're my employees, and I know more about what their, you know, performance ratings are, what the criticality of individuals are, and where they are actually in their pay scale, right, in their job scale, compensation scale." *Id.* at 1549. She considers those factors, as well as the budget size and comparisons with peers. She sees internal equity as part of her responsibility in the process. *Id.* at 1549. HR does provide general guidelines, which are more specific for India because Oracle has a large retention problem there. In the United States, there will be general guidelines designed to prevent using the budget to give everyone a little

raise, and instead rewarding high performers. *Id.* at 1550-51; *see also id.* at 1567-69. The equity and bonus processes are similar. Equity is used for retention and deserving employees that they want to make sure to retain. *Id.* at 1551. There is not enough equity budget to give an award to everyone. *Id.* at 1566-67. The recommendations suggest limited awards to a small portion of an organization. *Id.* at 1569. In each of the processes, the changes weren't finalized and effective until they received final approval. *Id.* at 1564-66. HR does not have the authority to independently change focal, bonus, or equity allocations. *Id.* at 1547, 1569-70.

Ms. Chan did not believe that she had even been discriminated against at Oracle because of her gender or her race. She had never witnessed discriminatory conduct at Oracle. *Id.* at 1551-52. Asked at the culture at Oracle from her perspective:

> I've been given a lot of opportunities at Oracle. I've been able to work on lots of different projects, different product lines. I work with really, really smart engineers, both male and female. I lead a team that obviously is predominantly women, that I really enjoy mentoring. You know, we have sort of a basic set of responsibilities, which is to basically deliver the product on behalf of our organization. But beyond that, my team and I—especially me, actually, I am given the freedom to look at what else the rest of the organization is doing and if there's something that interests me, I just do it. I take on those initiatives. I take on new projects. As long as the base responsibility—and we keep continuing to deliver products—we're free to work on other things if we wanted to. It's a really innovative and dynamic organization.

Id. at 1552. Oracle allocates money so that Ms. Chan can send employees to events like the Grace Hopper Conference, Oracle Women in Leadership events, and others. *Id.* at 1552-53. While at Oracle, she has taken "lots of training" on discrimination and affirmative action. *Id.* at 1553.

Ms. Chan was testifying because over her 24 years at Oracle,

> I've learned a lot at this company and I work with not only great engineers, really talented smart people, it's a very dynamic and innovative organization. But I've had the—I've been fortunate to work with really, really awesome leadership, who has been very, very supportive and willing to let me do, you know, to learn and let me do all the things I want to do in terms of all these interesting projects that are available within Oracle. It's just a great atmosphere there.

Id. at 1553-54.

13. Nachiketa Yakkundi

Nachiketa Yakkundi is a Senior Manager in Identity Management at Oracle, an M3 position in the Support function. He identifies as an Asian male. He was employed by Oracle from 1994 to 2000, but then left to join another company, Ventro. He then moved to Oblix, and it was acquired by Oracle in 2005, and Mr. Yakkundi has remained with Oracle since then. HT at 1884-85, 1898. When he started at Oracle in 1994, he was an IC1, and advanced to an IC3 or IC4 position before he left. While at Ventro he moved into management, and when he returned to Oracle he was an M3, the career level he has remained at since. *Id.* at 1897-99.

Mr. Yakkundi's cost center is "Fusion [Middleware] Identity Management." He manages 15 people. His team works "on providing technical support for the Access Management Suite of

Products, the chief of which is the Oracle Access Management Product, OAM." *Id.* at 1886. That suite of products "provides single sign-on capability between applications, provide authorization and authentication capabilities, provide figuration capabilities, and these are the overall functionality of the products." *Id.* They also do support for Access Management products that are in the Cloud line of products. *Id.* at 1887. Mr. Yakkundi manages Senior Support Engineers, Principal Support Engineers, and Senior Principal Support Engineers—IC3, IC4, and IC5 positions. *Id.* at 1888. Some of the duties are the same in that all of his employees have to be able to get the right knowledge and information from the customer, and do some investigation and analysis. But other duties differ. The more analysis and investigation is required, and the larger the problem, the higher level of employee will be assigned the work. *Id.* at 1888-89.

There are other Product Support Engineers working outside of Mr. Yakkundi's group. "They are functionally doing the same thing, in the sense that they are supporting customers, providing technical support to customers. But they are working on different products, different Oracle products all together." *Id.* at 1889. Those Product Support Engineers are doing a different sort of work that requires a different set of skills. *Id.* at 1890. He explained:

> In our team we have a requirement for a very specific set of skills that involves the web server, the application server, the operating system, a little bit of programming, and administration of all these components, as well as deep expertise in the Oracle product itself, in this case the Access Management Suite.

Id. Other teams report up to his manager, but they support different, generally less complex, suites. *Id.* at 1901-02.

There are no managers under Mr. Yakkundi and he does the hiring in his group. *Id.* at 1890-91. He creates the job postings, which involves adding the particular details and required skills that are specific to Access Management. *Id.* at 1891-92. He then gets assigned a recruiter and, later, is provided with a list of candidates. He interviews the candidates first, and then for the stronger candidates has his team members and sometimes management peers interview them as well. On "very seldom" occasions will he have his manager talk to the candidate. *Id.* at 1892. Mr. Yakkundi then makes a decision and prepares the administrative paperwork, which includes placement in a salary range. He sends that to his manager for approval, and HR is also involved, for instance completing the background check. *Id.* at 1892-93. He has never had a hiring decision overturned. He makes the decision about compensation, and those have never been overturned. *Id.* He was unaware of Oracle having a policy of basing compensation decisions on prior pay. *Id.* at 1893-94.

Every year Mr. Yakkundi goes through a formal appraisal process with his employees, based on some detailed criteria. It involves self-appraisal by the engineer and then feedback from him, over one or more discussions. He then rates the engineer and sometimes gives salary increases, depending on the rating and the overall budget. *Id.* at 1894. Mr. Yakkundi makes decisions about how to allocate his budget. He is given guidelines, but they are not detailed. The "important" guideline is not to "peanut butter" by spreading the budget evenly across every employee. He is not told how much to give particular individuals. *Id.* at 1894-95. In making pay decisions, he tries "to be as fair as I can." *Id.* at 1895. His ability to raise pay is limited by the budget. *Id.* at 1911.

Mr. Yakkundi has received training on non-discrimination that covers compensation decisions and has reviewed training on Affirmative Action and Oracle's Code of Conduct. *Id.* at 1895-96; *see also id.* at 1912. He has never witnessed or experienced discrimination at Oracle, and he did not think that he had been treated unfairly or wrongly due to his ethnicity. *Id.* at 1896.

14. Leor Chechik

Leor Chechik is employed at Oracle's HQ as a Software Developer 4. She identifies as a white female. HT at 1915-16. She joined Oracle in 2006 through the College Recruiting Program as she was finishing her Master's Degree in Computer Science at Stanford. She was attracted to Oracle because she wanted to work at an established technical company where she "could build a solid technical foundation as a new software developer." *Id.* The application process involved a screening interview and then an opportunity to select some groups with openings that interested her. She then interviewed with four to five groups at HQ. After the interviews, she ranked her choices and was matched with her top choice. *Id.* at 1917; *see also id.* at 1935-36. In her education and internships before Oracle, she learned a number of programming languages and this background was useful when she joined Oracle. *Id.* at 1933-35.

Ms. Chechik started as a Software Developer 2 in the Enterprise Manager Product Suite within the larger Server Technologies group. *Id.* at 1917-18; *see also id.* at 1936-37.

> Enterprise Manager is an application that monitors your servers. For example, within that I was working on application server, I was developing an application that monitors routing relationships, routing of data between servers. For example, when requests come into a server, you need to make sure that the load is balanced across different servers, this is the part of the application that I was working on.

Id. at 1918. Ms. Chechik believed that her initial position level was appropriate for her education and experience. *Id.* at 1919.

After a few years in this position, Ms. Chechik wanted to explore a new area and looked through internal job postings, interviewing with several groups. She then "decided to join the Fusion Apps group, as an [A]pplication [D]eveloper 2." *Id.* This occurred in the summer of 2008. *Id.* at 1922-23. The position was within a "Financial Applications" group in Fusion Apps. "There were some similarities in the tech stack, it was still Java development, but this was a completely different functional area, financial applications as opposed to server technologies, and it was more development on the front end EY, in the new group." *Id.* at 1920. This meant that she was doing more work on the application users interact with, as opposed to the coding behind the scenes. *Id.* at 1920-21. Working on the front-end and back-end involved different skills. *Id.* at 1921. Before the move, she had no experience with financial products, but her prior software development experience was helpful in working on the new product. *Id.* at 1939-40.

While Ms. Chechik was on the Fusion Financials team she was promoted to an Applications Developer 3 position. She approached her manager about next steps, and was told what she needed to do to move up a level. When she did that, she received the promotion. *Id.* The positions differed:

> As an [A]pplications [D]eveloper 2, the requirements would usually come from a manager, the technical design decisions would have already, usually, been made by that point. And I was simply implementing the portion of the web page or a web page. Whereas, in [A]pplications [D]eveloper 3, I had more ownership over that part of the application. I would be involved in the process from the beginning, talking about the requirements, building the technical design, implementing, maintaining it.

Id. at 1921-22. She had more duties in her new position, and had to consider the wider picture and

address customer issues that came in. The promotion occurred around December 2008. *Id.* at 1922.

Between a few and five years later, Ms. Chechik was promoted again, to an Application Developer 4 position. *Id.* at 1923. Her job duties and scope of responsibility changed with the promotion. *Id.* at 1924.

> At that point I had a lot more ownership, not just of a fragment of a web page or even a whole web page, but a portion of the application, a lot more responsibility over that. The work I was doing was now building, you know, affected a lot more different teams, just beyond just Financials. I was working on Java APIs that other pillars within Fusion Apps were also depending on and using for the applications. I was involved in just even beyond technical design to, you know, thinking about the architecture and how different groups fit in with ours.

Id. at 1923. One of her projects in this role involved working as a liaison across several Fusion teams/families. *Id.* at 1943-44, 1951.

Other applications developers on the Fusion financials team worked in different functional areas. *Id.* at 1924. They drew on different skills:

> For example, for those who were working on the UI application, the UI front end development, they need to be a lot more focused on the look and feel of the product. Those working on the back end, on the APIs, need to be more focused on performance, the time it takes to complete calculations and processes, and so on.

Id. at 1925.

After some time in this position, Ms. Chechik transferred into the JavaScript Extension Toolkit group as a Software Developer 4. *Id.* at 1925. She found the job via internal postings and after meeting with several groups, decided on this position. *Id.* The position involved "a completely different tech stack." *Id.* at 1926. She explained:

> Up to that point I had been a Java developer working more on back end APIs, and just a little bit of front end development. And now, within the JET group, it's a new programming language, a new concept, so JavaScript, CSS and HTML, which we use to develop UI components, so kind of the building blocks for an application instead of the web page. We would develop the button or the input text, or the table that an applications developer can use to build a web app.

Id. There was a learning curve because she had to learn a new programming language and get new trainings and refreshers. *Id.* There are other software developers on her team, but they "may own different components or parts of the framework behind them." *Id.* at 1927. "[T]here are different complexity levels for different components." *Id.* at 1928. In that group, she could not have simply picked up and started doing the work of another software developer. *Id.*

Ms. Chechik next transferred to a Software Developer 4 position in the Product Development HR group, the position she currently holds. Her discretionary title is Director of Technical Programs. *Id.* at 1928. She explained her transition and role:

> I—kind of in my spare time—have been building many different types of technical

> programs at Oracle, from kind of causal meet and greet coffee breaks, where we discuss tech topics, especially around women in tech, as part of the Oracle Women Leadership Tech Community, to larger lunch and learns where we bring guest speakers and leaders in technology to talk about careers in engineering, different products, different technologies, to workshops about how to encourage more women to present their work at conferences. And then now, as director of Technical Programs, I'm focusing my time on these efforts, as well as expanding them to campus recruiting. For example, I would help to set up a hack-a-thon on campus and bring engineers who are working on really interesting work to share it there.

Id. at 1928-29. Her job includes working to "establish and grow the Oracle Women Leadership Tech Community." *Id.* at 1929. There are about 1,100 members of the group at HQ. *Id.* In her position now, she's received "overwhelmingly positive feedback and support," both from attendees and at the executive level with event sponsorship. *Id.* at 1930.

In her time at Oracle, Ms. Chechik has received about nine raises, increasing her salary by around $50,000.00. *Id.* at 1931. She has received five or six bonuses and about five equity awards. *Id.* at 1931-32. She has learned several different programming languages, but is not equally proficient in them. *Id.* at 1949-50, 1954-55. Ms. Chechik has been a technical leader on projects and has coordinated work across multiple organizations, but she has not worked in management. *Id.* at 1950-52.

Ms. Chechik has taken non-discrimination training at Oracle—both general ethics and harassment trainings that cover the topic and training on interviewing that covered non-discrimination. *Id.* at 1932. She did not believe that her pay would be higher if she were a man or that she would have received more promotions if she were a man. She did not believe that she had been disadvantaged at Oracle because of her gender. *Id.* at 1932-33. While at Oracle, she has been a leader in OWL, a speaker at the Grace Hopper Conference, and in 2018 was presented an award by the Professional Business Women of California related to her work at Oracle. *Id.* at 1951-52.

15. Other Anecdotal Evidence

Some other anecdotal evidence was provided by other witnesses at the hearing[146], and the record contains some additional evidence of an anecdotal nature that could illustrate discrimination or Oracle's culture. For instance, an iRecruitment screenshot for a hire for an M2 QA Manager position shows an Asian female hire with a compa-ratio of 69.61. PX 100 at 1-2. Screenshots of the personnel file indicate that the employee in question received exceeds expectations ratings in 2014 and raises in (at least) 2014 and 2015, but still remained below range with a compa-ratio of 68.206. PX 101 at 6-7. The salary history indicates that the employee had been an internal promotion from an IC4 position, and that this promotion had come with a raise. *Id.* at 9-12. Taken on its own, this is an exemplar of some of the points discussed elsewhere about the tendency for focal reviews not to keep up with the market, in this case leaving an employee seemingly below market despite strong performance and allocation of raises.

Potentially speaking to Oracle's culture, on May 31, 2017, an Oracle employee in the QA

[146] Where OFCCP objected to anecdotal lines of questioning from Oracle witnesses not among the allotted anecdotal witnesses, I sustained the objection. *See* HT at 1373. Questioning relating to other anecdotal evidence already provided was presented without objection. *Id.* at 1374.

organization since 1999, and manager since 2000, sent the Legal Department an email reporting that she was resigning due to "extreme harassment" by a vice president, her manager's manager, and detailing "harassment, discrimination, intimidation, and abuse" by the individual, including inappropriate workplace behavior, purposeful overloading, excluding the employee from the workplace, setting the employee up for failure, and removing teams from her. These had caused the employee health problems. Efforts to remedy the situation by reporting through the chain of command and to HR achieved no results. The employee also mentioned other discrimination ongoing, including not hiring women and asking pregnant women to resign, as well as rampant nepotism and favoritism. JX 129 at 1-4. There is no further context to the situation and the individual did not testify at the hearing to provide additional details that would allow inferences about Oracle generally or attribute the issues complained of to upper-level executives or HR.

Additional anecdotal evidence, or evidence related to the anecdotal evidence, was provided via deposition or at the hearing. Ms. Westerdahl did not testify at the hearing, but did sit for a deposition. *See* PX 26; PX 26A. She denied ever making a comment along the lines of that attributed to her by Dr. Hanson Garcia related to paying women less than men, adding, "[t]hat would be insulting to myself." PX 26 at 338. Ms. Westerdahl did not discuss the particular allegation since the questioning was generally put and given without detailed context. But she did deny ever making a comment to that general effect. *Id.* Ms. Thrasher has known Ms. Westerdahl for 20 years and had never heard her make derogatory comments about women, or to have given any reasons to believe that she was biased against women.[147] HT at 1374.

Ms. Balkenhol has known Mr. Ellison since 1992 and Ms. Catz for 22 years. She has never heard either make a derogatory remark about women or on the basis of a person's race and had no reason to believe that either had ever intentionally discriminated. HT at 1300-02. Ms. Balkenhol has known Ms. Westerdahl since the mid-1990s and had never heard her make a derogatory remark about women or on the basis of race, and had no reason to believe she had ever intentionally discriminated. *Id.* at 1302. Ms. Balkenhol believes Oracle is supportive of women because

> we have a female CEO, we have a head of HR is a woman, our general counsel is a woman, our head of Litigation is a woman. We're very encouraged, we have a whole leadership program. And I have always felt like every opportunity is available to me if I wanted it.

Id. at 1302-03.

Ms. Waggoner believed that "[t]he work culture with respect to women is great" at Oracle, noting that women were in leadership at the company. She believes the HR culture was "very, very friendly to women." The same held for individuals of different races. She added, "[w]e win awards for our diversity and inclusion in the programs that we have." Ms. Waggoner did not believe that she had been treated differently because of her gender. HT at 1241-42.

VI. EXPERT EVIDENCE

This case is largely a dispute about statistical evidence, and the inferences to be drawn, or not drawn, from it. OFCCP relies on the opinions of Janice Fanning Madden, Ph.D. about the

[147] The same held of Ms. Dodson, who Ms. Thrasher had known for 23 years. HT at 1374.

existence of and explanation for racial and gender disparities in the relevant job functions. Oracle defends with the opinions of Ali Saad, Ph.D. [148]

[148] The record contains a number of exhibits that are "background" to the expert reports. I have reviewed this material, but it plays little role in the decision. Much of this background material submitted is raw data or mechanical information, and as a non-expert I am not equipped or permitted to conduct my own analysis or to independently reverse-engineer aspects of the expert reports. The background includes:

- Raw data for expert analysis: *E.g.* JX 128 (location data); JX 129 (all earnings data); JX 130 (appraisal data); JX 131 (employee qualification, experience, and assignment data); JX 132 (compensation and performance data); JX 133 (vacancy and offer data); JX 134 (salary, assignment, and Medicare wages data); JX 135 (requisition data); JX 136 (requisition data); JX 137 (H-1B and E-3 holder data); JX 156 (all earnings data); JX 160 (open dive and save requests); JX 161 (compensation history, including performance, bonus, and stock information); JX 162 (employee data, to include qualifications, prior employment, and assignment); JX 163 (similar collection updated); JX 164 (assignment, Medicare wages, and salary information); PX 319 (data related to college hires); PX 320 (cost center data); PX 328 (data file used by Dr. Madden); PX 328 (data file used by Dr. Madden related to term frequency); PX 330 (data file containing compensation and job title distribution information); PX 360 (data file with location information used by Dr. Madden); PX 361 (candidate skills data file); PX 362 ("CSW History" file for applications used by Dr. Madden); PX 363 (applicant education file used by Dr. Madden); PX 364 (applicant experience file used by Dr. Madden); PX 365 (application history data file); PX 366 (application source data file); PX 367 (file containing various applicant data fields); PX 368 (candidate demographics file); PX 369 (candidate language file used by Dr. Madden); PX 370 (file tracking candidate referrals); PX 371 (candidate job "preferences" data file used by Dr. Madden); PX 372 (candidate location "preferences" data file used by Dr. Madden); PX 373 (candidate organization "preferences" data file used by Dr. Madden); PX 374 (data file used by Dr. Madden, likely tracking cost centers); PX 375 (combined data file for hiring containing, e.g, qualifications, prior employment, assignments); PX 376 (data file of actions in Taleo); PX 377 (requisition "collaborator" file); PX 378 (data filed used by Dr. Madden coding requisition descriptions and qualifications); PX 379 (requisition locations file); PX 380 (requisition data file with combined fields); PX 381 (applicant skills coding data file); PX 382 (applicant "CSW history" file); PX 383 (applicant education data file); PX 384 (applicant experience data file); PX 385 (application history file); PX 386 (application source file); PX 387 (file with variety of application data coding); PX 388 (candidate demographics data file); PX 389 (collecting candidate government clearance level information); PX 390 (candidate language file); PX 391 (candidate referral source information); PX 392 (candidate job "preferences" file); PX 393 (candidate location "preferences" file); PX 394 (candidate organization "preferences" file); PX 395 (file recording Taleo data); PX 396 (applicant coding with outcomes for FY 2013); PX 397 (same); 398 (applicant coding with outcomes for FY 2014); PX 399 (same); PX 400 (applicant coding with outcomes for FY 2015); PX 401 (same); PX 402 (same); PX 403 (applicant coding with outcomes for FY 2016); PX 404 (same); PX 405 (same); PX 406 (applicant coding with outcomes for FY 2017); PX 407 (same); PX 408 (same); PX 409 (applicant coding with outcomes for FY 2018); PX 410 (file collecting data on offers, vacancies, and applicants); PX 411 (file with "collaborator" information on requisitions); PX 412 (Dr. Madden file combining description and qualification narratives); PX 413 (requisition locations file); PX 414 (file with combined requisition data coding); PX 423 ("Item 11 Report" file); PX 424 (focal, stock, and bonus file); PX 426 (bonus and performance rating file); PX 427 (equity data file); PX 428 (file containing applicant education information); PX 429 (similar file); PX 430 (file with information from Taleo); PX 431 (file with assignment and compensation information); PX 432 (applicant file with education information); PX 433 (file with Taleo information); PX 445 (file with equity, focal, and bonus information); PX 446 (file containing vacancy and offer related information); PX 447 (data file with "assignment" and compensation information); DX 264 (talent review notes spreadsheet); DX 265 (spreadsheet described as containing workflow data); DX 266 (workflow data for salary adjustments and promotions); DX 290 (H-1B data used by Dr. Saad); DX 291 (all earnings data sheet used by Dr. Saad); DX 303 (salary, Medicare wages, and "assignment" data sheet used by Dr. Saad); DX 304 (equity data used by Dr. Saad); DX 307 (vacancies data sheet used by Dr. Saad); DX 308 (additional vacancies data sheet used by Dr. Saad); DX 313 (offer compensation spreadsheet used by Dr. Saad); DX 314 (candidate data spreadsheet used by Dr. Saad); DX 317 (requisition data used by Dr. Saad); DX 318 (additional requisition data used by Dr. Saad); DX 319 (same); DX 320 (same); DX 321 (combined employee information including qualifications, acquisition, previous employment, and assignment used by Dr. Saad); DX 322 (combined performance and compensation data used by Dr. Saad); DX 323 (vacancy data used by Dr. Saad).

- Backup files from the experts, which generally include raw data, manipulations for analysis, programming and outputs form the analysis, and the building blocks of the charts in the reports: PX 8 (excerpt from Dr. Saad's backup files); PX 9 (same with error message); PX 327 (another excerpt from Dr. Saad's backup files); PX 333

(print-out of STATA.do file relied on by Dr. Madden) PX 434 (compiled backup files in excel and PDF for Dr. Madden's expert report); PX 435 (backup data files for Dr. Madden's rebuttal report); PX 441 (portion of Dr. Saad's backup data relied upon by Dr. Madden); PX 444 (same); PX 469 (backup files for Dr. Saad's expert report); PX 470 (backup data files for Dr. Saad's rebuttal report); DX 336 (large collection of backup files for Dr. Madden's expert report); DX 337 (backup files for Dr. Madden's rebuttal report); DX 338 (voluminous backup files for Dr. Saad's expert report); DX 339 (backup files for Dr. Saad's rebuttal report); DX 340 (assorted backup files for statistical analyses underlying Second Amended Complaint); DX 341 (partly redacted backup files for analyses underlying Notice of Violation).

- Professional literature relied upon by Dr. Madden: PX 452 (Bloom and Killingsworth article "Pay Discrimination Research and Litigation: The Use of Regression"); PX 453 (Finkelstein article, "The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases"); PX 454 ("Fisher article "Multiple Regression in Legal Proceedings"); PX 455 (excerpts from Hanushek and Jackson, *Statistical Methods for Social Scientists*); PX 456 (Killingsworth article, "Analyzing Employment Discrimination: From the Seminar Room to the Courtroom"); PX 457 (excerpt from SAGE Encyclopedia of Social Science Research Methods, Little, "Endogenous Variable"); PX 458 (excerpt from SAGE Encyclopedia of Social Science Research Methods, Little, "Exogenous Variable"); PX 459 (except from Singleton, Jr. and Straits, *Approaches to Social Science Research*, 3rd ed.); PX 460 (Amemiya article, "Tobit Models: a Survey"); PX 461 (Tobin article, "Estimation of Relationships for Limited Dependent Variables"); PX 462 (Kennedy, *A Guide to Econometrics*, 4th ed. textbook); PX 463 (Altonji and Blank chapter, "Race and Gender in the Labor Market," from *Handbook of Labor Economics*, Vol. 3); PX 464 (Blau and Kahn working paper, "The Gender Wage Gap: Extent, Trends, and Explanations"); PX 465 (Gerhart article, "Gender Differences in Current and Starting Salaries: The Role of Performance, College Major, and Job Title"); PX 466 (Stanley and Jarrell article, "Gender Wage Discrimination Bias? A Meta-Regression Analysis"); PX 467 (Wilson and Rodgers III Economic Policy Institute report, "Black-white wage gaps expand with rising wage inequality"); PX 468 (Quintana-Garcia and Elvira article, "The Effect of the External Labor Market on the Gender pay Gap Among Executives").

- Professional literature relied upon by Dr. Saad: DX 207 (Angrist and Pischke, "The Credibility Revolution in Empirical Economics: How Better Research Design is Taking the Con our of Econometrics"); DX 208 (Angrist, Chen, and Song, "Long-term Consequences of Vietnam Era Conscription: New Estimates using Social Security Data"); DX 209 (Becker, "Chapter III: Investment in Human Capital: Effects on Earnings," in *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education*, 3rd ed.); DX 210 (Bertrand, Goldin, and Katz, "Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors"); DX 211 (Blau and Kahn, "The Gender Wage Gap: Extent Trends, and Explanations"); DX 212 (excerpt from Cahuc and Zylberberg, *Labor Economics*); DX 213 (excerpt from Cameron and Trivedi, *Microeconometrics: Methods and Applications*); DX 214 (excerpts from Eherberg and Smith, *Modern Labor Economics: Theory and Public Policy*, 12th ed.); DX 215 (Goldin, "A Grand Gender Convergence: Its Last Chapter"); DX 217 (excerpt, Chapter 6, "Multiple Regression" from Greene, *Econometric Analysis*, 2nd ed.); DX 218 (excerpt from Gujarai, *Basic Econometrics*, 2nd ed.); DX 219 (Heckman, Lalonde, and Smith, Chapter 31 "The Economics and Econometrics of Active Labor Market Programs" in *Handbook of Labor Economics*, Vol. 3, Ed. Ashenfelter and Card); DX 220 (excerpt from *Handbook on the Economics of Discrimination*, Ed. Rodgers III); DX 221 (excerpt from Hicks, *Fundamental Concepts in the Design of Experiments*, 3rd ed.); DX 222 (Imbens and Wooldridge, "Recent Developments in the Econometrics of Program Evaluation"); DX 223 (Jovanovic, "Job Matching and the Theory of Turnover"); DX 224 (excerpt from Kennedy, *A Guide to Econometrics*, 6th ed.); DX 225 (Killingsworth and Heckman, "Female Labor Supply: A survey," Chapter 2 in *Handbook of Labor Economics*, Vol. 1, Ed. Ashenfelter and Layard); DX 226 (Lazear, "Performance Pay and Productivity"); DX 227 (Litecky, Aken, Ahmad, and Nelson, "Mining for Computing Jobs"); DX 228 (Madden, "Gender Differences in the Cost of Displacement: An Empirical Test of Discrimination in the Labor Market"); DX 229 (Madden, "The Persistence of Pay Differentials: The Economics of Sex Discrimination," Chapter 3 in *Women and Word: An Annual Review*, Vol. 1, Ed. Larwood, Stromberg, and Gutek); DX 230 (Mincer and Polachek, "An Exchange: The Theory of Human Capital and the Earnings of Women: Women's Earnings Reexamined"); DX 231 (Mincer and Polachek, "Family Investments in Human Capital: Earnings of Women"); DX 232 (Mincer, "On-the-Job Training: Costs, Returns, and Some Implications"); DX 233 (Oreopoulos, von Wachter, and Heisz, "The Short- and Long-Term Career Effects of Graduating in a Recession"); DX 234 (Piette and White, "Approaches for Dealing with Small Sample Sizes in Employment Discrimination Litigation"); DX 235 (Spivey, "Time Off at What Price? The Effects of Career Interruptions on Earnings"); DX 236 (Tambe and Hitt, "Job Hopping, Information Technology Spillovers, and Productivity Growth"); DX 237 (Waldfogel, "Understanding the 'Family Gap' in Pay for Women with Children"); DX 238 (Wowczko, "Skills and Vacancy Analysis with Data Mining Techniques"); DX 241 (U.S. Bureau of Labor Statistics Report 1075, "Highlights of women's earnings in 2017", August 2018).

A. Dr. Saad's Expert Report Responding to the SAC

This litigation is based on the allegations in the SAC. Dr. Saad's July 19, 2019, "Expert Report" critiqued the analyses underlying those allegations. *See* JX 103 at 5; *see also* HT at 1585-87. For the purposes of hearing, Dr. Madden's expert report supplanted the analysis underlying the SAC and provides the basis for OFCCP's claims. Dr. Madden's report, while relating to the same broad allegations, makes notable alterations in methodology and substance. As a result, Dr. Saad's expert report has limited relevance—it critiques an analysis that is not being offered. I thus review its findings only in outline.

In summary, Dr. Saad opined that:

> 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.

JX 103 at 6-7; *see also id.* at 20-21, 142-45 (extended summary).

Dr. Saad concluded that OFCCP incorrectly used multiple regression analysis over groups of employees who were not similarly situated, producing misleading results because it grouped employees in high-level job functions and then controlled only for standard job title, part or full-time status, time in company, and prior experience. Dr. Saad concluded 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 (like patents, tenure in current

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- Other articles and materials relied upon by Dr. Saad: DX 206 (New York Times June 27, 2018, "Apple and Samsung End Smartphone Patent Wars"); DX 216 (CNN article March 27, 2018, "Google loses Android battle and could owe Oracle billions of dollars"); DX 256 (December 2001 "Gender Equity Report" by Gender Equity Committee at the University of Pennsylvania); DX 239 (list of Oracle iDeveloper and Oracle ADF Releases from 1994 to August 2017); DX 240 (print out of webpage containing links to archived Consumer Price Index Supplemental Files from Bureau of Labor Statistics); DX 242 (print out of webpage from Bureau of Labor Statistics Occupational Outlook Handbook related to Computer Hardware Engineers); DX 243 (document related to software package for predicting gender using names); DX 244 (document related to software package for predicting demographic information using name); DX 245 (series of documents related to software package for predicting gender using names from historical data); DX 246 (LinkedIn profile); DX 247 (same); DX 248 (chart of bachelor's degrees conferred to males by race/ethnicity and field of study for 2014-15 and 2015-16); DX 249 (same for females); DX 251 (Oracle fact sheet from website, 2019); DX 252 (results of Oracle job search, November 2019); DX 253 (information on Oracle labs); DX 254 (list of Oracle products); DX 255 (USPTO datasets from Reed Tech); DX 293 (Long-Term Equity Incentive Plan document dated February 1, 2018); DX 294 (printout of internal webpage on "Patent Legal").
- Resumes relied upon by Dr. Saad: DX 267 to DX 289.

standard job title, tenure at non-USA Oracle affiliates, variables related to type of work, etc.). JX 103 at 8, 11-14.

These conclusions were partly based on Dr. Saad's view that Oracle is a large, complicated company with a vast array of different products that employees work on in different capacities. The employees at issue in this case occupy different functional positions, working in different organizations and work on different products. The defined classes collect employees working across products, organizations, and at every career level in Oracle. The career levels themselves each involve broad pay ranges. JX 103 at 21-32; *see also* HT at 1622-26. Within standard job titles, compensation varies significantly and based on Dr. Saad's review or requisitions, the skills involved in jobs within a standard job title also vary significantly. Dr. Saad concluded that standard job title does not similarly situate employees at Oracle. JX 103 at 33-44; *see also id.* at 222-55 (word cluster analysis of requisitions); HT at 1626. Dr. Saad then explored the implications of this variance for statistical modeling, generally finding that it limits the sort of inferences that can reasonably be drawn. For instance, the relationship between tenure and compensation differs between some organizations, undermining inferences based on an aggregated analysis. In Dr. Saad's view, OFCCP's model suffers from omitted variable bias because it does not include factors that actually matter in setting pay, as seen in the poor predictive power of the model in scatterplots. JX 103 at 45-53.

Dr. Saad faulted OFCCP for using averages over broad groups of differently situated employees in its analyses, which obscured important differences. This flaw is seen in the poor explanatory power of the model, as well as the inconsistent outcomes it produced in regards to findings of discrimination in different job functions. *Id.* at 14-16. In his view, scatterplots comparing actual pay to predicted pay under the model show that OFCCP's model is missing factors that matter for compensation. *Id.* at 56-66. Dr. Saad faulted OFCCP's NOV and SAC model for aggregating employees on a large scale on the assumption that Oracle is a "monolithic entity," with the result being that the averages in the aggregated analysis failed to produce strong evidence to support any inference. Dr. Saad further pointed out that if OFCCP's conception of Oracle was proper, the same results should be found in all 16 job functions, but in fact OFCCP only made allegations as to three and its model showed no statistically significant results elsewhere. *Id.* at 66-70; *see also* HT at 1630-32. From the full results, Dr. Saad did not see any consistent or systemic adverse pay outcome by gender or race at Oracle. HT at 1632-33. His analysis also showed that the deviation for women and Asians from predicted compensation varied considerable by manager, rather than reflecting a trend at the company as a whole. JX 103 at 70-77.

Dr. Saad opined that OFCCP mis-measured pay by including things like stock awards/options that were exercised but not earned in the year in question, with the result of allowing employee choices to shape the measure of compensation, and inflated damage estimates. The error, in his view, was the use of Medicare wages, rather than a measure that looked to pay earned in a particular year, even if it vested later.[149] *Id.* at 10, 77-79.

Dr. Saad faulted OFCCP's model for incorrect measures of tenure and experience. It did not count time at non-U.S. Oracle affiliates as Oracle experience and used age as a proxy for experience generally. *Id.* at 79-81. He also criticized the model for not accounting for leaves of

[149] Social security wages are wages subject to the social security tax and are subject to a cap--$132,900 in 2019. Medicare wages are those subject to the Medicare tax. There is no limit to Medicare wages. *See* PX 172 at 1; *see also* PX 448 at 16-17 (IRS instructions for W-2 and W-3 forms from 2019 relied upon by Dr. Madden).

absence. *Id.* at 81-83. In addition, the model did not control for time in a standard job title, which impacts pay. *Id.* at 83-84. And Dr. Saad faulted the model for not controlling for the particular products and services that the employees in question work on at Oracle, since the importance/profitability of the product/service and skills needed to work on it impact compensation. *Id.* at 84-86. Further, the model did not control for patent awards, which would provide some measure of "innovation and expertise." *Id.* at 86-88.

Once various errors in OFCCP's analysis were corrected, the statistically significant results largely disappeared. He opined that the corrected analyses are inconsistent with inferences to compensation discrimination. *Id.* at 14. His "refined" regression model added controls for Oracle tenure, cumulative leaves of absence, time in standard job title, organization, patent bonus, leave of absence in current year, and arrival at Oracle via acquisition or experienced hire. *Id.* at 89-106.

As to OFCCP's allegations regarding starting pay and prior pay, Dr. Saad opined that the categories OFCCP used for analysis are too broad and do not reflect the way that Oracle actually hires. For instance, OFCCP's analysis looked to career level, not standard job title, in conducting this analysis. Even had standard job title been used, this would not have captured differences in skill and the organization within Oracle. He added that the model only shows correlation between starting pay and prior pay, but that this is what one would expect absent discrimination, and is found in the economy generally. A proper model would have held constant the skills of new hires, but OFCCP did not do this. *Id.* at 17, 107-15.

Dr. Saad concluded that OFCCP's assignment theory was based on too crude a model and did not consider the job to which an individual applied. Once that was added, there were no statistically significant results. He determined that Oracle was not steering hires into particular jobs/career paths, and that most employees were hired into the job level they applied for. There were not statistically significant differences in up-leveling or down-leveling. *Id.* at 18, 116-25; *see also* HT at 1710-22.

Dr. Saad added that based on his analysis, there is no statistically significant different in starting pay or wage growth by race or sex, belying claims of discrimination. JX 103 at 18-19, 125-31. Dr. Saad also accused OFCCP of selectively reporting its own statistical findings to only include those that supported its hypothesis. He determined that other findings in the analysis were inconsistent with the theory that Oracle was systematically discriminating, but OFCCP elected to obscure those findings. *Id.* at 19, 131-37. Finally, Dr. Saad concluded that OFCCP's SAC analysis cannot show that any damages are owed, detailing a number of alleged flaws in the calculations presented and methodology used. *Id.* at 20; *see also id.* at 138-42.

B. Dr. Madden's Expert Report

OFCCP's case at hearing relied on the expert opinion of Dr. Madden, as first articulated in her July 19, 2019, report, "Analysis of Gender and Racial Differences in Compensation At Oracle, 2013-2018." *See* PX 1. Dr. Madden was engaged "to analyze whether there are gender differences in compensation in the Product Development, Information Technology, and Support job functions," "whether there are racial differences in compensation in the Product Development job function," and "the relationship of Oracle's decisions on job assignment and compensation at hire on any subsequent gender and racial compensation differentials" at Oracle's HQ between 2013 and 2018. PX 1 at 3; *see also* HT at 704-05. She was also tasked with estimating economic damages, but since damages have been bifurcated, those analyses are not directly relevant now. PX 1 at 3.

Dr. Madden's "principal results," omitting the damages calculations, were that women in those job functions with comparable age, education, and seniority earn 18% to 24% less than men, with three-quarters of the disparity coming from job assignment. The disparities existed in base pay and stock awards, and were the result of starting pay at Oracle and growth over time. Asians in product development earned 12-18% less than white employees, with 60% of the difference arising from "assignment." Average base pay was 7% less and there were further disparities in stock awards. The disparities were mostly due to starting jobs at Oracle. African-American employees earned 14-40% less than comparable white employees, with over 75% of the disparity resulting from job assignment. Disparities existed in both base pay and stock awards. Last, "[f]or employees who came to Oracle from other jobs, race and gender differentials in pay between 2013 and 2018 reflect the race and gender differentials in their starting pay, which are highly correlated with their pay at their prior jobs." PX 1 at 5-6; *see also* HT at 705-10 (summary of conclusions).

Dr. Madden approached the analysis by applying "human capital theory." Compensation varies by productivity, but productivity is hard to measure directly, so compensation analysis looks to the factors that make employees more productive, such as experience and education, with experience drawing on both tenure with an employer and age. PX 1 at 7. "If one individual has more education, or more job experience, he or she is more likely to be entitled to higher compensation." *Id.* Analysis of potential gender or racial disparities controls for systematic differences in the demographic groups at the time of hire, qualifications that are systemically different by gender and race after other credentials are included, and differences in qualifications that result from employee choice. *Id.* at 8. Crucially for Dr. Madden, since the analyses are about general characteristics across groups, she only compared what she believed to be equivalently qualified groups, not individuals. *Id.*

Thus, as a sort of foundational principle:

> Any qualifications that affect compensation that are possessed by equivalent proportions, or in equal intensity, by both gender or racial groups *after* controlling for any qualification differences already included in the model or analysis, cannot affect the size of the gender or racial disparities and, therefore, cannot affect the true level of gender or racial disparity in compensation practices.

Id. (emphasis in original). As this point is later developed, it serves as the basis for Dr. Madden's approach. She is not interested in individual employee compensation and contends that including individualized factors would render the results less precise. *Id.* at 8-9. Moreover, the particular job that an employee holds, or held, at Oracle is not part of the analysis controlled for, because Oracle's actions in making assignments could be discriminatory. *Id.* at 9. "Compensation differences that cannot be explained by differences in credentials that employees bring to Oracle are suspect if they are also associated with gender or race. After appropriately taking account of productivity, economists generally attribute such differences to discrimination." *Id.*

To test whether there are suspect disparities in compensation by gender or race, Dr. Madden used regression analyses. *Id.* at 9-10; *see also* HT at 718-22 (explanation of regression analysis and methodology). Her analyses lean heavily on a distinction between "exogenous" and "endogenous" characteristics. Exogenous characteristics are not in Oracle's control. They include "race, ethnicity, gender, age, time at Oracle, and education." Endogenous characteristics are in some part in Oracle's control. They include "[j]ob and management responsibilities, or global career level." Dr. Madden's analyses are based on another foundational principal: only exogenous characteristics may be

considered in determining *whether* Oracle is discriminating. Endogenous characteristics are in Oracle's control, at least in part, and thus could be a mode of discrimination. Analysis of endogenous characteristics, then, is proper "in order to assess the mechanisms by which discriminatory compensation occurs." PX 1 at 10; *see also* HT at 722-25.

Dr. Madden used ordinary least squared regression analysis to control for legitimate factors, with compensation as the dependent variable and controlling for the legitimate independent variables, tracking experience and education. Other controls can be added to determine the source of the disparity. PX 1 at 11-12. The method provides a measure of both the size of the gender or racial disparity and an estimate that the disparity is due to chance. A regression estimate that is 1.96 standard deviations indicates a 5% chance that the disparity is due to chance alone. In the field, a regression estimate of two or more standard deviations is considered "statistically significant." *Id.* at 12-13; *see also* HT at 730-35 (further explanation of standard deviations, probability, and statistical significance). Statistical significance is a measure of the likelihood that an outcome could have occurred by chance, considering the controls in the model and without saying anything about whether or not the controls are correct. HT at 946.

Dr. Madden's analyses sometimes looked at different measures of compensation, but focused on Medicare earnings as the measure of total compensation, which includes base pay, bonuses, and stock awards. Tobit regression was used for bonus and stock analyses, since many employees receive no bonus or stock. PX 1 at 13; *see also* HT at 806-07. In analyzing base pay alone, there is no need to adjust for leaves of absence or hours, since base pay is a pay rate measure. Medicare earnings combine base pay, bonus, and stock awards for a given period as a total compensation figure. It must be controlled for the amount of time worked, since it is a total compensation rather than rate of compensation measure. PX 1 at 13.

In her analysis, Dr. Madden focused on groups, and thus believed that "[a]ny characteristics that affect individual employee compensation levels but are possessed by equivalent proportions, or at equal levels, by both genders or races do not matter in the analysis of whether gender or race affects compensation." PX 1 at 48. Hence:

> In the absence of evidence to the contrary, I assume that employees are equivalently qualified by gender and race. No presumption that one group's "unmeasured" qualifications, or jobs, are on average "inferior" to those of another group should be made, when the groups have, on average, equivalent measured qualifications. I assume that employees of the same age, time at Oracle, educational level and work area do not systematically differ by race or gender in their qualifications. Therefore, to quantify racial or gender disparities in compensation, it is only necessary that we control for *systematic* differences by race or gender that remain after we have controlled for all other differences that exist by group.

Id.

Dr. Madden likened this assumption to a clinical trial, where difficult to measure characteristics are randomly distributed among control and trial groups. *Id.* at 49. So in analyzing discrimination across groups, Dr. Madden measured for things like education and experience that may systematically vary by group, but bracketed other differences. *Id.* at 49-50. Essentially, "[a]ny 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 50. In sum, Dr. Madden did not

believe it was important to control for any factors that varied between individuals but not groups, and did not control for factors that Oracle had some influence over, like the job assignment. *Id.*

To analyze potential gender disparities, Dr. Madden started with raw differentials in Medicare earnings in the Product Development, Information Technology, and Support job functions by gender. She then added control factors to determine what might explain the disparities. She started with race/ethnicity, then an age measure as a proxy for work experience (age and square of years of age).[150] Next she added 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 and exempt status, management status, and global career level. PX 1 at 14-19.[151]

The results are displayed in table form. The following is Dr. Madden's Table 1(a), which analyzes gender differences in Medicare Earnings:

Table 1(a)

2013 through 2018 Gender Differences in Medicare Earnings at Oracle Headquarters by Year, with Various Characteristics Controlled

			Controls for ...															
			Gender Only (1)		Adds Race/Ethnicity (2)		Adds Age (3)		Adds Education (4)		Adds Time at Oracle (5)		Adds Exempt/Non Exempt and Job Descriptor (6)		Adds Management Control (7)		Adds Global Career Level (8)	
Year	Number of Workers	% Women	Gender Coefficient	ST DEV*	Gender Coefficient	ST DEV	Gender Coefficient	ST DEV	Gender Coefficient	ST DEV	Gender Coefficient	ST DEV	Gender Coefficient	ST DEV	Gender Coefficient	ST DEV	Gender Coefficient	ST DEV
2013	4327	26.3%	-0.213	-11.96	-0.199	-11.33	-0.200	-12.07	-0.201	-12.17	-0.199	-12.40	-0.157	10.50	-0.128	-9.21	-0.065	-4.96
2014	4279	26.4%	-0.232	-11.69	-0.217	-11.09	-0.221	-11.83	-0.223	-12.05	-0.221	-12.29	-0.166	-10.07	-0.134	-8.70	-0.063	-5.21
2015	4225	26.1%	-0.188	-10.60	-0.173	-9.94	-0.174	-10.61	-0.176	10.80	-0.177	-11.06	-0.132	-8.95	-0.103	-7.57	-0.046	-4.27
2016	4273	25.5%	-0.199	-10.63	-0.189	-10.23	-0.198	-11.35	-0.203	-11.70	-0.199	-11.72	-0.150	-9.68	-0.119	-8.23	-0.052	-4.74
2017	4241	25.8%	-0.237	-11.05	-0.228	-10.72	-0.231	-11.46	-0.238	-11.91	-0.239	-12.15	-0.178	-9.92	-0.146	-8.80	-0.058	-4.71
2018	4019	26.2%	-0.242	-11.23	-0.235	-11.02	-0.231	-11.38	-0.238	-11.78	-0.239	-12.04	-0.187	-10.19	-0.151	-8.91	-0.058	-4.71
* ST DEV stands for Standard Deviation																		

PX 1 at 62. For 2013-2018, the raw gender differential in Column 1 ranged from 18.8% to 24.2%, with 10.6 to 11.96 standard deviations. Contolling for race/ethnicity in Column 2 left a differential of 17.3% to 23.5%, with 9.94 to 11.33 standard deviations. Adding Dr. Madden's age metric in Column 3 led to 17.4% to 23.1% differentials, with 10.61 to 12.07 standard deviations. Dr. Madden's education metric in Column 4 produced 17.6% to 23.8% differentials, with 10.8 to 12.17 standard deviations. Including the tenure at Oracle control in Column 5 yielded 17.7% to 23.9% differential, with 11.06 to 12.4 standard deviations. *Id.*; *see also id.* at 15-17. That ends Dr. Madden's exogenous factors and what she believed were proper controls to test for gender discrimination. *Id.* at 17-18.

The table continues by adding endogenous facotrs. Column 6 is job descriptor and exempt

[150] *Cf.* HT at 728 (explanation of use of this age metric as proxy for experience)

[151] Dr. Madden reviewed her gender-findings and methodology at HT at 759-64, 784-85, 878-85, 952-53.

status, where job descriptor is a classification of Dr. Madden's that parallels Oracle's job family.[152] This results in 13.2% to 18.7% differentials, with 8.95 to 10.5 standard deviations. Column 7 added a management control. The result was 10.5% to 15.1% differentials, with 7.57 to 9.21 standard deviations. Last, Column 8 added a control for global career level. This resulted in 4.6% to 6.3% differentials, with 4.27 to 5.21 standard deviations. *Id.* at 18-19, 62. Since the controls add a measure of job family, management vs. individual contributor, and global career level, Dr. Madden's Column 8 is akin to controlling for job title/code, as that classification exists at Oracle.

Additional tables perform the same basic analysis with different starting points. Table 1(b) is the same as Table 1(a) except that it only includes employees with recorded education measures. Column 5 has a 14.5% to 22.6% disparity, with 6.64 to 9.31 standard deviations; Column 8 results in a 3.7% to 6.4% disparity, with 2.28 to 3.77 standard deviations. PX 1 at at 19-20, 63; *see also* HT at 793-95, 902-03. In this analysis, Dr. Madden assumed that job assignment was a measure of the education concentration, or at least that there were no gender differentials in this regard. PX 1 at 19-20. The reason for this additional analysis was to test for robustness—a lot of education data was missing, so doing the analysis for only those with data would inform whether there were group-level differences in the unknown populations. HT at 789-91.

Table 1(c) modifies the endogenous analysis to add a control for job descriptor at the time of hire and limits the analysis to employees with this information. Dr. Madden took this as a gauge reflecting area of prior education and experience, information that was provided for some but not coded. Including both current and time of hire job descriptor, with global career level, yields differentials of 4.4% to 6.7%, with 3.54 to 4.8 standard deviations. *Id.* at 20-22, 64; *see also* HT at 797-98, 903-04. At the hearing, Dr. Madden characterized this as a robustness test that would look to area of specialization at hire, as reflected in job descriptor at hire. HT at 795. She did not control for global career level at the time of hire. *Id.* at 904.

Table 1(d) completes the same analyses as Table 1(a) but for base pay rather than Medicare compensation and with methodological adjustments to the employees included for analysis. Column 5 shows a 12.1% to 13.3% differential with 14.12 to 15.83 standard deviaitions while Column 8 shows a 3.2% to 3.9% differential with 7.32 to 9.03 standard deviations. PX 1 at 22-24, 65; *see also* HT at 802-03, 811-13, 905. Tables 1(e) and 1(f) mirror the analyses in Tables 1(b) and 1(c) but for base pay. PX 1 at 24, 66-67; *see also* HT at 802-03.

Table 1(g) performs the analyses from Table 1(a) but for stock awards. It replaces the Column 7 managerial control with a performance rating variable based on the highest rating in the compensation tool for the employee in a given year. Column 5 shows a differential of 6,322.1 to 11,881.3 units[153] with 2.08 to 9.21 standard deviations; Column 8 shows a differntial of 1,036.3 in favor of women to 2,240.9 in favor of men, with standard deviations varying from .25 to 2.42. Only one year, 2013, is over 1.96 standard deviations in this column. PX 1 at 25-27, 68; *see also* HT at 813-15, 905-06. She did not control for performance ratings in her other analyses. HT at 908. Dr. Madden also looked at bonus outcomes for 2014 and 2018, finding significant gender differences in 2014 but not 2018. HT at 816. The statistically significant difference, however, disappeared when Dr. Madden controlled for global career level. *Id.* at 908-09. She put this finding in a footnote, and

[152] Job descriptor does not appear to be something Oracle uses, instead representing Dr. Madden's own division of job titles. Based on the way in which it was done, it resembles job family classification as a general characterization of the sort of work an employee is engaged in. *See* PX 1 at 88-103; *see also* HT at 739-40.

[153] For this unit measure, Dr. Madden converted RSUs into stock options using Oracle's 1 to 4 ratio. PX 1 at 25.

did not include tables in her report reflecting her analysis. *Id.*

> Dr. Madden summarized her conclusions in the gender analysis:
>
> While the absolute size of gender differentials in compensation is smaller with base pay than with Medicare compensation (which includes bonuses and realized stock awards), the patterns are the same. The only controls that decrease the size of the gap are the endogenous controls, those that reflect Oracle's decisions and assignments, specifically job assigned at hire, currently assigned job and global career level of current job. The gender pay gap is statistically significant for all years, regardless of controls used to define comparison groups and of the pay measure analyzed (base pay versus Medicare compensation). Gender differentials in stock awards are also statistically significant for all years, unless I also control for Oracle's assignment of global career level.

PX 1 at 27.

Next Dr. Madden conducted an analysis of disparities for Asian employees as compared to white employees in the Product Development function only, following the same general methodology, except that she first, in Column 1, controlled for "Asian only" and then in Column 2 controlled for gender.[154] PX 1 at 27-31. Her Table 2(a) is the analog of Table 1(a):

Table 2[a]
2013 through 2018 Asian Differences in Medicare Earnings at Oracle Headquarters by Year, with Various Characteristics Controlled
Controls for ...

			Asian Only [1]		Adds Gender [2]		Adds Age [3]		Adds Education [4]		Adds Time at Oracle [5]		Adds Exempt/Non Exempt and Job Descriptor [6]		Adds Management Control [7]		Adds Global Career Level [8]	
Year	Number of Workers	% Asian	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV
2013	3584	72.5%	-0.237	-12.14	-0.220	-11.40	-0.125	-6.39	-0.128	-6.55	-0.121	-6.36	-0.113	-6.19	-0.123	-7.27	-0.041	-3.03
2014	3534	73.7%	-0.255	-13.38	-0.278	-12.76	-0.184	-8.27	-0.191	-8.58	-0.181	-8.36	-0.177	-8.69	-0.177	-9.32	-0.079	-5.28
2015	3471	74.4%	-0.269	-13.55	-0.255	-12.99	-0.158	-8.01	-0.164	-8.32	-0.158	-8.19	-0.154	-8.35	-0.156	-9.09	-0.071	-5.29
2016	3470	75.9%	-0.230	-10.76	-0.216	-10.23	-0.123	-5.80	-0.128	-6.01	-0.118	-5.67	-0.114	-5.87	-0.125	-6.93	-0.038	-2.76
2017	3494	76.5%	-0.235	-9.51	-0.220	-9.02	-0.126	-5.14	-0.126	-5.16	-0.117	-4.83	-0.103	-4.60	-0.131	-6.31	-0.046	-2.99
2018	3300	77.4%	-0.223	-8.74	-0.208	-8.28	-0.121	-4.74	-0.121	-4.73	-0.118	-4.71	-0.102	-4.36	-0.138	-6.37	-0.042	-2.67

Id. at 69. The raw differential for Asians ranged from 22.3% to 29.5%, with standard deviations of 8.74 to 13.38. Adding gender, Dr. Madden's age measure, Dr. Madden's education measure, and then tenure at Oracle resulted in race coefficients of 11.7% to 18.1%, with 4.71 to 8.36 standard deviations, as seen in Column 5. *Id.* at 28-30, 69. Adding Dr. Madden's endogenous characteristics, job description/exempt-status, management control, and global career level resulted in disparities ranging from 3.8% to 7.9% with standard deviations of 2.67 to 5.29, as reflected in Dr. Madden's Column 8. *Id.* at 30-31, 69.

Table 2(b) is restricted to employees with education information. Column 5 has disparities between 11.2% and 18.5%, with standard deviations between 2.27 and 6.49; Column 8 has disparities of 3.7% to 7.7%, with standard deviations of 1.71 to 3.55. PX 1 at 32-33, 70; *see also* HT at 791-93, 903. Table 2(c) analyzes the effect of job descriptor at hire in the manner of Table 1(c).

[154] Dr. Madden re-stated her findings at HT at 726-30, 735-43, 758.

The final column has coefficients from 3.8% to 8.4%, with standard deviations of 2.05 to 5.42. PX 1 at 31-33-35, 71; *see also* HT at 796-97, 904. Table 2(d) conducts the analyses for base pay. Dr. Madden calculated Column 5 differentials of 5.6% to 7.4%, with standard deviations of 5.17 to 7.68 and Column 8 differentials of 2.4% to 2.8%, with standard deviations of 3.92 to 5.24. PX 1 at 35-37, 72; *see also* HT at 803-06, 905. Tables 2(e) and 2(f), following 1(e) and 1(f), analyze base pay for those only with education data and looking to job descriptor at hire, respectively. PX 1 at 37, 73-74. Table 2(g) addresses stock awards using the same analytical approach. Column 5 shows unit differentials of 2,550.3 to 10,672.5, with standard deviations of 2.1 to 4.5. Column 8 shows differentials from 734.5 in favor of Asians to 3,219.5 in favor of whites, with all standard deviations below one. *Id.* at 38-39, 75; *see also* HT at 806-10, 906. Dr. Madden also looked at bonuses, in the years they were paid, but didn't find differences in outcomes between white and Asian employees. HT at 810-11, 909-10.

Dr. Madden concluded:

> For each panel, each year and each column, Table 2 shows that the Asian-white pay differential is well over two standard deviations, regardless of how comparable groups are defined or how compensation is measured in computing the Asian-white pay differentials. Asian employees of the same gender, age, education, and time at Oracle as white employees receive statistically significantly fewer stock awards. There is no racial differential in stock awards, however, if Oracle's assigned jobs and global career levels were to define comparison groups.

PX 1 at 39.

Next, Dr. Madden applied her methodology to African-American as compared to white employees in the Product Development Job Function.[155] Due to comparatively small number of African-American employees in product development, the statistical analyses were more imprecise. PX 1 at 40. Dr. Madden's Table 3(a) shows here analyses of Medicare wages following the same methodology as Tables 1(a) and 2(a):

Table 3(a)
2013 through 2018 African American Differences in Medicare Earnings at Oracle Headquarters by Year, with Various Characteristics Considered

			Controls for ...															
			African American Only (1)		Adds Gender (2)		Adds Age (3)		Adds Education (4)		Adds Time at Oracle (5)		Adds Exempt/Non Exempt and Job Descriptor (6)		Adds Management Control (7)		Adds Global Career Level (8)	
Year	Number of Workers	% African American	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV	Race Coefficient	ST DEV
2013	1008	2.3%	-0.229	-1.84	-0.219	-1.78	-0.148	-1.25	-0.159	-1.34	-0.139	-1.21	-0.096	-0.95	-0.007	-0.08	0.027	0.04
2014	954	2.4%	-0.490	-3.43	-0.459	-3.24	-0.391	-2.83	-0.416	-3.03	-0.383	-2.91	-0.314	-2.77	-0.194	-1.86	-0.089	-1.12
2015	916	2.8%	-0.431	-3.73	-0.412	-3.58	-0.335	-2.99	-0.362	-3.24	-0.336	-3.09	-0.298	-3.09	-0.221	-2.49	-0.082	-1.20
2016	867	3.5%	-0.501	-4.46	-0.479	-4.27	-0.343	-3.15	-0.352	-3.24	-0.336	-3.17	-0.273	-3.00	-0.203	-2.42	-0.075	-1.19
2017	848	3.3%	-0.538	-4.19	-0.508	-3.97	-0.446	-3.53	-0.440	-3.50	-0.413	-3.36	-0.320	-2.97	-0.255	-2.58	0.123	-1.74
2018	772	3.5%	-0.514	-3.88	-0.495	-3.75	-0.410	-3.15	-0.394	-3.06	-0.367	-2.92	-0.222	-2.03	-0.202	-2.02	-0.074	-1.07

Id. at 76. The raw differentials ranged from 22.9% to 53.8%, with standard deviations between 1.84 and 4.46. Adding Dr. Madden's exogenous factors—gender, age, education, and time at Oracle—Column 5 showed differentials from 15.9% to 44%, with standard deviations of 1.34 to 3.5. *Id.* at

[155] Dr. Madden summarized her conclusions at HT at 781-89.

41-42, 76. Including the endogenous factors—job descriptor and exempt status, management, and global career level—led to no statistically significant disparities in Column 8. *Id.* at 42-43, 76.

Given the small number of African-Americans in the Product Development function, Dr. Madden did not do corollaries to Tables 1/2(b) and 1/2(c). *Id.* at 44; *see also* HT at 903, 905. Table 3(b) completes the analyses for base pay in the same manner as Tables 1(d) and 2(d). Column five showed differentials of 16.3% to 21.3%, with standard deviations of 3.08 to 3.98; Column 8 showed differentials of 1.7% to 7.3%, with standard deviations of .68 to 2.75. PX 1 at 44-46, 77; *see also* HT at 816-18, 905. There is no analog to the analysis in Tables 1/2(e) and 1/2(f). Dr. Madden did perform an analysis of stock awards, akin to Tables 1(g) and 2(g), in Table 3(c). Column 5 shows disparities with greater than 1.96 standard deviations in only 2013 and 2014. Column 8 has no disparities with a standard deviation greater than one. PX 1 at 46-47, 78; *see also* HT at 818-20, 906-07.

Dr. Madden concluded:

> For each panel, each year and each column, Table 3 shows that the African American-white pay differential is mostly over two standard deviations. In the instances when the differential falls below two standard deviation, the differentials remain large relative to those statistically significant differentials by gender and for Asian employees. The lack of statistical significance arises in large part from the small number of African American employees, and not because they experience less differential treatment than women or Asian employees. African Americans of the same gender, age, education, and time at Oracle as white employees receive statistically significantly fewer stock awards.

Id. at 47.

Dr. Madden also studied the impact of base salary at hire. Though she found 4,868 employees with prior salary reports of some sort, only 1,387 were analyzable because the others were not regular new hires, recorded a zero as prior salary, stated salary unknown or included a narrative in the field, or used hourly pay or unknown foreign currency. The analysis by race and gender showed similar disparities for prior pay and starting pay, leading Dr. Madden to conclude "[t]hese results are consistent with Oracle setting starting pay based on prior pay and, as a result, 'mimicking' the racial and gender differentials in the wider labor market." PX 1 at 51-52, 79; *see also* HT at 847-49, 910-13.

Dr. Madden next looked to whether "assignment" of job or global career level at time of hire influenced the disparity for both Medicare earnings and base pay. She concluded that for women, this initial assignment accounted for about half of the disparity. For Asians relative to whites, most of the differential was accounted for by assignment at hire. There were too few African-American employees to draw precise conclusions, though current global career level appeared to account for a portion of the disparity. PX 1 at 52-54, 80-82; *see also* HT at 830-33, 839-40, 843-46, 914-18. The remainder of Dr. Madden's report was devoted to damages estimates, with Dr. Madden estimating, based on her views of the proper measure of discrimination by Oracle (i.e. Column 5), $275,482,024 in damages for women, $514,199,673 in damages for Asians, and $8,352,435 in damages for African Americans, with total damages of $798,034,132. PX 1 at 54-59, 83-85; *see also* HT 851-52.

Dr. Madden succinctly stated her conclusions:

> The economic and statistical evidence presented in this report is consistent with gender differences in compensation in the Product Development, Information Technology, and Support job functions at [Oracle] at its headquarters in Redwood Shores, California for the 2013-2018 period. The economic and statistical evidence is consistent with racial differences in compensation in the Product Development job function, at the same location for the same period. The economic and statistical evidence is also consistent with Oracle's decisions on job assignment and compensation at hire leading to subsequent gender and racial compensation differentials.

PX 1 at 59.

C. Dr. Madden's Expert Rebuttal Report[156]

Dr. Madden's rebuttal report critiques Dr. Saad's initial report, highlighting the areas of difference and retaining the conclusions from her initial report. PX 2 at 3, 43. Dr. Madden's framing is instructive:

> Any differences in outcomes by gender or race evident in the statistical analyses must come from one or a combination of the following reasons: (1) gender or racial differences in treatment when setting compensation; (2) systematic differences by gender or race in job assignments, or (3) systematic differences by gender or race in unmeasured characteristics after controlling for any gender or race differences in measured characteristics. The first two are forms of gender or racial discrimination, while the last reason ascribes gender and racial differences to a systematic inferiority in qualifications that are observed by Oracle management (but that are not recorded in the database) for women, Asian, and African American employees with the same database recorded qualifications as men and white employees.

Id. at 4.

In Dr. Madden's view, statistical analysis of discrimination can only consider exogenous characteristics and Dr. Saad does not present any such analysis. *Id.* at 4-5. She explained: "[e]xogenous characteristics are the characteristics of Oracle employees when they arrive at Oracle (education and prior experience) and the tenure or quantity of company experience they accrue after arrival. Exogenous characteristics are characteristics that Oracle does not control, but that employees themselves control." *Id.* at 8. After reviewing her basic findings in the earlier report, Dr. Madden explained the difference between the two experts as follows,

> The main reasons for the differences in the estimated effects of gender and race on compensation between my report and Dr. Saad's report are differences in the employee characteristics or controls. Dr. Saad decreases the statistical power of his analyses by adding hundreds of control variables and by dividing employees into separate, smaller groupings. Specifically, Dr. Saad includes several hundred control variables for Oracle's assignment of employees to organizations and job titles (endogenous variables), but includes no controls for education (exogenous variables).

[156] The rebuttal report is found is PX 2 and DX 449. PX 2, however, omits the tables and charts accompanying the reports. I refer to PX 2 for the report itself, and DX 449 for the charts and tables, as needed.

> Dr. Saad's studies answer a different question from the question I address in my report. Dr. Saad studies gender and racial compensation differences within a job, and does not evaluate compensation differences arising from gender or racial differences in Oracle's promotion or initial assignment decisions. The gender and racial compensation effects of job assignments cannot be analyzed with a statistical analysis that controls for job assignments (effectively assuming from the start that no such gender and racial differences exist). Dr. Saad shows that most of the gender and racial differentials in compensation are due to gender and racial differences in job assignments. I concur with this finding, as shown in my July 19, 2019 report. He assumes without any scientific testing, however, that all of these differences in jobs (at the level of organizational names and standard job titles) are due to the unobserved systematic productivity inferiority of women, Asians and African American employees who are otherwise identical in age, tenure, education, and job descriptors to their male or white counterparts.

Id. at 10-11.

Dr. Madden's criticism centered on the difference between endogenous and exogenous characteristics. Her basic 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 found it improper, accusing him of assuming that Oracle is not discriminating, for instance, in terms of job assignments. Education, age, and tenure are exogenous variables. Variables used by Dr. Saad, like time in current job and organization are endogenous variables. *See generally id.* at 11-32. Dr. Madden allowed that patent production is potentially a proper control, but that when she adds it to the analysis, the statistically significant findings remain. But she questioned whether it is proper, since Oracle has some control over the circumstances or procuring a patent, such as job assignment. *Id.* at 5, 16-18; *see also* DX 449 at 46-47.

In Dr. Madden's view, time in current job and organization are endogenous and should not be considered in analyzing potential discrimination. PX 2 at 22-24. Dr. Madden specifically criticized Dr. Saad's use of organizational controls in the analysis as subject to Oracle's control, as not measuring the product produced and thus the proper measure for compensation, as problematic because employees move through organizations, and as introducing too many variables, causing problems with insufficient data. *Id.* at 5-6, 24-30; *see also* DX 449 at 46-47, 50. Dr. Madden opined 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." PX 2 at 28.

Dr. Madden also opined that word clusters are improper for analysis because they involve endogenous variables and are unscientific. *Id.* at 6, 29-31; *see also* RX 449 at 51; *see also* HT at 756-58. Dr. Madden further criticized 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. She contends that Dr. Saad's analysis includes too few employees, improperly includes endogenous variables, and does not control for career level at hire, instead aggregating all career levels to arrive at conclusions about up-leveling and down-leveling. PX 2 at 32-39; *see also* DX 449 at 56-57.

The report addressed several other areas of divergence. Dr. Madden accused Dr. Saad of

justifying discrimination against mothers by controlling against cumulative years leave of absence on top of an adjustment for experience. PX 2 at 5, 18-21; *see also* DX 449 at 56-57. Dr. Madden also disagreed with Dr. Saad's measure of compensation, arguing that Medicare earnings are the proper metric. She avers that 401K contributions are included and that while stock options earned in one year but vested in another do impact Medicare earnings in the latter year, this is not important in measuring group differences, since the behavior of the individual will not depend on race or sex. PX 2 at 3 n.1. Finally, Dr. Madden argued that the various analyses of global career level at hire, starting salary, and pay growth have errors and do not rebut the analyses completed by Dr. Madden. *Id.* at 6-7, 40-42; *see also* DX 449 at 54.

D. Dr. Saad's Expert Rebuttal Report

Dr. Saad's rebuttal report analyzed and responded to Dr. Madden's expert report. JX 104 at 4; *see also* HT at 1586, 1589-91. He generally opined that:

> 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.

JX 104 at 6-7 (emphasis in original).

In Dr. Saad's view, Dr. Madden's variables are "poor proxies that ignore the relevance of an employee's background to the work he or she performs at Oracle." *Id.* at 7. He also contended that Dr. Madden's "Oracle variables" are insufficient to allow comparisons between suitably similar employees. "Because of these flaws, Dr. Madden's analyses do not support any inferences of pay discrimination at Oracle." *Id.* As Dr. Saad sees matters, Dr. Madden assumed discrimination by Oracle in placements and promotions, and reached conclusions about compensation discrimination only because of these prior assumptions. In his view, there is no empirical evidence of this assumed bias. He averred that the empirical evidence indicates that there is no such bias, and that once the proper comparisons are made between employees with similar skills and similar work, he finds "no pattern of statistically significant pay differences." *Id.* at 7-8.

According to Dr. Saad, Dr. Madden's analysis differs from the NOV and SAC analyses in important ways. Those analyses proceeded by job function. Dr. Madden by contrast, lumps the job functions at issue together into one analysis. OFCCP's prior studies also used variables in Oracle's data to control for the type of work being done, at least attempting to similarly situate employees for comparison. Dr. Madden does otherwise, rejecting all variables related to the work done at Oracle as tainted on the assumption that Oracle is discriminating in making "assignments." *Id.* at 8-9; *see also* HT at 1594-95. Dr. Saad criticized this move as circular, assuming discrimination in order to find discrimination, and contended that Dr. Madden failed to examine how jobs are actually "assigned" at Oracle in order to test the predicate assumption underlying the analysis. JX 104 at 9.

The bulk of Dr. Saad's report critiques various aspects of Dr. Madden's analysis.[157] He began with the exclusion of Oracle-related variables from the analyses, pointing out that this means that Dr. Madden is ignoring all aspects of the work performed at Oracle—the type of job held, the projects worked on, the level at which the employee works, and everything about the actual job except tenure. He deemed this an assumption, and not a standard way of doing labor economics. Instead, it was "an extreme and untenable way of studying pay outcomes in a specific company about which you have large amounts of data regarding the nature of the work employees are engaged in. *Id.* at 10-11. He observed that Dr. Madden's approach elsewhere has been different, such as her work on the University of Pennsylvania Gender Equity Committee, which utilized different models for university-related assignments, such as rank and department, and made use of controls related to the particular work being done, including whether the subject area was high, medium, or low paying. *Id.* at 11-12.

The rationale for treating Oracle differently was that it is steering employees in a discriminatory manner, but Dr. Saad's empirical study of potential steering found no evidence of discrimination.[158] *Id.* at 12. The results did not support the assumption, and once the assumption was discarded and appropriate job-related variables are included as controls, "there is no pattern of adverse outcomes for women, Asians, or African-Americans." *Id.* at 13. Dr. Saad was also critical of Dr. Madden's clinical trial analogy as a basis for assuming that all non-measured factors are evenly distributed. In his view, studying pay at an actual company is not akin to a clinical trial under controlled conditions, and the claim that anything that Dr. Madden does not wish to include in her analysis averages out over groups is an "untested and unproven" assumption that on a "scientific approach" would be empirically tested rather than assumed entirely. *Id.* at 14; *see also* HT at 1609-11 (discussion of point).

Dr. Saad argued that Dr. Madden's education and experience variables are deficient "crude proxies" for actual education and experience. Education, per Dr. Madden, is only degree level and ignores major and specialization. Experience, per Dr. Madden, is simply age, without regard for topical area or level of actual experience, with no accounting for time outside of the labor market. Dr. Madden's license for using these proxies was that more particular differences do not exist, but Dr. Saad contended that this is simply an assumption that should be empirically tested, or rendered unnecessary by using better measures of education and experience. JX 104 at 14-16. Moreover, Dr. Saad observed that Dr. Madden's education measure is missing for about 60% of the employees. Excluding those employees entirely is problematic, since missing data is not randomly distributed—women and whites are more likely to have missing data than others. *Id.* at 16.

Turning to Dr. Madden's Oracle-variables, Dr. Saad argued that the analysis effectively only controlled for job title by the end, which is not sufficient to similarly situate employees doing similar work. Though Dr. Madden deems those in the same "job descriptor" to be in the same job, this improperly lumped individuals at an IC1 level with those at an IC6 level as doing the same work—a point that is plainly false. Dr. Madden's Column 8 effectively controls for job title, and so does control for global career level. By doing so, it is similar to OFCCP's NOV and SAC analyses. But Dr. Saad opined that this is insufficient since there are important differences based on the products

[157] Dr. Saad restated the mechanics of Dr. Madden's analysis at HT at 1634-36.

[158] Dr. Saad added that Dr. Madden's appended promotion analysis when modified to account for changes in economic conditions showed only one year and one promotion type with statistically significant results. Dr. Madden's model on its own terms showed no significant results outside of women in IC3 and IC4—not for other job levels and not for Asians and African-Americans, points that Dr. Madden either did not study or declined to report. JX 104 at 12-13.

that are worked on in different organizations and the skills that are required. Review of requisitions for the same job title in different organizations indicates that the desired skills differ markedly, and potentially draw employees from differently paying markets. JX 104 at 16-18.

Dr. Saad asserted that there are a number of other errors in Dr. Madden's analysis. By using Medicare wages, Dr. Madden included the value of a stock award in the year in which it was cashed out, not the year in which it was earned as compensation. *Id.* at 18. In his view, Medicare wages are an improper metric because they are dependent on employee choices about pre-tax set asides and when to exercise stock awards. The difference can be important, since an employee might exercise millions of dollars of stock options held over from years past. *Id.* at 69-70; *see also* HT at 1682-84.

The aggregation across job functions was also inappropriate, since OFCCP's earlier analyses produced different results by job function—with only 3 of 16 deemed indicatory of discrimination—so it was inappropriate to assume at this phase that the functions can be aggregated. JX 104 at 18-19. Dr. Saad asserted that "Dr. Madden's conclusions are scientifically unsound and highly unreliable," as well as "based on a distorted version of what she refers to as the human capital model." *Id.* at 19.

Dr. Saad observed that although OFCCP is alleging that a common set of pay practices results in systemic discrimination, it only alleged that these common practices led to discrimination in 3 of 16 job functions, resulting in an inconsistency. In his analysis, OFCCP failed to account for skills and type of work, undermining any inference to discrimination. JX 104 at 19-20. After summarizing Dr. Madden's approach, *id.* at 20-22, Dr. Saad averred that employees who Dr. Madden deems similarly situated are actually very different situated. He points to two white men as an example, who Dr. Madden's model deems similarly situated, but who make vastly different amounts, have very different jobs, and have different backgrounds. Other variables ignored by Dr. Madden would distinguish the employees. *Id.* at 22-24. Another comparison involves an Asian man and women who Dr. Madden deems equivalent, but who are in vastly different jobs—M6 Software Development VP vs. IC4 Product Manager/Strategy 4—which Dr. Madden assumes must be due to discrimination in assignment. As it turns out, the two also have significantly different backgrounds based on factors ignored by Dr. Madden and were hired into positions with quite different requisitions. *Id.* at 24-27. Third, Dr. Saad compares a male and female employee—IC5 Software Developer 5 and M6 Vice President of Software Development—who Dr. Madden deemed equivalent but who actually differ in important ways, for instance with prior employment at an Oracle acquisition and different job responsibilities. *Id.* at 28-30; *see also* HT at 1653-57.

Dr. Saad argued that Dr. Madden's decision to ignore individual difference in favor of group experience is problematic since it leads to a measurement of averages, which could mask significant variances in experience within the group, if, in fact, the individuals in the group are differently situated. This can be remedied by considering more refined groups and more reliable factors, but Dr. Madden declined to take these steps. JX 104 at 31. Dr. Madden's analysis was premised on assumption that factors she doesn't measure are evenly distributed. But given the basis for the assumption, it would also apply to the attributes that she did control for, licensing an inference to discrimination from a raw disparity alone, since one assumes that all other factors are evenly distributed. *Id.* at 31-32. In Dr. Saad's view, this foundational point should be tested, not assumed, and Dr. Madden has no basis to assume that any difference in distribution of factors that affect pay must be due to discriminatory actions by Oracle. She casted this as rejecting group inferiorities, but this is an inappropriate characterization, since the point is only about differences that may exist, whatever the cause, and Dr. Madden has no empirical support for her assumption that any

differences not captured by level of degree, age, and time at Oracle must be due to discrimination by Oracle. *Id.* at 32-33.

While Dr. Saad allowed that some individual differences can be bracketed at the group level, he contended that Dr. Madden has stretched this point improperly, and used it as a license to ignore potential systematic differences between groups without testing. The result is that Dr. Madden assumed away many factors generally believed to legitimately affect pay, without ever testing whether they make a difference. Dr. Madden thus treated changes in the disparity once job-specific factors start to be included as evidence of discrimination, without testing whether, in fact, there is any discrimination in the manner in which employees come to have their jobs. His analysis, as well as Dr. Madden's promotion analysis once all of the results are reported, undermined that conclusion. In addition, Dr. Saad's analysis of things like patent activity and organization showed that there are variances by gender. *Id.* at 34-35. Dr. Madden's model fails because it assumed away any group-associated variables without testing, when evidence showed that there are group variances that should be accounted for, and that once accounted for lead to a different conclusion. *Id.* at 36.

Dr. Saad elucidated his point by plotting Dr. Madden's predicted pay against actual pay for men and women in the three job functions at issue for employees earning less than $1,000,000. For both genders, there was wide variance, indicating that Dr. Madden's model poorly predicted actual results within male and female employees as separate groups. This was remarkably true of the model for Column 5, but also held true of the model in Column 8. The regression model considered employees similar despite wide variation, which Dr. Saad attributed to mis-measuring compensation using Medicare wages, failure to similarly situate employees, and using a single regression model for an employee population that was too diverse. In his view, it is not enough to simply state a concern with average differences—one must also consider how well that average describes the group averaged over. Dr. Madden's model failed here, under-predicting pay in some instances by millions of dollars, indicating that it was missing factors that matter. *Id.* at 36-40; *see also* HT at 1649-52, 1662. In this regard, the clinical trial analogy was inapt, since in a clinical trial there is randomized assignment of individuals into the control and test groups. Assignments here were not randomized and the data was not being generated by a controlled trial—it is observed data from an actual situation, raising the potential for omitted variable bias. JX 104 at 40-41. Dr. Saad asserted that Dr. Madden's approach here differs from her published work and reflects disregard for "the most basic principle of empirical research" by assuming away all variables that might differ on a group basis without testing. *Id.* at 42; *see also* DX 228 (Dr. Madden article cited by Dr. Saad).

Dr. Saad further argued that Dr. Madden's models have poor explanatory power because she omitted variables that matter for pay. He explained that the R-squared statistic measures the amount of variation in the variable being studied that is explained by the factors included in the model being used. In the model found in Table 1(a), Column 5 leaves almost 80% of the variance in pay unexplained. In "company data," R-squared will generally range as high as 90%, meaning that only 10% of the variance is unexplained. JX 104 at 42-43; *see also* HT at 1662-67, 1670-73.

Returning to Dr. Madden's education analysis, Dr. Saad found fault in not distinguishing the type of master's degree, for instance, and the field of study, and of using a measure that was missing for over half of the group. He added that studies of areas of study/major indicate that there is not equal demographic distribution[159], contrary to Dr. Madden's assumption, and that the data provided in this case did include that information for some employees, but Dr. Madden decided not to use it.

[159] JX 104 at 109-10 contains tables related to this point.

Looking at that data, areas of study were not evenly distributed across males and females, or by race. Since both broader studies of the population as a whole and the information available for Oracle indicated group variance in areas of study, Dr. Madden improperly assumed that there was no such variance. In addition, Dr. Saad noted that having missing educational data correlates with pay on Dr. Madden's model, indicating that the missing data is not distributed randomly. Dr. Madden also coded some people as missing when in actuality the data was available. JX 104 at 44-50. In sum,

> Dr. Madden's pay models do not control adequately for degree earned, in that the data are missing for over half the incumbents in the data sources she used, and she does not use any of the available information on educational specialization on institution granting the degree. These issues render her "education" control inadequate.

Id. at 50; *see also* HT at 1643-46. The control also did not account for degrees earned while at Oracle. HT at 1644-45.

Dr. Saad also concluded that Dr. Madden's experience controls, age and tenure, were inadequate.

> It is untenable from a labor economics perspective to think that after holding educational degree constant, age is all it takes to similarly situate employees with respect to skills, experience, and abilities prior to their arrival at Oracle, at which point they will work in jobs that are highly complex and tremendously varied in work content.

JX 104 at 50. Rather than looking at the nature of prior experience, Dr. Madden assumed that any differences in that regard are eliminated at the group level. But this assumption was never empirically tested. In Dr. Saad's view, differences in the sort of experience matter—whether it is with Oracle or an Oracle product or not, whether it is in technology or not, etc. Those differences emerge in the actual data about employees. Dr. Saad also contended that it has been well-documented that women are more likely to have spent time outside the workforce than men, a point Dr. Madden ignored and assumed away by treating age alone as a proxy for experience. *Id.* at 50-52; *see also* HT at 1642-43. Further, the tenure variable as used across large groups leads to unexpected results, indicating that Dr. Madden's simple approach of counting years is inappropriate. Tenure would be better studied by time and job, and by including work at Oracle affiliates. JX 104 at 52-53; *see also* HT at 1647-49.

Moreover, Dr. Saad believed that Dr. Madden's Oracle-related variables were inadequate to similarly situated employees. He was particularly critical of the assumption that any difference accounted for in a job-related variable is indicative of bias by Oracle management. Dr. Madden's back-up data belied her assumption here, showing positive outcomes for women and minorities in regards to promotions, at least in some positions, which should not be the case if any Oracle-related decision is tainted. JX 104 at 53-55, *see also id.* 57-61 (elaboration); HT at 1726-30. Dr. Madden further ignored the actual process though which Oracle employees end up in a particular job, which involves applying to a posted position, not assignment by an Oracle manager. Dr. Saad's analysis indicated that there are race and gender differences between the jobs people apply to at Oracle. The analysis also showed that Oracle generally hires individuals into the job applied for. JX 104 at 55-56.

Dr. Saad's rebuttal contends that his original analysis, working within OFCCP's earlier analytic approach showed that once better factors for tenure (including time at Oracle related firms,

leaves of absence, time in standard job title), organization, patent bonus, and whether the employee was hired or acquired are taken into account, there is no evidence of systemic discrimination. JX 104 at 62. He argued that these variables are not tainted. His analyses showed that applicants are hired into the organization they applied to, rather than being sorted in some discriminating matter or assigned in any manner at all. Review of requisitions indicated that different organizations hiring for the same job seek different sorts of skills and experiences, which would involve different value. Standard job titles provide only broad descriptors that do not provide important information about the sort of work an employee does and its value to Oracle—as is seen by wide variance in pay within a standard job title. Dr. Saad opined that organization, as defined by cost center, was a better control because it more precisely associated employees with products, and among those doing similar work with similar skills. His analysis showed that most Oracle employees are hired into the organization to which they applied, and there are no statistically differences in this regard by gender or race. *Id.* at 63-66. In addition, Dr. Saad found no evidence that Oracle was steering women or Asian's away from patents—comparison to national data in the areas Oracle patents in indicates that Oracle actually awards higher than average patent bonuses to women and Asians. *Id.* at 66-69; *see also* HT at 1692-93.

Dr. Saad also offered a revised version of Dr. Madden's analysis that disaggregated job functions, altered the total compensation measure away from Medicare wages, used revised age and tenure measures, and attempted to better compare similar employees by controlling for standard job title, organization, and patent bonus. Though Dr. Saad opined that this was an inappropriate manner to study compensation at Oracle, his refinements of the approach produced notably different results—dramatic shrinking in disparities, mostly statistically insignificant findings, and a number of positive relationships by gender and race, undercutting any inference that Oracle is systemically discriminating against the employees in question. JX 104 at 70-72; *see also id.* at 78-82 (tables); HT at 1675-80, 1685-89, 1693-95, 1703-08.

Turning to Dr. Madden's starting pay analysis, Dr. Saad pointed out that there are inherent difficulties in sorting out whether a correlation is due to reliance on prior pay in setting starting pay vs. the expectation that employers will pay similar amounts for the same skills, experience, and other job market factors. The correlation at Oracle is consistent with the correlation across the economy, and consistent with the conclusion that Oracle sets starting pay based on employee skill and experience. JX 104 at 72-73; *see also id.* at 83-91 (tables related to starting pay). He contended that Dr. Madden's analysis has internal flaws as well, including individuals hired outside the job functions, outside the class period, and outside the headquarters facility. Once these flaws are corrected, there is no pattern of setting starting pay adverse to protected groups, except for one finding in female experienced hires in the Product Development function, which results from the missing education data. Once employees without educational data are removed, the finding disappears. *Id.* at 73-74.

Dr. Saad devoted some discussion to contesting the damage calculations, *id.* at 74-75, which are not at issue in this litigation. He concluded his rebuttal:

> It is my opinion that the analyses presented by Dr. Madden in support of OFCCP's allegations regarding pay at Oracle rely on unsupported assumptions instead of empirical research, utilize mis-specified models, rely upon incorrectly measured variables, suffer from omitted variable bias, and have a number of other methodological flaws. The variables on which her model relies are not sufficient to generate economically meaningful comparisons such that any gender- or race-based

> pay differences can be meaningfully assessed. Her *assumption* that any variables that are potentially subject to the influence of Oracle should be left out of the analysis is unsupported.

Id. at 76 (emphasis in original). Hence, "Dr. Madden's analyses do not support inferences of pay discrimination at Oracle." *Id.* Assuming that the approach is proper, correction to control for appropriate job-related factors indicate that no inference of discrimination is warranted. *Id.* Dr. Saad found no evidence of bias in the process by which employees end up in jobs, and no bias in starting pay or pay growth. *Id.* He concluded no damages were owed. *Id.*

E. Dr. Madden's Hearing Testimony

At the hearing, Dr. Madden for the most part re-stated and explained the conclusions and rationales in her reports, which were discussed above and will not be re-capitulated here. She also offered some additional explanations and elaborations on points relevant to her analysis and opinions.

To begin with, Dr. Madden explained that she chose not to approach the questions in this case by looking for employees who performed similar work, because in her view this potentially obscured potential discrimination because Oracle was involved in determining which employees performed which work. Hence, she focused on her understanding of employee credentials. The relevant similarities were thus in how employees arrive at Oracle. HT at 711-12. In her understanding, discrimination occurs when people have the same productivity but get different outcomes. She takes human capital theory to mean that productivity is a function of experience, which is measured by age, as well as tenure if it is available, and education. *Id.* at 713-14. Dr. Madden recognized that on her approach, it was necessary to control for systematic differences between racial and gender groups in qualifications, but she maintained that it was unnecessary to consider qualifications "that are possessed by equivalent proportions or at equivalent levels by both racial or gender groups that we're comparing." *Id.* at 714-15. In her view, including qualifications in an analysis where there are not group-level differences makes the analysis less precise and less accurate. *Id.* at 716. So her multiple regression analyses focused only on experience as defined by age and time at Oracle and education as defined by highest degree obtained. *Id.* at 717-18.

Later, Dr. Madden clarified that she did control for some variables that ended up not varying at the group-level, since they had an insignificant effect on the analysis. But she affirmed that she did not think it was necessary to control for any individual variances that were not also group variances, and that the goal of the study was to look only at the characteristics of employees at the time of hire. HT at 864-66. In an individual study, it would be important to control for all individual differences, but at a group level, Dr. Madden believes that doing so isn't necessary and in fact renders an analysis less precise. *Id.* at 866-67. In addition, inclusion of endogenous characteristics is impermissible in an analysis of whether discrimination has occurred, and endogenous characteristics include all of those that are controlled by the employer, which here included job responsibilities, whether an employee is a manager, and the global career level of an employee. They were properly used only to determine the mechanism of discrimination. *Id.* at 868-70.

Dr. Madden denied that she assumed that absent evidence to the contrary, employees are equivalently qualified by gender and race. Pointed to her report stating the opposite, Dr. Madden agreed that "she said" that she was making that assumption, but added that it wasn't necessary to her model. She maintained that "as an American that, that's how we start everything." HT at 872-73.

The same held for what, at least in her report, she called an assumption that unmeasured qualifications do not differ between groups when measured qualifications do not differ. *Id.* at 873. Dr. Madden understood compensation discrimination to mean difference in earnings for comparably qualified persons as they entered Oracle. *Id.* at 874. She treated employees with equivalent education and experience measures as similarly situated. Dr. Saad was looking at pay difference within job, while she was looking at a different, broader question. *Id.* at 874-76. Dr. Madden was not examining whether individual women/minorities were being paid less, or whether every member of the group was paid in a discriminatory manner. *Id.* at 876-77

Dr. Madden defended her use of Medicare earnings as a measure of compensation, asserting that it includes compensation that is tax-deferred and is used regularly in litigation. HT at 717. In her view, however, the issue of whether to consider equity awards in the year earned or the year redeemed was not central, since it was not the driving factor in the different results. *Id.* at 801-02. She agreed that Medicare earnings can reflect compensation received from decisions in other years. *Id.* at 877-78.

Dr. Madden used age as a proxy for experience. She had resumes available to her and reviewed them looking for more specific prior experience, but determined that there was no way to match the thousands of resumes they had to employees and so a more specific measure could not be used. HT at 880-81. Education in her model was highest degree obtained—bachelor's, master's, or doctorate—and was missing for over half of the employees she analyzed. It did not include any measure for area of specialization, though Dr. Madden maintained that her Column 6 (job descriptor) did that. It did not include school or whether honors were awarded. It did not reflect whether there was any fit between the degree and the work at Oracle. *Id.* at 882-83. School was inappropriate to use because it is already a factor in the hiring—the "superstars" from lower ranked schools are hired alongside those further down in the class at higher ranked schools. *Id.* at 953-54. The tenure measure in Column 5 included only time spent at Oracle itself, not at an Oracle affiliate or at a company acquired by Oracle. She did adjust the measure to reduce time spent in leaves of absence. *Id.* at 883-84.

Dr. Madden initially agreed that Columns 1-5 completed the exogenous variable analysis, but then added that Column 6 was a proxy for area of education and experience. HT at 884-85. Queried as to where this understanding of Column 6 could be found in her reports, after reviewing the reports in recess, Dr. Madden pointed to a comment within one of the analyses suggesting that the job descriptor could reflect areas of education or experience or a decision by Oracle. *Id.* at 887. Dr. Madden agreed that she didn't know whether job descriptor actually reflected someone's major, specialization, or area of prior experience. Instead, this was based on "professional judgement." *Id.* at 889-94. She also agreed that job descriptor was not an appropriate "job control" in that it was not a way to similarly situate employees within jobs. *Id.* at 921-24. But she believed that both job descriptor and job code could be used to reflect training and experience. *Id.* at 950. She agreed that Oracle was better positioned than she was to determine if different job descriptors involved different skills. *Id.* at 897. By the time Dr. Madden analyzed through Column 8, she was effectively controlling for job code. She recognized that job codes mapped onto salary ranges for Oracle, and that those ranges are broad to account for difference in skill. *Id.* at 898-99.

During the hearing, Dr. Madden recognized that the disparities seen in her Column 5 could result from group-level differences between genders or races within Oracle's employee population involving selection of majors, specialties in prior employment, job placement, or "narrowly defined skills: programming language, platform or operating system experience, different levels of

complexity of the job." HT at 737-38. She then cast her further analysis, and particularly job descriptor, as a way of looking at whether areas of expertise made a difference. *Id.* at 738, 762. Indeed, though allowing that it was at least in part endogenous, she deemed it a more "conservative" measure of specialization than major, though she also had no objection to including major data, if it was available. *Id.* at 799-800. Dr. Madden agreed with OFCCP's counsel that in her usage, job descriptor was a proxy for an exogenous characteristic, in this instance area of expertise, like software development. *Id.* at 739-40; *see also id.* at 959.

Dr. Madden considered other potential controls in response to Dr. Saad's report, like patent bonuses, time in current job, and organization, but determined that they should not be included. HT at 743. She would have used patents received prior to Oracle, but she didn't think Oracle had good data related to patents and patents at Oracle represented an endogenous characteristic. *Id.* at 743-45, 764-65, 925-26. The innovation represented by a patent was exogenous, unless that innovation was tied to Oracle. *Id.* at 925. She added that including a patent bonus as a control, the disparity for Asians decreased but remained significant. *Id.* at 745. The same held for the gender disparity. *Id.* at 765. Dr. Madden rejected use of time in current job because it was endogenous, reflecting Oracle's decisions about promotion. *Id.* at 745-46, 775, 960. She agreed that time in job does reflect additional experience in a position that would allow employees to be more productive. *Id.* at 926-27. She did not analyze length of time to promotion and the analysis of promotions she did only found adverse results for women in two global career levels. *Id.* at 927-28. This control didn't make a difference for Asians or women. *Id.* at 746, 775-76.

Use of organization or cost center is improper, in Dr. Madden's view, because it is endogenous, based on Oracle's decisions on assignments, and did not indicate product line.[160] In addition, her economic theory led her to the conclusion that product would not matter, since profitability of a product would affect the employment curve but not the wage level for people who brought the same skills to the work, as those with the same skills would move to higher paying work. Further, organization at Oracle is fluid, with employees changing organization without changes in pay. Last, there are hundreds of organizations at Oracle and adding it as a control reduces the precision of the model. *Id.* at 746-49, 776-79; *see also id.* at 749-54 (elaboration). In Dr. Madden's opinion, including organization had the effect of "slicing and dicing" in that it spread the data out so thinly that the statistical analyses lose precision since there are fewer comparisons to be made. *Id.* at 751, 753. In the case of gender, this was extenuated in treating the job functions separately, as Dr. Saad did, because there were few employees in IT and Support. *Id.* at 778.

Dr. Madden agreed that job requisitions (at least sometimes) are for specific organizations and that the same job code can be used for positions in different organizations. She did not analyze whether employees were hired into the organization to which they applied. HT at 928-29. In reaching the conclusion that profitability of a product or organization should not align with compensation, Dr. Madden assumed that the work on different products requires the same level of skill. *Id.* at 929-30. Dr. Madden agreed that, in actual fact, there was wide variance in compensation within a job code. But she resisted accepting the conclusion that individuals with the same skill levels would not accept those differences, and would move to different jobs. *Id.* at 930-32.

Differences in skill within a job title could account for differences in pay. Dr. Madden did not study whether different jobs in a code required fungible skills and outside of an analysis of pay in her rebuttal report that she thought could be interpreted to speak to organization, she did not

[160] Dr. Madden determined that Oracle did not have data on product-line assignments. HT at 738.

study whether, in fact, different organizations required different skills. *Id.* at 933-34. She did not do so because the information was in narrative form and what was recorded would be limited to what the manager was thinking of at the time. *Id.* at 961-62. In general, she did not use information from narratives because there was too little of it and it wasn't standardized. She claimed that using it would have been impossible. *Id.* at 963. She did not analyze the text of any job requisitions, except in critiquing Dr. Saad's cluster study. *Id.* at 935-36. She agreed that Oracle's actual job postings list specific requirements and that all applicants, as individuals are not equally qualified for varied positions. *Id.* at 937. Dr. Madden reviewed narrative new hire justification, but found it unusable because she didn't have it for everybody. *Id.* at 937-38. Dr. Madden denied that she didn't use information when she couldn't easily fit it into her statistical model, though acknowledged deposition testimony to that effect. *Id.* at 938-39. There was information in new hire justifications that would have been product specific in individual cases, but it was not enough for statistical analysis. *Id.* at 939. While Dr. Madden had "no problem" including more narrowly defined skill controls, (though she doubted there would be differences at a group level) there was no data that would allow adding these controls, at least the sort of data that could be used in a statistical analysis. *Id.* at 754-55, 789.

Dr. Madden disagreed with Dr. Saad's method of accounting for leaves of absence through a cumulative leave of absence factor. In her view, the proper approach is to deduct cumulative leaves of absence from time at Oracle in the experience measures. Dr. Madden was concerned that Dr. Saad's approach controlled for mothers, and thus justified discriminating against women. *Id.* at 766-77*; see also id.* at 767-75, 954-55. She agreed that Dr. Saad consistently applied the measure without regard for race or gender and she also accounted for leaves of absence. *Id.* at 924, 969.

Dr. Madden maintained that she was not assuming that individuals do not contribute to Oracle's profitability in the same manner or that all individuals equally possess the characteristics that warrant higher compensation. She explained that she was not evaluating individuals, she was evaluating groups, and so only needed to consider those factors in which the groups differ. HT at 826-27. For this reason, the R-squared measure (which measures the percentage of variation in the dependent variable accounted for by the explanatory variables in the model, *id.* at 899-900) was not important in evaluating the analysis because it measured individual variance under the model. *Id.* at 827-28. The point, as I understand it, is that even if a model is a poor predictor of individual compensation, if the unaccounted for factors leading to a low R-squared value do not differ across the groups being compared, then the model can still lead to sound conclusions at the group level. Dr. Madden didn't include R-squared for her analyses because in the literature they "don't matter" and "nobody's interested in R-squared." *Id.* at 956; *see also id.* at 956-57.

In advocating her approach and conclusions, Dr. Madden stressed the clinical trial analogy, where individual variance is washed out by randomized assignment to groups. She allowed that the analysis here differs in that race and gender cannot be randomly assigned. But the upshot for Dr. Madden is that it was only necessary to control for differences by race and gender, and permissible to bracket individual differences within the groups. HT at 828-29.

In her original report, Dr. Madden had done an analysis that she believed showed that most of the Asian-white disparity was due to assignment at hire. Drawing on her rebuttal report, she argued that the analysis showed that when whites and Asians applied for the same job levels, Asians were more likely to be hired down one level, while whites were more likely to be hired into a higher level. She differed from Dr. Saad in this regard by dis-aggregating the levels of the job being applied

to.[161] As a whole, Asians were not more likely to be hired into a lower level than that applied for, but this was partly a function of more Asians applying to lower level jobs, where up-leveling is more common. Once job-level applied for is controlled, disparate patterns emerged at IC4 and IC5 level positions. HT at 831-36. Dr. Madden also worried that Dr. Saad's analysis relied on only a small portion, 23-27%, of those individuals who fit the parameters.[162] *Id.* at 836-37. Women applying at the IC4 level were less likely to get up-leveled than men. This held at the IC5 level as well, but the results were not statistically significant. *Id.* 841-42. The requisition database in this instance was also problematic because it included only a small share of the population. *Id.* at 842-43. When Dr. Madden revised Dr. Saad's pay growth analysis for women to include those who received promotions and job changes and to control for starting pay, in order to address the tendency for those with low pay initially to receive more growth, she found disparities in pay growth for women between 2013 and 2016. *Id.* at 843.

Dr. Madden agreed that her prior pay analyses showed no disparities in the correlation of prior pay to starting pay. She also agreed that even where an employer is not relying on prior pay in setting starting pay, it is expected that there will be a correlation between the two because the employee is being paid for the same skill package. HT at 912-13.

Dr. Madden acknowledged that when she uses "assign" she means that job that a person at Oracle holds. HT at 914. Her analyses of the impact of job assignments at hire in her Tables 5-7 were based on compensation data and did not look at how an employee came to occupy a particular job. For metrics involve changes in career level, Dr. Madden inferred there was a promotion, but did not look at the mechanisms of the change. *Id.* at 914-18. Dr. Madden did do a separate analysis of promotions and reported findings for gender at the IC3 and IC4 levels. She also did analyses for the other levels. These showed that there were no statistically significant differences adverse to women, and showed that there were statistically significant differences favorable to women at M5 and M6. She declined to report these results. *Id.* at 919-20. She explained that she omitted these results because there were smaller numbers of people in the group and maintained that she wasn't trying to hide results favorable to Oracle and contrary to her theory. *Id.* at 957-58. She didn't dispute that there were 1,746 observations in the analysis, but thought that there were few women. *Id.* at 967-68. She did not report results for Asians and African-Americans. *Id.* at 921. She found no evidence of difference in promotion rates for Asians and whites. *Id.*

F. Dr. Saad's Hearing Testimony

As with Dr. Madden, much of Dr. Saad's hearing testimony reviewed and restated the findings in his reports, discussed above. Here I consider those aspects of the testimony that elaborated on or clarified his opinions in this case.

Though Dr. Saad noted some important differences between OFCCP's prior analyses and Dr. Madden's analyses, there were similarities as well and some of the points from his original expert report applied equally to Dr. Madden's analysis. Generally, both improperly aggregated employees in different positions/situations for analyses. Second, both ended up controlling for job code, but Dr. Saad believed that this was insufficient to similarly situate employees. HT at 1593-96. He

[161] This was described as adding controls, but since Dr. Madden's conclusions are stated with reference to particular Global Career Levels, it was more properly described as dis-aggregating the analysis.

[162] Dr. Madden also criticized Dr. Saad's study of pay growth for Asians, but in this discussion she arrived at the conclusion that there was no disparity in pay growth or promotions for Asians. HT at 838-39.

summarized his basic disagreement with Dr. Madden:

> [A] lot of what Dr. Madden is doing rests on some assumptions. Some of it are [sic] just purely assumptions, or untested assumptions are not sufficiently tested assumptions . . . In particular, what Dr. Madden claims is that there are particular kinds of factors that should be excluded on principle from the analyses. And it is my opinion that nothing should be excluded on principle without an empirical evaluation as to whether that's an appropriate thing to do.

Id. at 1596.

The level of aggregation and use of job codes alone to similarly situate employees formed other central disagreements. HT at 1597. Last, he believed that Dr. Madden's education and experience controls were inadequate, and that other appropriate variable controls were omitted. *Id.* at 1597-98. Dr. Saad did not find evidence of bias steering or channeling employees, and did not believe that Dr. Madden's analyses showed bias in promotions or pay growth, or a causal relationship between prior pay and starting pay. *Id.* at 1598-99. In sum, he believed that Dr. Madden had used only a "bare bones, very simplistic version of the human capital model" that was inadequate in this case to "draw inferences from that set of analyses regarding any of the practices that she analyzed." *Id.* at 1599.

> The analyses in this case were based on multiple regression analyses.
>
> Multiple regression is a statistical or mathematical technique where you take a variable of interest or a phenomenon of interest called the "dependent variable," and seek to associate or explain that dependent variable with a set of what are called "independent variables." So, in this case factors influencing pay would be your independent variables, and pay itself would be a dependent variable.

HT at 1599-1600; *see also id.* at 1600-02 (elaboration with example). "Omitted variable bias" occurs if a variable that matters for the outcome is left out of the analyses, which will bias the measure of the impact of the other variables in the analyses. *Id.* at 1602; *see also id.* at 1612-14. The technique was appropriate to use, but the correctness of the results, and the inferences that can be drawn from it, turn on how well it is used. *Id.* at 1603-05. Statistical significance is a measure of confidence in an estimated effect. In employment cases, "if there's less than one in 20 chance that an effect you've measured could have been due to random chance, then we say it's statistically significant." *Id.* at 1606. Statistical significance alone does not justify a particular conclusion—the model yielding the results must be correct as well. *Id.* at 1606-07; *see also id.* at 1862-63. Dr. Saad did agree that if the model was properly constructed and appropriately included all pay-related factors, one could draw inferences about discrimination from statistically significant results. *Id.* at 1774-75; *see also id.* at 1826-27.

Here Dr. Madden assumed that employees are equivalently qualified by gender and race absent evidence to the contrary. In Dr. Saad's view, if this is correct then there will not be a problem with the model, but if it is incorrect then "failure to include those characteristics in your analysis could bias the effect you've measured between race and compensation or gender and compensation." He opined that the assumption shouldn't be made without some testing. Dr. Madden claimed that to not accept her assumption presumed gender or racial inferiority. Dr. Saad was "puzzled" by this claim and usage, since the point wasn't about inferiority or superiority; it was about whether there were empirical differences. Taking Dr. Madden's assumption at face value, it

would be proper to look at simple averages without any controls, and draw conclusions on that basis. HT at 1607-09.

Models must also be examined for specification bias and aggregation bias. Specification bias is when mistakes are made in specifying how a control variable is measured and used. Aggregation bias occurs when groups are analyzed together when they should be broken into more homogenous subsets. HT at 1611-12; *see also id.* at 1614-18. Dr. Saad agreed with Dr. Madden that large data sets can provide more precision and power, but only if one wasn't using biased or inaccurate measures. In that instance, the analyses would yield precise but inaccurate results. Precise results are those with high statistical significance. Accurate results are those measured without bias. A regression that omits variables that matter could be precise but not accurate. In Dr. Saad's view, both are important, but inaccuracy is "far worse than lack of precision." *Id.* at 1618-20.

Dr. Saad opined that it is important to have an understanding of Oracle as a company to do the analyses because only by understanding the company can one determine the appropriate factors to include in a model. HT at 1620-21. He does not use the same model to study every company, because companies differ and attention must be paid to the "nature of the pay process at a particular company." *Id.* at 1621. Here there were three job functions with almost 8,500 employees (6035 in one of the "classes") doing a variety of work at different career levels, in different job titles, and at a company with hundreds of different products. There were over 1,000 unique organizations/cost centers, which Dr. Saad understood to provide a general relationship to the nature of the work that an employee did, and partially to the product or service that an employee worked on. *Id.* at 1622-24.

The components of pay at Oracle varied considerably by job level. HT at 1627; *see also* JX 103 at 94-95. The way that different factors impacted pay also differed by job level. The impact of tenure varied by the nature of the work and skill set, in some instances having a negative relationship with compensation and in some instances a positive relationship. If the jobs are aggregated, the different relationships are obscured, and if the different jobs also have different gender or racial populations, the aggregation would distort the inferences one could draw. HT at 1628-29.

As Dr. Saad understood it, in her expert report Dr. Madden had drawn a sharp distinction between exogenous and endogenous factors/variables, where only exogenous variables were properly considered because endogenous variables were determined by Oracle. The split came between Columns 5 and 6 in her charts. He believed this had changed in Dr. Madden's testimony, since she presented Column 6 as a proxy for areas of specialization. In her (a) series of tables, however, job descriptor was that currently possessed, not that possessed at hire, though at other points Dr. Madden did use job descriptor at hire. Job descriptor generally was a poor proxy for area of education or prior experience, and it would be better to look at the actual resumes to determine the actual areas of education and experience. HT at 1635-38. Dr. Saad pointed out that broader studies show that the specialization/major of education varies by race and gender in meaningful ways, which also at least suggested that more particularized skills might vary in meaningful ways as well. *Id.* at 1646-47.

Endogenous variables are those that can be influenced by the phenomena under study, potentially by more than one actor. HT at 1775-76. They can be used in economic analyses, but this depends on the circumstances. *Id.* at 1776-78. In a regression analysis, the left-hand side of the equation is the phenomenon under study, and the right-hand side is the variables being used to study that phenomenon. What is appropriate to include on the right-hand side depends on the underlying facts. In Dr. Saad's view, excluding variables on the hypothesis that they are a mechanism of

compensation bias is circular logic—it assumes compensation bias in order to purport to show compensation bias. *Id.* at 1778-80. In general, Dr. Saad does not believe that a statistical analysis should be structured to assume conclusions one way or another. *Id.* at 1799-1800. Over-specification basis occurs when a model contains too many explanatory variables that do not relate to the "variable of interest." The appropriate amount and sort of variables to include depends on the situation and what the model is attempting to study. HT at 1781. Adding additional variables does, in general, increase the risk that variables will measure the same effect. *Id.* at 1830-31

Regardless of how the Columns were understood, Dr. Saad did not believe that Dr. Madden's analyses provided a reliable basis to infer discrimination. He summarized:

> [I]f one starts with Column 5 and stops there, there's absolutely nothing about the work the individuals are doing. And to simply assume that the work individuals are doing is entirely dictated by decisions made by Oracle and not by any other factors, or is inappropriately determined by Oracle, is simply an assumption, it's not a demonstration and, therefore, the Column 5 results, I don't believe, could be used at all to infer disparity or differences in pay on the basis of gender. But even when you get to Column 8, in Column 8, as I've spent considerable time showing in my reports and we've discussed a little bit, the job codes have very wide pay ranges, we've already looked at that. And there's a great deal of variation within each job code, with respect to the pay, and in my opinion with respect to the nature of the work being performed. And if you don't fully capture the nature of the work being performed, or attempt to do so, you could end up drawing inferences that are incorrect.

HT at 1638-39. Based on the pay ranges and information on how managers are supposed to set pay, as well as the requisitions provided, Dr. Saad concluded that individuals in the same job code were not doing similar work. *Id.* at 1639-40. It is important to compare employees doing similar work because the nature of the work performed is a major factor influencing pay. *Id.* at 1641.

Dr. Saad opined that job descriptor does not similarly situate employees because it doesn't differentiate by skill level and involves enormous differences in pay. HT at 1652-53. Further, Dr. Madden's Column 8 did not similarly situate employees. Within job code there are large variances in pay, suggesting that the employees are performing different work involving different skills. His review of requisitions for the Software Developer 4 job code, where the greatest number of hires took place, showed a wide variation in what was sought for the jobs. He illustrated this in job word clusters, with words selected by an algorithm and displayed in a cloud. *Id.* at 1657-61; *see also id.* at 1844-47.

Dr. Saad elaborated on his views of the R-squared statistic for Dr. Madden's models, which, as discussed above, indicated that Columns 5 and Columns 8 left significant portions of pay variance unexplained. *E.g.* HT at 1664-66. Dr. Saad disagreed with Dr. Madden's suggestion that R-squared does not matter. His review of the literature, including literature cited by Dr. Madden showed that it was consistently reported. He agreed that it would be improper to pursue a good R-squared metric at the expense of everything else, but did not think that this implied that the measure could be ignored. *Id.* at 1673-74. R-squared measures unexplained variation. In cross-sections of data it is always less than one. The value ranges widely in published studies, depending on what is being studied. HT at 1782-84. One should "not let R-squared hold up interpretation of estimates that you get that agree with theory that you are testing with your econometric procedure." *Id.* at 1788. There

was a time in the field when too much weight was being placed on R-squared. In Dr. Saad's view, one should not pursue R-squared for R-squared' s sake, but one should not, in the same way, look at coefficient values alone and ignore other things, like R-squared. *Id.* at 1863-64.

In the revisions of Dr. Madden's analysis, Dr. Saad disaggregated job functions, modified and added control variables, and altered the measure of total compensation. HT at 1676-80. He did the analysis for total compensation rather than base pay since the complaint was framed in terms of total compensation. He would use the same model for base pay. *Id.* at 1680-82. Dr. Madden used Medicare earnings, which is a measure of total compensation but not the best measure because it will reflect stock awards in the year they are exercised, not earned. *Id.* at 1682-83. As to worries that counting equity awards in the year earned could result in including compensation never realized, Dr. Saad argued that in a statistical analysis of compensation the aim is to study the compensation awarded in a given year, so the more important concern was not letting employee choice about when to act on an equity award shape the analyses.[163] *Id.* at 1684-85.

As to his use of a leave of absence variable, Dr. Saad noted that Dr. Madden had also accounted for leaves of absence, but had done so by adjusting her experience variable. It was appropriate to account for leaves of absence as more than reduced experience. Whether it mattered was an empirical matter, deserving testing. He rejected Dr. Madden's claim that his approach was idiosyncratic, pointing to a prominent article he cited that adopted the same methodology. HT at 1685-87. His analyses added controls for both leave of absence in current year and cumulative leaves of absence. The cumulative leave of absence measure was limited to data from Oracle, since there was no information from prior employers or acquired companies. *Id.* at 1834-36. He believed that his time in job control was proper as well, since it indicated the amount of experience in the particular job. Dr. Madden criticized it as endogenous, since it could be shaped by promotion decisions, but that claim was empirical and not tested by Madden. *Id.* at 1688. Dr. Madden and Dr. Saad agreed that patent work could reflect productivity, but Dr. Madden was critical on using it since it could reflect Oracle decisions. But this was an assumption, and when Dr. Saad tested it against data about patents generally, it wasn't true. *Id.* at 1689-93.

Dr. Saad explained that he used organization as a control based on evidence from Mr. Miranda and what was found in the requisitions, which suggested that organization could be used as an imperfect proxy for the nature of the work and product worked on. It substantially increased the explanatory power of the model. HT at 1694-95. In addition, the impact of tenure on compensation varied by organization—a point that would be lost in an aggregated analysis. *Id.* at 1696-97. Based on the way organization was being used in the material he reviewed and Mr. Miranda's opinion about how it related to the work being done, Dr. Saad chose it as a control. He did not know how exactly organization/cost center fit into the budgeting process, but this was not relevant to his analysis. It is not a "perfect proxy," but has an approximate relationship between the products and services employees work on and the nature of the work involved. *Id.* at 1811-12; *see also id.* at 1812-18 (same points). Some of the materials he reviewed referred to hot skills, and requisitions were for work in particular organizations. *Id.* at 1823-25. Dr. Saad was not sure if compensation changed when there was a change in organization or if there are changes in pay with transfers. *Id.* at 1825-26. He knew that there were a lot of organizations. He did not independently study the correlation between organization and product. *Id.* at 1813, 1817-18. Dr. Saad did not know which products related to which cost centers/organizations, but explained that he didn't need

[163] He admitted that he had been incorrect in earlier criticism that Medicare earnings did not include tax-deferred compensation. HT at 1826.

to know this in order to conduct the statistical analysis, based on other evidence that there was a correlation between product and organization/cost center. *Id.* at 1818, 1820. There were a "fair number" of organizations with a single employee at the HQ facility, constituting about 2% of the population, but in the statistical analysis these single observances get dropped out. *Id.* at 1819-20, 1865.

Dr. Saad did not find Dr. Madden's worry that organization could reflect Oracle's decisions convincing. It was an assumption that gender or racial differences in organization were due to Oracle's decisions. His analysis of employees' initial organizations indicated that there were not statistically significant differences between races and genders in the (high) rate at which employees end up in the organization to which they applied. HT at 1697-99. Dr. Madden's point that people in lower paying organizations would not accept the lower pay and move was correct—but it assumed that the individuals in the lower paying organizations were equally skilled and the same skills as those in other organizations. *Id.* at 1699. Dr. Madden's analysis of the amount of movement between organizations had a programming error that overstated the amount of change. In fact when Dr. Madden's analyses was corrected, approximately half of the people in the population were only ever in one organization and another quarter were only in two organizations. In a given year, 80-90% remained in one organization. *Id.* at 1699-1701.

Dr. Madden had also criticized Dr. Saad's use of organization because it added too many variables. In Dr. Saad's view, however, adding too many variables would mean that the regression wouldn't run at all and the particular worry Dr. Madden articulated was only valid it one was adding variables that didn't improve the explanatory power of the model. HT at 1701-02. Dr. Madden was also incorrect in claiming that a certain number of individuals, 50, were needed in each category of a control. Adding the control did not mean that one was only comparing individuals in that control—rather, one was comparing all of the individuals taking that control into account. So he was not "slicing and dicing" by carving up sub-populations for separate analysis; the analysis remained on the larger job function group, it just took organization into account. *Id.* at 1702-03.

Dr. Saad concluded that "[w]ith the refinements that I proposed, again staying with the aggregated format and so on, I find that there's no statistically significant pattern or systemic pattern with respect to the compensation of women, Asians or African-Americans." *Id.* at 1703-04; *see also id.* at 1704-08 (point drawn out for each revision of Dr. Madden's analysis). This was working within the aggregation adopted in this case, which Dr. Saad did not necessarily believe were proper, and without making further refinements, which also might be proper. *Id.* at 1704. With the refinements, the R-squared measure for the model increased considerably, indicating that the refinements added to the explanatory power and made it a better predictor of pay. *Id.* at 1708.

Dr. Madden's original study of assignment was done by analyzing compensation. Dr. Saad opined that this was improper, and looked instead at the jobs into which individuals were hired, which he viewed as the variable being studied. HT at 1710-11. He first studied the positions that employees applied for, finding statistically significant differences in the level of jobs that in that the demographic groups applied to. *Id.* at 1712-15. He then studied up-leveling and down-leveling. The majority of all groups ended up in the position they applied for. With one exception, there were not statistically significant differences between demographic groups in this regard. The exception was Asians applying to IC positions. However, Asian applicants tend to be younger than other applicants, and once age was factored in, the statistically significant result disappeared. *Id.* at 1715-21. His analyses, "[t]aken collectively, [] do not support any inference that there's some sort of taint

or bias in the way Oracle handles initial assignments that individuals receive at Oracle." *Id.* at 1721-22. His approach aggregated career levels. *Id.* at 1832-33.

Dr. Saad opined that Dr. Madden's criticism of his use of too few data points was mistaken, since he used 1,661 requisitions in product development, 90-91% of those that could be studied. *Id.* at 1722. He also rejected the criticism that he didn't control for exogenous characteristics reflecting qualifications. That would have been done in analyzing hiring, but his analysis was directed only at the question of whether an individual hired was up-leveled or down-leveled. *Id.* at 1723. Dr. Madden had altered the analyses by disaggregating career levels and analyzing each separately. That revealed a few instances where groups were up-leveled and down-leveled differently, but it did not change Dr. Saad's conclusion because there was no pattern of systematic differences. *Id.* at 1724-26.

Dr. Saad also highlighted his exploration of Dr. Madden's promotion analyses. Dr. Madden had only reported a few findings where there were statistically significant adverse effects for the defined groups in this case. Full analysis, however, indicated that for other groups there were no other statistically significant outcomes for women, except for at M5, where there was a statistically significant positive outcome for women. Dr. Saad disagreed with Dr. Madden's assertion that there were too few individuals to make this meaningful, contending that there were 1,746 individuals in the group, with probably between 200-300 females, enough for an analysis. HT at 1726-28. The same model for Asians showed no significant shortfalls, and two significant excesses. *Id.* at 1729. Applied to African-Americans, there was one significant excess and no shortfalls. The outcome signs were mixed. *Id.* at 1729-30. Dr. Saad concluded that there was no pattern of adverse promotion outcomes by gender or race. *Id.* at 1728-30.

Dr. Saad criticized Dr. Madden's analysis of pay growth in her rebuttal report on the grounds that it had included a variable on both the left-hand and right-hand side, which was "incorrect econometrically." His analysis computed the percentage pay in adjacent years, finding different results. Dr. Madden also took out changes in job from her analyses, which Dr. Saad contended was inappropriate. Further, there were lots of zeroes in the data set, and Dr. Madden had declined to make the appropriate statistical refinement that she had made in other instances when the data contained a lot of zero values. He concluded that Dr. Madden hadn't provided reliable evidence of any bias in pay growth. HT at 1730-33.

Turning to Dr. Madden's analysis of starting pay, Dr. Saad observed that Dr. Madden had done a regression of starting pay on prior pay. She reported a 61% explanation of the variation, which based on the backup, was the R-squared measure for several results. This translated to a .78 correlation between starting pay and prior pay. HT at 1733-36. Dr. Madden's analyses, however, did not show any causal connection between starting pay and prior pay. *Id.* at 1738-39. Correlation is expected, since the two employers are paying for the same skill set, and the correlation at Oracle is similar to that found in the economy generally. *Id.* at 1739-41.

In sum, Dr. Saad opined that Dr. Madden's analyses did not support OFCCP's allegations, that Dr. Madden relied on unsupported assumptions instead of empirical research, that Dr. Madden utilized mis-specified models, that Dr. Madden relied on incorrectly measured variables, and that Dr. Madden's analyses suffered from omitted variable bias. HT at 1743. Dr. Madden's analyses did not support an inference of discrimination

> [b]ecause in my opinion they do not compare people who are doing similar work and there's no basis to exclude the variables that would permit one to identify individuals doing similar work, based on the analyses that Dr. Madden did. In some cases she

> did analyses purporting to justify the exclusion of certain variables, those analyses do not justify, they do not conclude that one should leave those variables out. And in other cases she simply assumed that certain variables should not be included in analyses, and did not include them.

Id. at 1744. Dr. Saad found no evidence of discrimination in the way that individuals end up in their jobs, no evidence of bias in promotions or pay growth, and no evidence that prior pay causes starting pay. There was no systematic pattern of up-leveling or down-leveling and the correlation between starting pay and prior pay was consistent with employers paying for the same skills. *Id.* at 1743-45.

VII. CREDIBILITY DETERMINATIONS

The finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw his own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). In weighing testimony, an ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the subject matter at issue. An ALJ may also consider the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006). Having heard the witnesses' testimony, I have been able to observe their behavior, bearing, manner, and appearance. Credibility "involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963); *see also Indiana Metal Prods. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971). I have based my credibility findings on a review of the entire record, according due regard to the demeanor of witnesses who testified before me, the logic of probability, and "the test of plausibility," in light the record as a whole. *Indiana Metal,* 442 F.2d at 52.

A. Credibility of Fact Witnesses

Apart from the anecdotal witnesses, 18 "fact" witnesses testified either at the hearing or via deposition—or both. I generally found the witnesses who testified before me credible, though they offered varying levels of information and explanation. This case doesn't turn on historical, factual disputes. There are factual disputes about Oracle and its compensation and other practices, but the issues do not involve weighing competing accounts of the same events and deciding which version is the most credible. Rather, resolution of the factual disputes turns more on synthesizing and coming to conclusions about large volumes of evidence. Nonetheless, brief comment on the background and credibility of the factual witnesses is appropriate. They can be roughly divided into three categories: 1) Oracle non-HR and manager witnesses; 2) Oracle HR witnesses; and 3) OFCCP witnesses.

1. Oracle Non-HR or Manager Witnesses

A number of Oracle managers outside of HR testified about the nature of the work at Oracle and their practices regarding hiring, compensation, and other functions. Steven Miranda is Oracle's Executive Vice-President of Applications Development at Oracle. He identifies as male, "Hispanic or Mexican-America." After college, he worked for GE Aerospace for a year and then

moved to Oracle, where he has been for over 27 years. He started as an application developer and engineer, was promoted to development manager, became a group manager, and then was promoted to a director, where he was responsible for a couple of products. He was made a vice-president, responsible for more products, and then a senior vice president and executive vice president. HT at 1065-67.

Campbell Webb has worked at Oracle for over 25 years and is the Senior Vice President of Oracle Managed Services, which is the IT organization at Oracle. He identifies as a Caucasian male. He is "responsible for managing all the applications and services that our employees use on a daily basis, things like e-mail, calendaring, financial systems, support systems, as well as systems of our customers, again, financial systems." Mr. Webb started at Oracle as a sales consultant in Australia. He then transferred to the HQ facility as a technical program manager and has worked his way through the organization into his current role, moving to the Cambridge, Massachusetts office after 13 years. In his time at Oracle, he has worked on databases and worked as a systems administrator. HT at 1391-92, 1395-96. Balaji Bashyam has been at Oracle for 23 years and at the time of the hearing was Senior Vice President of Customer Support for Database, thought he had recently been Senior Vice President of Customer Support for SaaS Services. He identifies as an Asian-Indian male. HT at 1431-34. Mr. Webb and Mr. Bashyam testified generally about the sort of work that is performed in their organizations and their compensation practices.

Juan Loaiza is Oracle's Executive Vice-President of Mission Critical Database. He was previously Senior Vice-President of Database Systems. He is part of the engineering or development organization and in the product development function. He joined Oracle in 1988 and identifies as a "male, Hispanic, white." HT at 1464-66. Carolyn Balkenhol is an Oracle employee of 25 years who currently works as a business-planning director, a position she has held for nine years. She identifies as a white woman. Her duties are "[p]rimarily reviewing transactions, HR, purchase requisitions, things of that nature, that require approval from our most senior executives" (i.e. Mr. Ellison and Ms. Catz). She has two reports and on her team who have similar responsibilities. HT at 1286-88.

I found each of these witnesses credible in providing testimony related to their particular organization at Oracle and their own practices related to compensation. Nothing in the record countered or otherwise questioned their credibility, and I generally found their testimony reliable and convincing. Each is limited in their knowledge to their particular domain, but within the appropriate scope I give them weight.

2. Oracle HR Witnesses

Oracle and OFCCP also presented testimony from a number of Oracle HR employees. Kate Waggoner provided the most extensive testimony at hearing, and sat for three separate depositions that are part of the record (as designated). *See* PX 22; PX 24; JX 102. She is the Senior Director of Global Compensation at Oracle, a role she has held since January 2018. She joined Oracle in 2005 as part of the PeopleSoft acquisition. She was an individual contributor Compensation Consultant for seven years, became a Senior Manager of Compensation, and then Director of Compensation before being promoted to her current role. As a Compensation Consultant she supported IT, Support, Product Development, Sales, Consulting, Marketing, and other areas. Ms. Waggoner identifies as a white woman. HT at 1161-63; *see also id.* at 1243-44 (history working with Product Development).

In Ms. Waggoner's current role,

> my team is responsible for anything that really has a global reach when it comes to compensation at Oracle. I have someone under me and I partner with her to administer and set up any Global Compensation Program, whether it be a focal, an annual salary increase program, an equity program, a corporate bonus program. I have someone underneath me who is responsible for managing the Global Job Table, and reviews requests for new jobs and monitors that. I have someone underneath me who is responsible—she's considered the Compensation M&E lead, and so she reviews the target companies and the companies that we acquire, to learn more about their employees and their jobs and their organizations and how they will then map into Oracle. And then I also play a role in some executive compensation responsibilities and things with the Compensation Committee.

Id. at 1163; *see also* JX 102 at 8-14 (discussion of history and duties); PX 23 at 1 (corrections to JX 102).

Ms. Waggoner testified expansively on Oracle's practices related to compensation. She is well positioned to offer insight into Oracle's practices in a number of areas that are of importance in this case. She was deposed multiple times and testified at length, and based on my review gave consistent accounts and testimony.[164] While an Oracle employee and witness for Oracle, at the hearing Ms. Waggoner gave straightforward accounts and direct answers to questions, and I did not get the sense that she was attempting to hide information or "spin" particular points. I found her testimony to be forthright, highly informative, and credible, and I give her accounts weight.

Shauna Holman-Harries was the Director of Diversity Compliance from October 2011 to 2017 and has been the Senior Director of Diversity Compliance since. She was responsible for overseeing Oracle's OFCCP compliance efforts and affirmative action. HT at 331-34, 337-39, 344-45. At the hearing and in depositions she testified about the compliance review and Affirmative Action Plan compliance. Tamberlane Baxter is a Senior Director in HR at Oracle. She joined Oracle in 2005 and since late 2014 has managed Oracle's workplace investigations in the United States. HT at 477-80. She testified about Oracle's internal investigations. I found both Ms. Holman-Harries and Ms. Baxter credible, though both appeared concerned not to share too much detail or to offer testimony that might be used to infer conclusions they did not agree with. With Ms. Baxter, for instance, there was a great reluctance to give any ground about workplace investigation practices beyond the non-existence of standard practices—other than involving counsel. In both cases, the guardedness was likely in part a function of over-preparation, but it had the result of rendering the testimony less helpful in some respects. However, in both cases I found the testimony honest and credible and gave both witnesses weight within the scope of their testimony.

Both Ms. Holman-Harries and Ms. Baxter play a limited role in the decision making below. This is true for most of the Oracle HR witnesses. Victoria Thrasher is Oracle's Senior Vice President of Human Resources Organization and People Capability. She identifies as a Black female. She has been at Oracle 23 years, starting as an HR consultant and then being promoted into management. She has been responsible for Diversity and Inclusion Initiatives since June 2015 and

[164] There is perhaps some variance as to whether Oracle has compensation policy or guidelines, which came out in § V.D.2 above. However, any differences here turned on how those words were being used, not underlying facts.

has been in her current role since January 2019. She has responsibility over "Talent Development Organization, Top Talent Programs, Diversity Inclusion, Diversity Compliance, the HR Communications and Learning Capabilities." HT at 1341-43. I found Ms. Thrasher credible within the scope of her testimony, but since that scope is of only of very limited relevance to the claims at issue, her testimony plays little role below.

The same holds for the other HR witnesses. Madhavi Cheruvu is a Vice-President of Human Resources. She manages a team of individuals and provides HR support to seven lines of business, including "Database" and "Fusion." In 2015 she supported the "development organization" that was run by Mr. Kurian. PX 12 at 11, 23, 60. Anje Dodson is an HR Vice President. HT at 64-65. She gave a deposition in the *Jewett* matter concerning training and performance management at Oracle, which has been submitted, as designated, here. *See* PX 14; PX 14A. Chad Kidder is/was a Director of Talent Advisory for North America Product Development, except for Oracle Cloud Infrastructure. Previously he was a Senior Recruiter, Interim Recruiting Manager, Executive Recruiter, Recruiting Manager, and then a Senior Manager in talent advisory. PX 20 at 12-13. He sat for a deposition on Oracle's behalf in the *Jewett* matter, and that deposition, as designated, has been submitted in this case. *See* PX 20; PX 20A. In each instance, the testimony provided was credible when the designations provided enough context to fairly discern the content, but in no instance is the testimony central to the issues that matter most in this litigation.

Joyce Westerdahl has been with Oracle since 1990 and is the Executive Vice President of Human Resources. In that role, she oversees HR at Oracle. She is also the Executive Director of the OWLs program and is involved with the Oracle Foundation and Oracle Academy. HT at 1240; PX 22 at 62; PX 81 at 1; PX 26 at 12-13, 17, 338. She does not make or approve compensation decisions for the job functions at issue in this case or assist with global compensation programs. HT at 1240-41. Limited portions of Ms. Westerdahl's deposition are in evidence, *see* PX 26; PX 26A, that briefly covered a range of topics. Overall, I found Ms. Westerdahl to be credible and gave her testimony weight. However, in areas regarding compensation and job organization most relevant to this case, I rely more on Ms. Waggoner, who is in a better position to provide details and insight about the actual practice, and who testified at far greater length and in more detail.

3. OFCCP Witnesses

A number of witnesses from OFCCP provided testimony in this case, though this was mostly done via deposition given the narrowing of issues for the hearing. The testimony of these witnesses informs some of the background to this case, but is of relatively low importance for the issues in dispute at this stage.

Sean Ratliff is the OFCCP district director for San Diego. HT at 649-50; *see also* DX 442 at 8-9. He was not involved in the Oracle audit. HT at 667-68. He sat for a deposition as a Rule 30(b)(6) witness for OFCCP in relation to the compliance review. *See generally* DX 442 (as designated in DX 442A). Though I have included some aspects of that testimony as background above, the procedural complaints and defenses are not at issue here, so the testimony has only background relevance to this decision. At the hearing Mr. Ratliff testified about the process of creating PX 171 from PX 260, which was done at the request of counsel. *See* HT at 650-53, 670-74, 676. He was also permitted to testify about snapshots generally. *See id.* at 662-66. I found Mr. Ratliff's testimony sufficient to admit PX 171. HT at 677-78. I attach no great importance to Mr. Ratliff's testimony about it or the exhibit itself, beyond the point that Oracle has a variety of salary grades that are used for different jobs in different functions, specialties, and global career levels.

Hea Jung Atkins is currently Director of Planning and Support at OFCCP, a position she assumed in 2017. She joined OFCCP in 2010 as District Director of the San Jose District Office. She then moved to the San Francisco District Office in April of 2012. DX 439 at 11-13. She was in this position when the audit at Oracle HQ started. She was responsible for managing enforcement and compliance investigations, as well as administrative tasks. *Id.* at 14-16. She attended at least one onsite in this compliance review and was involved through the conciliation meeting. *Id.* at 19, 24. Although Ms. Atkins appears to have been very involved in the compliance review, she testified that she could not remember a number of points that seem improbable she would forget given the importance of the case. For example, she could not remember whether she was concerned that her office was treating Oracle differently, if OFCCP gave Oracle indications of what it was worried about in the review, whether she and OFCCP responded to concerns about misconduct during the review, what information OFCCP was giving Oracle, the basis for the NOV, whether any concerns had been discussed at entrance or exit conference or the conduct of the review, a letter she signed in September 2016 responding to Oracle, what happened at the conciliation meeting, or whether she was under a directive not to give Oracle information. *Id.* at 74-77, 102, 151, 157-58, 175-78, 179-83, 187-88, 192-93. The inability to remember if there were special directions not to share information is peculiar—this sort of exceptional treatment would be something one would remember, or confidently deny. None of these points are important for the issues remaining here.

Dr. Shirong Andy Leu is a statistician at OFCCP, where he has been employed since 2005. DX 440 at 37-38-40, 43-47. He testified about statistical analysis at OFCCP in general, including directives governing the work he does and the training provided. *Id.* at 47-49, 51-53, 58-60, 71-73, 75-76, 209-10. A statistician does not make decisions about groups for analysis or controls to use, though there is some exchange between statisticians and others in the agency in this regard. *Id.* at 61-65, 69-71. Dr. Leu also testified, to a limited degree, about his views on conducting statistical analyses of compensation. *Id.* at 67-69, 75, 171-73. And he testified about his work in relation to Oracle in general and the Oracle HQ audit, particularly the analysis underlying the NOV, in which he took directions from Ms. Wipper as to what to analyze and what to use as controls. *Id.* at 77-80, 97, 102, 126-28, 139, 143, 170; *see also id.* at 88-90, 97-109, 112-26, 132-39, 141-44, 147-50, 173, 185-87, 205-07, 209-16, 229-32, 240-46, 258-63, 276-79. Dr. Leu claimed poor memory in regards to his work on this case, or who might have performed the statistical work. *Id.* at 77-78, 82, 84-86, 87, 88-92, 95-96, 126-27, 136-37, 155-57. He even claimed not to know what other statisticians work for the Department of Labor, initially saying that only management would know. *Id.* at 92-95. In any event, the information is purely historical background and not important to the decision below.

Dr. Michael Brunetti performed the statistical analysis underlying the SAC. DX 440 at 25. He testified via deposition about the work he did, the basis for his analysis, and the manner in which the calculations/analyses in the SAC were made, though at times he had limited memory.[165] Dr. Brunetti's responses, when they were provided,[166] were generally credible but are not material to the discussion below.

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[165] *E.g.* DX 440 at 33-34, 36-38, 48-51, 70-72, 76-78, 80-82, 85-87, 88-89, 104-05, 108-09, 110-11, 114-15, 118-19, 124-26, 144-45, 146-51, 153-55, 163-66, 168-69, 172, 174-75, 176, 181-84, 185-86, 192-94, 197-99, 201-03, 205-07. Dr. Brunetti generally testified about the way that OFCCP's counsel made the decisions underlying the analysis. *See id.* at 39-41, 43, 56-57, 71-72, 75-77, 116-17, 119-20, 145, 165-66, 172-73, 183, 186, 189, 192-93, 198. He did make some statistical decisions about the analysis. *See id.* at 47-48, 51, 73-74, 113, 198. But he was instructed on the choice of dependent and independent variables for the analysis and how to define the groups to be analyzed in the regression. *E.g. id.* at 50-51, 71-72, 75-77, 145, 165-66, 172-73, 186, 193.

[166] *See, e.g.*, DX 440 at 44-45, 55, 70, 99-100, 101, 102-03, 209.

Jane Suhr sat for a deposition on behalf of OFCCP related to conciliation. DX 443 at 11, 13-14. She discussed the conciliation process generally. *See, e.g.*, DX 443 at 14, 17. Ms. Suhr also testified about the conciliation efforts in this case. *See, e.g.*, DX 443 at 14-16, 18-19, 21-22. As presented in the deposition, I found Ms. Suhr's testimony credible. She was straightforward and any claims of poor memory were limited and reasonable in the circumstances. Though her testimony provides some background insights concerning OFCCP's behavior and motivations, it is not important in this decision given the issues remaining for adjudication.

B. Credibility of Anecdotal Witnesses

A total of 14 anecdotal witnesses testified at the hearing about their experiences at Oracle. In general I found these witnesses credible and well-intentioned. I will give some weight to their accounts below, as they become relevant. While the parties dispute the import of particular facets of the evidence—which will be discussed below—they do not contend that any of these witnesses should be disregarded or given little weight. Several general credibility issues did emerge on the record, though I find that none are serious impediments to giving some weight to the testimony provided.

On April 4, 2019, counsel for OFCCP sent a solicitation letter to Oracle employees, whose contact information had been provided earlier in the litigation. It stated that OFCCP's analyses showed that female, Black, and Asian employees at Oracle were undercompensated by as much as 20%, with $600,000,000 in lost wages since 2013. It stated that the Department of Labor was bringing a lawsuit to end the discrimination and require payment, and asked for assistance from the recipients. It stated that OFCCP was particularly interested in evidence of the use of prior pay, placement in lower paid positions, or channeling. It assured recipients that they were not accused of any wrongdoing and that their evidence would be kept confidential unless they agreed to be a witness. It then provided contact information for a witness line and email address. DX 447; *see also* DPF at ¶ 6.

Oracle elicited testimony that OFCCP's witnesses became involved in the case via media reports or in response to this letter. *E.g.* HT at 80-81 (Dr. Hanson-Garcia), 147-48 (Ms. Klagenberg), 189-90 (Ms. Ng), 286-87 (Ms. Boross), 313 (Ms. Esteva), 432-33 (Mr. Pandey), 554 (Dr. Alexander), 627 (Ms. Hardman), 1022 (Mr. Mensah). Some witnesses had also been laid off or separated from Oracle, some quite recently. *See* HT at 75-78 (Dr. Hanson Garcia), 186-88 (Ms. Ng), 432-33 (Mr. Pandey). All, as is to be expected, were not happy with Oracle and had some negative experiences to relate. However, there is no convincing evidence that there was any coercion or undue pressure and I did not get a sense from any witness that he or she was motivated at all by pecuniary gain. The accounts OFCCP's anecdotal witnesses gave will be viewed, as needed, through the lens of how they came to be involved in this case, but I do not find any basis to give less weight to them at the outset.

In questioning Oracle's anecdotal witnesses, OFCCP elicited that they work for Oracle and rely on Oracle for compensation. *See, e.g.*, HT at 1520 (Mr. Adjei). But I did not get any sense that these witnesses were coerced or pressured in any way. For instance, I found Mr. Adjei very genuine when he explained that he testified "because I heard about the lawsuit with Oracle and I wanted to come share my experience as far as being with Oracle, because I wanted it to be part of the whole picture." *Id.* at 1500; *see also id* at 1916 (similar testimony from Ms. Chechik). Mr. Adjei had been proactively contacted by OFCCP about the case and told them that he didn't think he had been discriminated against—afterwhich he never heard from OFCCP again. *Id.* at 1499-1500. So the

employment reality of these witnesses is part of the context, but not reason to give less weight to their testimony at the outset.

The anecdotal evidence is limited in that each witness could only talk about his or her experience. For instance, Dr. Hanson-Garcia did not work in the Product Development, Support, or IT job functions, was not involved in compensation decisions for those functions, and was unaware of how those decisions were made or who made them, or how budgets were allocated. HT at 90-92. Ms. Ng was never a manager at Oracle and so did not make compensation or promotion decisions, wasn't involved in those processes, and didn't know other peoples compensation unless they told it to her. *Id.* at 196-97. Dr. Alexander was never a manager at Oracle and was not involved in hiring, transfer, or compensation decisions. She was unfamiliar with job functions, focal reviews, global career levels, or job codes. *Id.* at 558, 583-85, 589-90. Ms. Hardman has never been a manager at Oracle and hasn't been involved in hiring, transfers, making compensation decisions, promotions, or budgeting. *Id.* at 627-28; *see also id.* at 629-31. The same held for Ms. Shah. *Id.* at 240. But this is all just to say that the anecdotal witnesses were all limited in their manner to providing their particular perspective and experience at Oracle, and is thus a reason to treat these witnesses as anecdotal witnesses rather than possessing some special knowledge.

C. Credibility of Expert Witnesses

1. Dr. Janice Madden

Dr. Janice Madden is "a labor economist with extensive experience in the analysis of labor markets and, in particular, gender and racial differentials in labor markets." She completed an MA and Ph.D. in Economics at Duke University and has been a professor at the University of Pennsylvania since 1972, first in the Department of Regional Sciences and from 1994 in the Department of Sociology. She was also a member of the Department of Real Estate at the Wharton School from 1990 to 2016. She taught courses in economics, labor economics, and statistical methodologies, published five books, and published various academic articles. She was elected Fellow of the Regional Science Association International and has lectured at the Federal Judicial Center. PX 1 at 3-4, 111, 113-18; *see also id.* at 111-25 (full CV); HT at 686-701 (discussion of qualifications).

Dr. Madden is now a senior consultant with Econsult Corporation, where she is hired by parties in discrimination litigation. This has led to testimony in more than 45 cases. PX 1 at 4-5; *see also id.* at 127 (testimony since June 2015); *id.* at 129 (hourly rate); HT at 696-97. Roughly 85% of her litigation work is on behalf of plaintiffs. HT at 697. Though Dr. Madden holds an academic appointment, it is part-time and the majority of her time is now spent doing expert witness work through Econsult, where she is a founding partner. *Id.* at 858-59. This is the only case that Dr. Madden could recall where she has offered an expert opinion involving a software-technology company. *Id.* at 859.

OFCCP avers that Dr. Madden "has significant credentials relevant to this matter," point to her long academic career, history of testimony in complex statistical cases, and training role at the Federal Judicial Center. PPB at 16 n.21. OFCCP also points to a recent Third Circuit case describing Dr. Madden as having "extensive experience" in this area. *Id.* at 15-16 (citing *Greater Phila. Chamber of Commerce v. City of Phila.*, 949 F.3d 116, 128 n.60 (3d Cir. 2020)).

I find that Dr. Madden is a well-qualified statistical expert—just as Dr. Saad is a well-

qualified statistical expert. Both are competent to conduct statistical analyses and offer expert opinions, and both offered opinions warranting serious consideration in this case. At the hearing, I found Dr. Madden somewhat credible. I will give her views some weight below, but subject them to critical scrutiny. Dr. Madden's direct examination was compelling in its ways, but functioned more as a presentation of slides for an audience than a simple explanation of expert opinions for a finder of fact. Dr. Madden and Dr. Saad were not so different in this regard—he also testified on direct with the aid of an extensive slideshow demonstrative exhibit, rendering the testimony somewhat of a presentation. With Dr. Madden, however, the demeanor and presentation of information changed markedly on cross-examination. Rather than simply answering questions straightforwardly, Dr. Madden was in cases reluctant to answer questions she perceived as potentially problematic for her position and a times became argumentative and/or evasive. This led to a number of impeachments—generally not on core points or even points hostile to Dr. Madden's theory (indeed sometimes on points consistent with her views but where she was reluctant to give any ground). This was one of several credibility warning signs that emerged through her testimony.

Dr. Madden is a hired expert, like Dr. Saad. She has been retained by OFCCP in the past, though peculiarly she was resistant to agreeing to any estimate of the number of cases. Initially she could only agree to three. When pointed to prior testimony she gave in another case estimating five to eight prior cases for OFCCP in the past five years, Dr. Madden didn't "dispute" that, but refused to "agree with it." She maintained that she could only remember three. HT at 853-56. She has testified for OFCCP in court twice in the last five years, as well is in three other cases for plaintiffs. *Id.* at 856-58. The underlying point—that Dr. Madden has regularly testified for OFCCP—is apparent from the record regardless of her uncertainties. It does not distinguish her from Dr. Saad, who has testified in other matters for Oracle. Both are hired exerts and should not uncritically be trusted. That point is simple; Dr. Madden's reluctance to give any ground and defer to testimony when her memory was better only attenuated the worry.

In another instance, Dr. Madden resisted the statement that she believed that Dr. Saad used a different understanding of "similarly situated" than she did. This was peculiar, since the point is obvious and was one that she had highlighted. When pointed to language to that effect in her rebuttal report, she only agreed, "I did write that." HT at 875-76. Dr. Madden initially denied that her version of human capital theory applied to analyze potential discrimination, only exogenous factors should be considered. Pointed to statements indicating otherwise, she clarified that she did believe this to be true, but as a matter of "scientific statistics," rather than human capital theory. *Id.* at 859-62.

Dr. Madden questioned whether she had ever said that compensation differences associated with race or gender that cannot be explained by her credential measures are suspect. Pointed to her report, she agreed that she had said that, but pivoted and argued that she hadn't said that at the hearing (yet). She agreed that she believed the point from the report. HT at 867-68. Dr. Madden would not agree that some job descriptor categories contained thousands of employees. Pointed to her deposition in which she had testified that the softer developer descriptor included thousands of employees, Dr. Madden agreed only that she "may have said that." *Id.* at 894-95. She initially resisted agreeing that she had opined that prior pay predicts starting pay at Oracle. When pointed to her report, she agreed that "I did write that." *Id.* at 911-12. Dr. Madden resisted agreeing that she did not believe that job descriptor was an appropriate "job control" on the grounds that she wasn't sure what the term meant. After being pointed to language in her rebuttal report and again being reminded that the term was one she was using, Dr. Madden acknowledged that job descriptor is not meant to similarly situate employees in jobs. *Id.* at 921-24.

Dr. Madden agreed that, in actual fact, there was wide variance in compensation within a job code. But she resisted accepting the conclusion that individuals with the same skill levels would not accept those differences, and would move to different jobs. Pointed to deposition testimony in which she agreed with that point, Dr. Madden would only agree that she had said that, maintaining that she wanted to review the larger portion of the deposition before agreeing again. HT at 930-32. Dr. Madden denied that she didn't use information when she couldn't easily fit it into her statistical model. Pointed to deposition testimony directly contrary, Dr. Madden acknowledged that she gave the testimony under oath, but maintained that she needed to see context. Shown the context, she added only that "Oh. Boy this is really hard to say what this was about." *Id.* at 938-39.

In many of these instances, counsel was not asking for damaging or even potentially damaging information—counsel was merely pinning down commitments that Dr. Madden had made and that defined parts of her opinion. Yet apparently afraid that counsel was setting up a criticism or attempting to procure a damaging admission, Dr. Madden evaded, refused to answer, and was corrected. Even then, Dr. Madden didn't simply answer the question, she tended to further evade by admitting only that she said or wrote something. What I want to know is whether or not Dr. Madden believes something to be true. If she says or writes one thing but then refuses to agree with it, only acknowledges that she did utter an opinion, and declines to answer further, the end result is that I'm not sure what to take as Dr. Madden's definitive opinion and argument. It is not Dr. Madden's role to craft the legal arguments or maneuver to reach a particular conclusion. That is the job of OFCCP's attorneys. Credible expert testimony would have simply forthrightly stated the position and the rationale, without attempt to evade or argue. At times, Dr. Madden offered forthright, credible expert testimony and opinions that will be considered on the merits below. But her overall credibility was lessened by other parts of her testimony that became argumentative, evasive, and unnecessarily reluctant to state a firm opinion.[167]

Dr. Saad observed that Dr. Madden participated in a University of Pennsylvania Gender Equity Committee, which issued a report including compensation analyses that did control for factors related to the nature of the work being done, including differentiation of whether the degree in question was high, medium, or low paying. JX 104 at 11-12. Dr. Madden allowed that she contributed to the report. She was not involved in the salary analysis, but reviewed it as part of the committee before it went public. She likely contributed to that part of the report. She could not recall whether she expressed concerns about the structure of the analysis. She acknowledged that she was listed on the report as a committee member. She didn't really remember what she did. HT at 947-49, 962.

The report was issued in December 2001, 19 years before the hearing. *See* DX 256. It engages in a sort of analysis involving more fine-grained assessments of the topical focus of work at an institution and the market for that work that Dr. Madden opposed allowing for Oracle in this case, since the organization/department worked in could mask discrimination. Dr. Madden's professed lack of memory is surprising. Nineteen years is a long time, but not so long that a complete lack of recollection is likely given the nature of the event. Dr. Madden's professional life

[167] Not all instances of correction resulted in a credibility issue. Dr. Madden acknowledged that her testimony and PowerPoint presentation were inaccurate as to the stock award analysis in that she had referred to Column 7 as containing a managerial control, but, in line with her report, she had actually used a performance rating control instead. HT at 907-08. This was a simple mistake in the preparation of the slideshow demonstrative exhibit. When it was brought to light, Dr. Madden acknowledged the error and we all moved on. People make mistakes and it does not render them necessarily less credible. The difficulty created by the instances discussed in the text was more about the manner or the response than the simple correction.

has been devoted, in fair part, both in academia and as an expert witness, to analyzing discrimination at institutions. Her long and successful academic career occurred at the University of Pennsylvania. The confluence of Dr. Madden's area of professional focus and the location of her professional life is unlikely to have been a non-event over which she lost all recollection. Regardless of her memory, she was involved with the report and advertised as a committee member. It represents how gender equity was assessed at Dr. Madden's institution. And it diverges markedly from Dr. Madden's approach here.

Another warning sign arose surrounding Dr. Madden's shifting use of job descriptor and endogenous variables. Dr. Madden initially agreed that Columns 1-5 completed the exogenous variable analysis, but then added that Column 6 was a proxy for area of education and experience. HT at 884-85. Queried as to where this understanding could be found in her reports, after reviewing the reports in recess Dr. Madden pointed to a footnote within one of the analyses suggesting that the job descriptor could reflect areas of education or experience or a decision by Oracle. *Id.* at 887. After a string of non-responsive answers, Dr. Madden agreed that she didn't know whether job descriptor actually reflected someone's major, specialization, or area of prior experience. Instead, this was based on "professional judgement." *Id.* at 889-94.

Dr. Madden's original report is stark and clear—endogenous factors are those that are within Oracle's control and should not be used to assess whether or not Oracle is discriminating because they could reflect discriminatory assignments or steering. *See, e.g.*, PX 1 at 9-10. Job descriptor is, in the manner that Dr. Madden discusses, controlled by Oracle because it reflects Oracle's job family. Her report reflects this understanding whereby the analysis of discrimination ends at Column 5, with the remainder narrowing the manner of Oracle's discrimination. *Id.* at 14-19. Dr. Madden's rebuttal report is quite direct—only exogenous characteristics are appropriate to use in a statistical analysis of discrimination, since the company controls/influences endogenous characteristics and thus they could be a means of and mask for discrimination. PX 2 at 4-5, 8; *see also id.* at 11-32. At the hearing Dr. Madden made a similar point—endogenous variables are those determined/influenced by the employer and are properly used only to determine the means of discrimination. HT at 868-70.

At the hearing, however, Dr. Madden also opined that Column 6, job descriptor was actually a metric or proxy for area of specialization, pointing to some comments in her report indicating that job descriptor could be used in this manner or reflect Oracle's decision-making. HT at 882-887. This reading can find some support in the reports. In addition to the note Dr. Madden found in the rebuttal report, her original report did at one point reference using a job descriptor metric as an "assumed" measure of specialization in Table 1(b). PX 1 at 19-20; *see also id.* at 30-31.

But despite these statements, a problem remains. There was a considerable shift in tone and presentation between the reports and the hearing testimony. Dr. Madden and OFCCP apparently perceived that there was a weakness in the analysis because Dr. Madden's experience and education controls did not in any way track areas of specialization, which could be found to be an important factor for compensation purposes. The reports gestured at using job descriptor in this way, but at the hearing Dr. Madden trumpeted this point, holding out job descriptor as a proxy for aspects of education and experience that were missing, and that her analysis had been criticized for lacking.

There is nothing intrinsically wrong with this. What was troubling, however, is that Dr. Madden was reluctant to acknowledge the clear shift in emphasis and position. The shift was considerable. Both reports stress the impropriety of using endogenous variables in an analysis. Job descriptor is obviously endogenous—or at least it is endogenous in the same manner that global

career level, job code, patent bonuses, organization, etc. would be endogenous. Dr. Madden's rebuttal report is *organized* around the point that endogenous variables cannot be used and that Dr. Saad's opinion is therefore deficient. *See* PX 2 at 2. So it is highly incongruous for Dr. Madden to turn around and urge reliance on an endogenous variable as a basis for her opinion.

The incongruity is a problem, and it remains a problem because Dr. Madden resisted acknowledging it. If, as Dr. Madden urged at the hearing, an endogenous factor like job descriptor can properly be used as a proxy for an exogenous factor like specialization in education and experience, then why can't Dr. Saad's proposed factors be used in the same way? Why not use career level, management designation, job code/title, organization/cost center, etc. as proxies for the more particularized skills, experiences, and backgrounds that matter for compensation? Dr. Madden's critique on these points was predominantly that they should not be used because they are endogenous and thus could be a means of/mask for discrimination. But if *that* is true, it applies equally to job descriptor, since it is equally an endogenous variable. So I am left with a serious change in emphasis by Dr. Madden that was not acknowledged, and a new line of argument and use of a control that if applied consistently calls into question Dr. Madden's critique or other potential controls. Since Dr. Madden was reluctant to acknowledge the shift, it was not adequately explained, leaving a credibility issue in the record.

Other inconsistencies of this sort also emerged. Questioned about the R-squared measure, Dr. Madden resisted giving plain answers, adding that it applied to "individuals." HT at 899-900. This may be a good point in an argument about the interpretation of the measure—but Dr. Madden was simply being asked about what the measure was, a point any statistics expert should have been able to answer without elaboration. Instead, Dr. Madden was insistent on qualifying to argue with counsel. But counsel wasn't arguing or trying to elicit interpretations (yet). Dr. Madden's overall testimony about the unimportance of R-squared had some convincing aspects, but was overstated. As a credibility matter, while Dr. Madden was highly dismissive of the measure as a basis to evaluate her own model and question whether it was missing important aspects, she also invoked R-squared as part of her argument that prior pay and starting pay were in a causal relationship. *See* PX 1 at 51. That was not an "individual" conclusion, and while there may be some story that could be told on the point, the impression I am left with is that Dr. Madden is perfectly comfortable relying on R-squared if it assists in arguing for her conclusions, but dismisses it when it calls her conclusions into question.

Dr. Madden acknowledged that in her rebuttal report when she criticized Dr. Saad for drawing conclusions from an analysis with 1,689 employees, but then had immediately proceeded to further critique Dr. Saad with an analysis that included 841 employees. HT at 941-42. Another analysis, from which she drew the conclusion that there was a causal relationship between prior pay and starting pay, involved only 1,387 instances. PX 1 at 51-52. Dr. Madden cannot have it both ways. Analyses of Dr. Saad cannot be too small when they come out favorable to Oracle while at the same time analyses of Dr. Madden are to be trusted to draw robust conclusion about Oracle generally even though they have fewer instances. Dr. Madden never properly explained or confronted this issue, leaving the sense that Dr. Madden was not applying consistent methodological principles.

Last, some selective reporting of results raises worries about Dr. Madden's overall credibility. Dr. Madden did a promotion analyses and reported gender findings at IC3 and IC4, where she found disparities. Her analysis did not show other disparities, except that there were statistically significant disparities in favor of women at M5 and M6. She did not report the results. Nor did she

report results for Asians and African-Americans, despite finding no evidence of difference in promotion rates between Asians and whites. She claimed that that she was not trying to hide evidence and claimed that the analysis of promotions contained too few women. HT at 919-21, 957-58, 967-68. Dr. Saad, however, added that the groups in question contained 1,746 individuals with 200-300 females, which was sufficient for an analysis. *Id.* at 1726-28.

Dr. Madden did analysis showing disparities in bonus outcomes for women in 2014 and 2018, found an adverse result in 2014 and reported it, but then buried in a footnote the fact that when she controlled for global career level the disparity disappeared and did not include the tables reflecting this analysis, which would have made the result apparent. *See* HT at 816, 908-09. Other analyses controlled for global career level and there is no reason this one shouldn't as well—even more so, since bonuses are likely to be more prevalent and larger with more senior employees. On its own, this would be minor, but it fits into a pattern of selectively reporting results to favor one conclusion. The fact that the material was in there somewhere for Oracle to find is unavailing—Dr. Madden wasn't trying to pull one over on Oracle, she was trying to pull one over on me. Statistics can be powerful, but they can also be manipulated and selectively used to establish pre-ordained conclusions and preferred points. These instances of skewed findings and gamesmanship about what to report undermine my trust in Dr. Madden's fair description of the results.

Dr. Madden is a competent and highly accomplished statistical expert. Her views deserve serious consideration, and will be given serious consideration below. However, I will not accept her views uncritically and will examine the basis for her conclusions given the number of warning signs regarding credibility that arose at the hearing. Overall, Dr. Madden was deeply committed to her particular conclusion—not just about the results of a statistical analysis but on the way that discrimination claims are viewed generally—and that point of view detracted from her credibility. The result was some evasiveness, argumentativeness, selective reporting, and use of some sorts of reasoning and analysis when they favored her conclusion coupled with criticism of those same sorts of reasoning and analysis when they were used by Dr. Saad. I found Dr. Madden somewhat less credible than Dr. Saad. The weight accorded to her particular views will be addressed below, in more detail, and with respect to the merits of the contents of those views, not the manner of presentation.

2. Dr. Ali Saad

Dr. Ali Saad is the Managing Partner of Resolution Economics Group LLC. He holds a Ph.D. in Economics from the University of Chicago. Prior to moving into consulting, Dr. Saad held a tenure track position at Baruch College of The City University of New York for six years. He subsequently taught econometrics as an adjunct professor at USC and UCLA. He left the City University of New York before a tenure decision was made and is no longer listed as adjunct faculty at UCLA or USC. Before joining Resolution Economics LLC, Dr. Saad was a partner at Deloitte & Touche LLP and Altschuler, Melvoin and Glasser LLP, and a member of the disputes consulting group at Price Waterhouse. His consulting work focuses on statistical and economic analysis in employment litigation matters. JX 103 at 5-6, 147; HT at 1578-81, 1748 (discussion of qualifications); *see also* JX 103 at 147-54 (detailed CV); *id.* at 155-57 (case list of testimony over last four years); DX 438 (additional copy of CV); JX 104 at 5, 93-103 (same material in rebuttal report).

Dr. Saad is one of the founders of Resolution Economics. The firm engages in consulting work and litigation services for companies on labor employment issues, including conducting pay equity analyses. Given Dr. Saad's background, his consulting and litigation work focuses on

employment discrimination, analysis of employment practices, and wage and hour cases. HT at 1581-84. He has conducted economic analyses of compensation in a variety of industries, including technology companies, both hardware and software companies. *Id.* at 1584. Over the last 25 years he has been involved in over 40 discrimination cases where he testified or issued a report. He has never been found to be not qualified as an expert. *Id.* at 1584-85. Resolution Economics mostly represents defendants, roughly 80% of the time. Historically 70-75% of its work has related to litigation, though the balance changes and at the time of the hearing it was 50-60%. *Id.* at 1751-52. Over the last five years, Dr. Saad has testified in about 12 discrimination cases on behalf of defendants. *Id.* at 1752-54.

In this case Dr. Saad was engaged to respond to OFCCP's and Dr. Madden's reports. He did not conduct a freestanding statistical analysis. HT at 1801-02. He has not conducted such analyses of Oracle. *Id.* at 1802-03. He is also engaged as an expert witness for Oracle in the *Jewett* matter and did a report responding to an expert report related to a class certification motion. *See* HT at 1748-50; *see also id.* at 1763-64, 1859-60. He has been engaged by Oracle for different sorts of litigation a total of four times. *Id.* at 1804. He received the data produced in discovery in this case from Oracle's counsel and also drew from three sources of external data. *Id.* at 1804-06. Dr. Saad has periodically given presentations at law firms. His experience with those firms involved representing defendants. *Id.* at 1754-56. He was not paid for the presentations, and one hoped for byproduct was marketing. *Id.* at 1756-57. In the past he participated in a webinar with one of Oracle's attorneys. *Id.* at 1761-62.

I found Dr. Saad generally credible. He is a hired expert, engaged by Oracle to issue opinion in support of a particular set of conclusions. This cautions that his views should not be uncritically accepted, and I will not do so below. But in this regard Dr. Saad is similarly situated to Dr. Madden, who is also a hired expert engaged to construct models and offer opinions to support a set of conclusions. In addition, although Dr. Saad in some sense gave a presentation of his opinions, he did not appear to be trying to sell a conclusion. His tone and demeanor did not change on cross-examination. He continued to attempt to answer questions from his point of view and did not become combative or evasive. Overall, he struck me as an expert with a point of view and hired to support a particular party, but able to present his analyses and opinions in a straightforward manner.

At the hearing, Counsel for OFCCP purported to impeach Dr. Saad on, by my count, nine occasions. But each time it turned out that the prior testimony was consistent with Dr. Saad's statements at the hearing and counsel either was imprecise or confused about the record, or was manufacturing purported impeachments by changing the questions, leading to different answers. *See* HT at 1755-56, 1757, 1758-59, 1760-62, 1784-86, 1813-14, 1815-16, 1827-30, 1849-52. Another attempt to refresh recollection was devoid of context and involved material OFCCP hadn't even put into the record. *See* HT at 1766-67.

Counsel did elicit the point that Dr. Saad is not an expert in the software industry. *See* HT at 1797. But neither is Dr. Madden. Both must rely (and I must rely) on the fact witnesses and documentary evidence for information about Oracle, the nature of the different jobs at Oracle, and the factors that matter for compensation. So unless Dr. Saad is on some point substituting his own views for those found in and supported by the record with regard to some aspect of the software industry, then this is no reason to discredit his opinion in favor of Dr. Madden's.

OFCCP pursued questioning about Dr. Saad's short academic career, but I did not find any of the points raised to be a serious credibility problem. Dr. Saad left academia before any tenure

decision was made, with some time later as an adjunct professor. Instead he pursed a career in consulting. Dr. Saad has only published one article in a traditional academic journal. *See* HT at 1767; *see also id.* at 1767-68; PX 323 (June 1989 publication of dissertation summary in The Journal of Economic History). He did have other publications and used pay regression analyses and an approach broadly based on human capital theory. HT at 1769-72; *see also id.* at 1861-62. When Dr. Saad was in academia, he went through a period in which he was overly critical of and not happy with his own work. *Id.* at 1769. This indicates that academia wasn't a good fit for Dr. Saad and so he sensibly made a different career choice. It is not a reason to discount the content of his opinions.

At another point, OFCCP sought to elicit testimony that there were internal errors/warnings in Dr. Saad's analyses that undermined his opinions. The software Dr. Saad used to run his analyses will give warnings and not work if too many variables are included. HT at 1849-52. Dr. Saad's backup data here did contain a warning. *Id.* at 1853-54; *see also* PX 9. However, this warning appears on "practically every" use made of the analyses because of the manner in which the software inverts the matrix and creates to coefficient estimates for the variables. This relates to the use of indicator/dummy variables and is not a signal that there is some error or problem with the analysis. *Id.* at 1853-56. The same message will appear in an analysis with few variables because it is a feature of the way that the program completes the analysis. It is present in "virtually all" of the work that his firm does and was not a reason for concern. *Id.* at 1866-67. No contrary evidence was provided on this point, and I accept Dr. Saad's cogent explanation. I thus do not consider this a reason to discount Dr. Saad's views or to give less weight to his analysis.

The last credibility issue to consider concerns Dr. Saad's word cluster analyses, which were part of his first report. *See, e.g.*, JX 103 at 222-55. During cross-examination of Dr. Saad, counsel for OFCCP moved to strike Dr. Saad's earlier testimony about how he arrived at 24 word clusters, as opposed to another number, on the grounds that the backup material didn't provide the charting that led to this conclusion. The point had not been pursued via deposition and no objection was made to Dr. Saad's testimony. After hearing argument, I denied the motion to strike. HT at 1840-44.

On the final day of the hearing, OFCCP made an oral motion to strike portions of Dr. Saad's testimony related to word cluster analyses or in the alternative to admit OFCCP's three additional declaration-reports from Dr. Madden, which had been excluded for failure to comply with the pre-hearing schedule for submitting expert reports. HT at 1873-75. Oracle opposed the motion, pointing out that the issue that exercised OFCCP was limited to how Dr. Saad arrived at the number 24 for his word clusters, and that the objection was untimely, since the issue had been evident far earlier. *Id.* at 1875-77. After hearing further argument, I denied the motion. I explained that the issue was completely different from OFCCP's unilateral production of three additional expert reports after the discovery deadline, since it was limited to one particular decision within Dr. Saad's report. I further found that the objection was untimely, since the testimony had been given during the hearing without any objection from OFCCP, with the objection only being raised for the first time hours into the cross examination of Dr. Saad. *Id.* at 1877-80; *see also id.* at 1658-60 (underlying testimony). Regardless, I do not find the word clusters material or probative, so this dispute over what was or wasn't in the backup data or whether 24 was arbitrary or not is a non-issue.

VIII. DISCUSSION

Executive Order 11246, as amended, requires most federal government contractors to agree to non-discrimination requirements: "[t]he contractor will not discriminate against any employee or

applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin." EO 11246 § 202(1). To establish a discrimination claim, a plaintiff must show that the defendant took actions to create the disparity by intentionally discriminating against protected groups or by adopting a policy or practice that has a disparate impact on protected groups. *See, e.g.*, *Ricci v. DeStafano*, 557 U.S. 557, 577 (2009). 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 doing or within the employer's control, there is no actionable discrimination claim against the employer. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-52 (1989); *see also American Federation of State, Cty., and Municipal Employees (AFSCME) v. Washington*, 770 F. 2d 1401, 1407 (9th Cir. 1985) ("Title VII does not obligate [an employer] to eliminate an economic inequality which it did not create").

The anti-discrimination provisions of EO 11246 are interpreted through the legal analyses that have been applied to Title VII of the Civil Rights Act.[168] *See* 81 FR 39108, 39108; *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)). EO 11246 specific regulations address discrimination on the basis of sex in particular and elucidate some generally applicable principles. *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.

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

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[168] Similar to EO 11246, Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any 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).

The regulations implementing EO 11246 do not provide a specific appellate mechanism to the federal courts. Review, if sought by Oracle, would thus proceed under the Administrative Procedures Act, per 5 U.S.C. § 702. Venue would be in a "court of competent jurisdiction." 5 U.S.C. § 702. More particularly, venue in an APA challenge is either where the defendant resides, where the substantial part of the events giving rise to the claim occurred, or where the plaintiff resides where no real property is involved. 28 U.S.C. § 1391(e)(1). Given the location of the ARB and Secretary of Labor, the location of Oracle, and the events underlying this complaint, that would likely either be in the Northern District of California, in the Ninth Circuit, or the District of the District of Columbia, in the D.C. Circuit. Applicable circuit law is thus indeterminate. However, on the questions presented, I am not aware of splits that would bear on the outcome. The legal standards themselves rely on Supreme Court cases and I have looked at decisions by the courts of appeals elucidating those standards, focusing in particular on the Ninth Circuit and D.C. Circuit.

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).

In the SAC, OFCCP 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 alleges both that Oracle discriminated by paying women, Asians, and African-Americans in the job functions at issue less in the same or a comparable job *and* that Oracle discriminatorily assigned/steered those groups of employees into 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 its theories are limited to discrimination by top-level managers/executives/board members and HR managers. Though both ultimately come down to compensation, OFCCP's complaint is best analyzed in two aspects: 1) it alleges that Oracle is engaged in straightforward compensation discrimination in paying similarly situated employees differently based on gender and race; and 2) it alleges that Oracle is engaging in steering employees into jobs differently based on gender and race. Both claims result in under-compensation for the groups in question and they would share at least some remedies.[169] Both allegations are part of OFCCP's disparate treatment claim. OFCCP also brings a distinct disparate impact claim, alleging that a neutral policy or practice has disparate impact on women, Asians, and African Americans in the job functions. The practice at issue in this claim is reliance on prior pay as a basis for starting pay.

OFCCP asserts that it has proven that Oracle "breached its obligations as a federal contractor by systematically engaging in gender and racial pay discrimination at its Redwood Shore headquarters"—and moreover that the record "dictates that judgment on liability be granted for OFCCP." PPB at 1. OFCCP contends that it has established compensation discrimination through statistical evidence relating to system job title, as well as steering discrimination as to placement of employees into job titles. *Id.* OFCCP also contends that it has established a disparate impact claim based on Oracle's practice of setting starting pay and career legal based on pay in prior employment. *Id.* These theories are primarily based on statistical evidence, but OFCCP also points to additional evidence showing discriminatory intent by Oracle's top management. *Id.* at 1-2. OFCCP maintains that its statistical evidence similarly situates employees and "requires" judgment against Oracle because the "only plausible explanation" of the disparities is discrimination. *Id.* at 14. Moreover, OFCCP contends that the same evidence supports its steering discrimination and disparate impact claims. *Id.* at 15. It adds that other evidence, to include lean budgets, failure to correct disparities,

[169] Other remedies might differ. The non-pecuniary remedies or 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.

and abandonment of its Affirmative Action and other regulatory objections indicates that Oracle is engaging in intentional discrimination. *Id.*

Oracle contends that OFCCP failed to present evidence of discrimination, let alone a pattern or practice of discrimination. As it understands the case, OFCCP's complaints "rise and falls on the overly-aggregated and unreliable statistical analyses of Dr. [] Madden." DPB at 1. But Oracle avers that Dr. Madden's model is purpose-driven and assumes its conclusions, presenting an analysis that is "entirely divorced" from the reality of jobs at Oracle. *Id.* at 1. Oracle contends that even OFCCP is not advocating Dr. Madden's actual views and instead focuses on a narrower analysis within Dr. Madden's reports, based on job code, but that this too fails to similarly situate employees at Oracle and ignores important factors including skills and product, as well as factors like performance and productivity that OFCCP ignored because they could not easily be fit into the model. Oracle asserts that the result is that Dr. Madden's analyses are "meaningless." *Id.* at 1-2. It represents that Dr. Madden did not actually study job assignments and that her opinions were the result of a faulty assumption because employees at Oracle are not assigned jobs. It asserts that the statistics indicate that there are not disparities in hiring. It claims that racial and gender differences in applications is not the result of discrimination of Oracle. *Id.* at 2. Oracle also maintains that OFCCP did not establish that Oracle ever had a policy or practice of basing starting pay on prior pay or that such a policy or practice caused any discriminatory impact. Instead OFCCP found a correlation between starting and prior pay, but one that would be expected regardless of policy or practices. *Id.* Oracle concludes: "The evidence at trial confirmed this case never should have been brought in the first place. OFCCP failed to prove any of its claims. Oracle is entitled to an administrative order in its favor and dismissal of this lawsuit once and for all." *Id.*

In reply, OFCCP maintains that Oracle is relying on the wrong legal standard and has failed to rebut the statistical evidence, requiring a finding of discrimination. It asserts that Oracle "has no answer" to OFCCP's evidence of centralized control and represents that Oracle's position is that it should be permitted to not comply with federal law or its contracts. PRB at 1. In its reply, Oracle contends that OFCCP has not established any of its theories, but instead offers "tortured legal theories, misplaced reliance on compliance regulations, and disregard of well-settled Title VII law" in an effort to prevail without evidence of discrimination. Oracle accuses OFCCP of contorting and departing from the trial record and presenting "facts it wished it had" in an effort to rescue Dr. Madden's flawed analysis. DRB at 1. Oracle contends that OFCCP's claims of intentional discrimination by senior managers cannot succeed given the decentralized nature of the compensation system, asserting that merely overseeing a decentralized system that OFCCP concedes is bias-free does not provide evidence of centralized control or intentional discrimination. *Id.* at 1-2. Oracle also maintains that OFCCP's steering claim fails because there are no assignments, there is no pattern of discriminatory up or down leveling, and the assignments, if made, would be made by the low-level managers OFCCP is not accusing of wrongdoing. *Id.* at 2. And it contends that OFCCP's disparate impact claim must fail because it did not establish a policy or practice or establish causation. *Id.*

The evidence and argument is intertwined, but the discussion below proceeds by considering each theory individually: A) the disparate treatment compensation discrimination theory; B) the disparate treatment steering discrimination theory; and C) the disparate impact theory.[170] I conclude that OFCCP has not established any of its theories and thus recommend dismissal of the complaint.

[170] Two of Oracle's arguments can be bracketed at the outset as initially unpersuasive and ultimately not necessary to consider since I conclude that OFCCP has not otherwise established its claims.

A. Disparate Treatment: Compensation Discrimination

1. Basic Legal Framework

"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). The plaintiff is required to show discriminatory intent. *E.g. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *American Federation of State, Cty., and Municipal Employees (AFSCME) v. Washington*, 770 F. 2d 1401, 1406-07 (9th Cir. 1985); *EEOC v. Metal Service Co.*, 892F.2d 341, 347 (3d Cir. 1990) ("proof of the employer's discriminatory motive is critical" and "can either be shown by direct evidence or through indirect or circumstantial evidence" (internal citations omitted)). "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

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In one line of argument, Oracle contends that in order for OFCCP to prevail it must first establish a violation during the audit period in this case: January 1, 2013, through June 30, 2014. Oracle argues that under OFCCP's procedures and governing law, a continuing violation must be based on a violation during the audit period. It contends that OFCCP failed to do this because Dr. Madden aggregated data across a larger period, 2013-18, and thus never even attempted to show a threshold violation in 2013-14. DPB at 8-9. This argument is a bit of a blind alley. There is no evidence that Oracle's policies, practices, or regular operating procedure changed in the 2013-18 period—except for a change in potential reliance on prior pay that would *weaken* OFCCP's case for a later violation. If I were to conclude that Dr. Madden's evidence establishes a pattern or practice of discrimination between 2013 and 2018 or a disparate impact claim, I would also conclude that it established discrimination in the audit period. Put otherwise, there is no basis to find that Oracle did not discriminate during the audit period but then altered course and began discriminating later. The point, however, is moot since I do not find that Dr. Madden's analyses supports an inference of discrimination.

Oracle also claims that I must consider its affirmative defenses under the Equal Pay Act per the Bennett Amendment to Title VII, including differences in pay based on a seniority system, a merit system, a system measuring earnings by quantity or quality, or a difference based on a factor other than sex or race. DPB at 7-8; *see also* DRB at 12 (same argument); 29 U.S.C. § 206(d)(1) (Equal Pay Act); 42 U.S.C. § 2000e-2(h) (incorporation into Title VII). OFCCP replies that Oracle never explains what those defenses are and how they apply here, and so cannot carry its burden in establishing them. PRB at 2 n.4. Oracle cites a great deal of law to this point, but crucially fails to argue and evidence how an affirmative defense applies. These are *affirmative* defenses and if Oracle seeks to rely on them, it has the burden of coming forward with an actual theory, argument, and evidence. *See, e.g., Rizo v. Yovino*, 950 F.3d 1217, 1223 (9th Cir. 2020 (en banc) (employer in Equal Pay Act case has burden of showing affirmative defenses); *see also Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974). Oracle does not do this, instead merely insisting that its affirmative defenses must be considered and outsourcing to the adjudicator the task of figuring out exactly what those are, how they apply, and what evidence might support them. That is not my role and merely citing law without application achieves little purpose. In any event, since I find that OFCCP has not established its claims, there would be no need to consider the affirmative defenses.

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 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 v. Pompeo*, 923 F.3d 1078, 1087 (D.C. Cir. 2019). Rebuttal evidence must be admissible evidence that if believed would lead to a finding that there was no discrimination is facially credible, and presents 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).

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. Here, OFCCP is pursuing a pattern or practice case, not any individual case. Pattern or practice cases are analyzed with the framework elucidated in *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). 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 v. Or. State Bd. of Higher Educ.*, 816 F.2d 458, 463 (9th Cir. 1987); *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).

The initial burden is on the plaintiff to establish a prima facie case of a 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 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)). The plaintiff bears the burden of persuasion by a preponderance of evidence throughout the analysis and burden-shifting frameworks are not meant to be rigid, mechanized, or ritualistic. The ultimate question at trial is whether the defendant intentionally discriminated as alleged by the plaintiff.[171] *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983) (citing and

[171] In individual discrimination cases that proceed to jury trials, it "is not normally appropriate" to instruct the jury with burden-shifting framework. *See Costa v. Desert Palace*, 299 F.3d 838, 855-56 (9th Cir. 2002) (quoting *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983)). The burden-shifting framework announced in *Teamsters* came in a case that had been decided in a bench trial, not at summary judgment, and the framework provides a helpful analytical tool in

quoting *Burdine*, 450 U.S. 253, 256; *Furnco*, 438 U.S. at 577).

2. Theory and Argument

OFCCP's compensation discrimination case relies primarily on statistical evidence, though it also asserts that a variety of other evidence favors an inference to intentional discrimination as the explanation for the statistical disparities. PPB at 1-2. OFCCP avers that under governing law, it must show intentional less favorable treatment, but does not need to show particular racial or gender animus. *Id.* at 4. It maintains that its statistical evidence similarly situates employees and "requires" judgment against Oracle because the "only plausible explanation" of the disparities is discrimination. *Id.* at 14. It adds that other evidence, to include lean budgets, failure to correct disparities, and abandonment of its Affirmative action and other regulatory objections indicates that Oracle is engaging in intentional discrimination. *Id.* at 15. OFCCP's theory relies primarily on the analysis of Dr. Madden, and in particular her findings controlling for system job title in Column 8 of her tables. *See id.* at 15-19. It argues that systems job title similarly situates employees and that Dr. Madden's use of education and experience is "on all fours" with the factors that Oracle considers in setting compensation within a range. *Id.* at 15-17; *see also* PPF at ¶¶ 16-20. An inference of discrimination is licensed at 1.96 standard deviations, while Dr. Madden's analyses reveals disparities that are less probable than winning the Powerball lottery, which shows that Oracle has "decided" that women and Asians are systematically inferior abilities but does not document the basis for the decision, or that it is intentionally paying women and Asians less than their white male colleagues—either of which OFCCP deems a violation. PPB at 17; *see also* PPF at ¶ 28 (OFCCP's characterization of Dr. Madden's core findings). Though the findings as to African Americans were not statistically significant, OFCCP contends that this is simply due to the few number of African Americans and that the raw coefficients should be used to make the inference to discrimination. PPB at 17 n.26.

OFCCP further argues that Oracle has failed to rebut its statistical analysis showing intentional discrimination. It asserts that Oracle cannot merely point to hypothetical flaws and must rebut via factors that are actually used to set pay and asserts that Oracle did not even attempt to perform its own independent analysis. As such, in OFCCP's view Oracle cannot rebut OFCCP's statistics and cannot show that any additional factor actually provides an alternative explanation. PPB at 19-20. It maintains that Oracle cannot rely on work on different products as a criticism of Dr. Madden's analysis because it does not keep records of assignment to particular products. Further, OFCCP asserts that the evidence shows that Oracle does not set pay based on product, since job codes are not associated with product and product is not mentioned in the materials as the basis to set pay. OFCCP adds that Oracle's policy is to not make compensation changes when employees shift between product and that numerous witnesses testified about working on different products at the same time or changing the products they worked on frequently. *Id.* at 20-21; *see also* PPF at 21-25. It charges Oracle with "post-hoc" attempts to insert product as an explanation in variance in pay when the record indicates that Oracle hires skilled individuals to work on a "vast and ever-changing array of products," with education and experience, not product skills, being critical to the value of employees to the corporation. PPB at 21-22 (emphasis removed). OFCCP further contends that Oracle does not pay for job performance, pointing to evidence that some strong

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explaining the decision. *See also Obrey v. Johnson*, 400 F.3d 691, 694-96 (9th Cir. 2005) (elaborating on *Teamsters* framework to structure analysis in appeal of evidentiary rulings in a jury trial). Part of the discussion below thus uses the framework to structure the analysis, though I am mindful that the ultimate question must be whether or not OFCCP has shown by a preponderance of the evidence that Oracle is engaged in a pattern or practice of intentional discrimination against women and minorities in compensation in the relevant job functions, as alleged in the SAC.

performers were underpaid, that performance evaluations are not required at Oracle leaving no basis for analysis of the relationship of performance to pay, and that when individuals are promoted they generally do not receive any pay raise. Hence, it concludes that variance based on performance cannot be used to rebut Dr. Madden's statistics. PPB at 22-23; *see also* PPF at ¶¶ 25-27.

Oracle views the disparate treatment compensation discrimination claim quite differently. It argues that OFCCP's claim relies crucially on Dr. Madden's analyses, and that those analyses do not meet the applicable legal standards or sustain OFCCP's claims of discrimination. DPB at 9. It argues that Dr. Madden did not similarly situate employees and did not use proper controls for experience and education. Column 5, which Oracle understands to be the basis of Dr. Madden's opinion, does not account for the actual work performed, and uses defective education and experience variables that do not capture important facets that matter for compensation. *Id.* at 9-12. Oracle contends that Column 6 (which adds the "job descriptor" control) does not similarly situate employees because the buckets imposed are too broad. *Id.* at 12-13. Oracle argues that Dr. Madden's Columns 7 and 8 do not similarly-situate employees because, as with Column 6, they were deemed improper by Dr. Madden and because job code/title groups together employees who do very different sorts of work using different sorts of skills that are paid differently in the job market. *Id.* at 13-17. It adds that Dr. Saad's adjustments, including adding organization, greatly improve the explanatory power of the model and lead to the disappearance of most statistically significant findings. In Oracle's view, Dr. Madden and OFCCP rely on improper assumptions, which lead to a misleading model from which no conclusions can be drawn. *Id.* at 17-18.

Oracle further argues that Dr. Madden's analyses do not account for the major factors influencing pay at Oracle or account for its affirmative defenses because Dr. Madden was indifferent to performance, skills, and other competencies and overly aggregated employees, obscuring important differences in factors that matter for pay. DPB at 18-21. It concludes that Dr. Madden's statistics are too flawed to support any conclusion that the differences found are due to discrimination rather than a legitimate factor that is not been accounted for, since the employees aren't similarly situated and the factors that actually influence pay aren't included. *Id.* at 21. Oracle further argues that OFCCP cannot establish a pattern or practice of discrimination because it did not demonstrate some common mode of discrimination or glue that links the compensation decisions at issue in this case. *Id.* at 22-24. Oracle also argues that OFCCP's anecdotal evidence failed to support an inference to intentional discrimination. *Id.* at 24-28.

3. Respective Burdens and the Use of Statistical Evidence

This is a pattern and practice case. At the outset, the parties have some disagreements[172] about the structure of the analysis and burdens each party bears, as well as the import of statistical evidence. OFCCP contends that it has the initial burden of making out a prima facie case of unlawful discrimination due to a regular procedure or policy, which can be done by producing sufficient evidence to give rise to an inference of discrimination in the employment decision. This can be accomplished by statistics alone or statistics with other evidence. In OFCCP's view, a disparity with 5% or less probability of occurring by chance, or 1.96 standard deviations, gives rise to such an inference. PPB at 4-5. OFCCP asserts that in a pattern and practice case a defendant, like Oracle here, bears a "heavy rebuttal burden" that cannot be carried by pointing to flaws in the statistics unless it can show that correcting the flaws cures the disparities. *Id.* at 5. OFCCP

[172] The disagreements exist far more in the uncharitable re-statements of the party-opponent's position than in the positions themselves.

acknowledges that it has the ultimate burden of persuasion of showing discrimination, but stresses that this burden is a preponderance of evidence standard, not scientific certainty. *Id.* at 6.

Oracle contends that OFCCP must establish an actual pattern or practice of discrimination—that Oracle treats some individuals less favorable because of their sex or race as its standard operating procedure. DPB at 3. As Oracle sees it, OFCCP must provide common evidence of discrimination, or the glue that shows that there is a pattern or practice. *Id.* It avers that the framework for the claim is provided by *Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 360 (1977). First, OFCCP must establish a prima facie case that the employees at issue were victims of a common pattern or practice. At this stage, the statistical evidence must be evaluated for flaws and to determine if it "fails to establish discrimination." DPB at 3. To prevail, the statistical analysis must compare employees who are similarly situated in material respects. *Id.* at 4-6. Oracle represents that if OFCCP makes out this prima facie case, it may rebut the showing by producing evidence to the contrary. If that is done, then the question is whether a preponderance of the evidence supports the finding that Oracle engaged in a pattern or practice of discrimination. *Id.* at 3-4.

In reply, OFCCP maintains that Oracle has misunderstood the case law and respective burdens. As it sees Oracle's argument, Oracle's claim is that in order to make out a prima facie case of discrimination a plaintiff must rule out "every possible explanation for a pay disparity impacting every individual member of a class." PRB at 1 (emphasis removed). But OFCCP asserts that this is not the law. It recognizes that it has a "heightened" prima facie burden that can be met with statistical evidence, but adds that Oracle has a heightened rebuttal burden to provide explanation so systemic pay disparities that change the outcome of the analysis. *Id.* at 1-2. It accuses Oracle of conflating individual and systemic discrimination cases on this point, and asserts that Oracle must provide explanations for the disparities or be found liable for discrimination. *Id.* at 2-3.

In its reply, Oracle accuses OFCCP of misconstruing the use of statistics in the case. It claims that OFCCP must establish intentional discrimination and that while statistics can be used to draw an inference about intent, those statistics must be properly constructed in order to support the initial inference. DRB at 3-4. Oracle argues that "[a]s a matter of law, statistics must be properly structured to raise any inference of discrimination." Here it asserts that Dr. Madden's models are incorrect—a deficiency that statistically significant results cannot remedy—and so the results are incorrect as well. *Id.* at 8. It also argues that rebuttal does not require an alternative model, but can be based on showing the flaws in the statistics. It adds that even if an alternative model is needed, it offered one via Dr. Saad's modifications of and corrections to OFCCP's analyses. *Id.* at 12.

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. *Teamsters* provides the basic framework. In a pattern or practice case, the plaintiff's "initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." The plaintiff is "not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed." 431 U.S. at 360. Since a plaintiff in a pattern or practice case alleges "a systemwide pattern or practice" of discrimination, it "ultimately ha[s] to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." Rather, it must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336. If a prima facie case is established, "[t]he burden then shifts to the

employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiff's] proof is either inaccurate or insignificant." *Id.* at 360. The rebuttal burden in a Title VII case is one of production, not persuasion. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509-11 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

As the D.C. Circuit has summarized the framework, "[i]n order to make out a prima facie case, the plaintiffs must prove 'more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts.' They must establish, by a preponderance of the evidence, that discrimination 'was the company's standard operating procedure[—]the regular rather than the unusual practice.'" But "the plaintiffs need not show each individual member of the class 'was a victim of the employer's discriminatory policy,' since 'proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy'" and "[s]tatistical evidence may suffice to establish a prima facie case if the disparities in treatment are significant." *Aliotta v. Bair*, 614 F.3d 556, 562 (D.C. Cir. 2010) (internal citations removed) (quoting *Teamsters*, 431 U.S. at 336, 360, 362) (citing *Wagner v. Taylor*, 836 F.2d 578, 592 (D.C. Cir. 1987); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1303 (D.C. Cir. 1987). "Once a prima facie case is established, the burden shifts to the employer to rebut the inference of discrimination by showing the employees' proof is either inaccurate or insignificant." *Id.* at 563 (citing *Teamsters*, 431 U.S. at 360).

Cases alleging "that an employer routinely and purposely discriminated [] require[] substantial proof of the practice." *King v. General Electric Co.*, 960 F.2d 617, 624 (7th Cir. 1992). The Second Circuit relatively recently helpfully explained the respective burdens in this sort of case:

> 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-[statistical] 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 v. Or. State Bd. of Higher Educ.*, 816 F.2d 458, 463 (9th Cir. 1987) (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 v. Shultz*, 815 F.2d 84, 91-92 (D.C. Cir. 1987); *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 v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531, 550 (9th Cir. 1982); *see also Diaz v. Am. Tel & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985). 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 intent and determination of intent is not merely a battle of statistics. *Gay*, 694 F.2d 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.

OFCCP is correct that in one sense its prima facie burden is lessened in this case—it need not establish any particular individual cases of discrimination. However, it does need to establish an

inference to a regular practice of discrimination, something that is unnecessary in an individual claim of discrimination. This different texture of the shifting burdens is simply a result of the "crucial difference" between an individual claim of discrimination and a pattern or practice claim. *See Cooper v. Federal Reserve Bank*, 467 U.S. 867, 876 (1984). It is not so much that the burdens are "lessened" or "heightened"—they are simply *different* because the initial inference that must be established importantly differs between the two sorts of claims. OFCCP bears an initial burden of "making out a prima facie case of discrimination" and must "establish, by a preponderance of the evidence, that [] discrimination was the [defendant's] 'standard operating procedure.'" *Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005). OFCCP is correct in stressing that its statistical evidence need not "rule out" every conceivable alternative explanation in order to suffice, but I do not take this to actually be Oracle's position. Regardless of Oracle's position, in making the initial showing of an inference to discrimination as a policy or practice, not just *any* statistical analysis will do—even where the analysis is admissible, it may be inadequate to support a prima facie case. *See id.* at 695-96. Statistics can suffice to make the showing, but they "must be used meaningfully and properly." *Carroll v. Sears, Roebuck &Co.*, 708 F.2d 183, 190 n.5 (5th Cir. 1983) (citing *Teamsters*, 431 U.S. at 340).

The D.C. Circuit has explained that for statistical proof to establish a *prima facie* case, it must eliminate the most common nondiscriminatory explanations, focus on the proper groups for comparison, and yield statistically significant results. "In other words, both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination." *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984). This, in turn, shapes the rebuttal burden. A pattern or practice plaintiff must "make an initial showing of disparate treatment [that] will typically have [involve] statistical evidence showing pervasive disparities and eliminating most, if not all, potential nondiscriminatory explanations for the observed disparities," so the defendant must meet that evidence by producing a "nondiscriminatory explanation [that] casts sufficient doubt on the plaintiffs' proof to permit the trier of fact legitimately to decline to draw an inference of discrimination from that proof." *Id.* at 1269. This rebuttal burden is the same as the burden in an individual case, except that because the initial showing by the plaintiff in a pattern and practice case requires more to support the claimed inference, the evidence needed to meet this burden will typically need to be higher. *Id.* at 1269-70. 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, a defendant 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. *Id.* at 1267-69. If the rebuttal burden is met, the question is whether the plaintiff has shown, by a preponderance of the evidence, that the defendant did have a pattern or practice of discrimination. *E.g. Aliotta*, 614 F.3d at 564.

The Ninth Circuit has framed these points somewhat differently at times, but ultimately in a manner that produces the same result. Once a plaintiff has produced statistical evidence of a statistically 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.

While "in certain cases an inference of intent may be drawn from statistical evidence," "statistics must be relied on with caution." Across "dissimilar jobs" statistics can be relevant, but "[t]he weight to be accorded [to them] 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))).

To summarize: the statistical evidence must be sufficient, on its own terms, to license an inference to a pattern or practice of discrimination. If the statistical and other evidence presented makes out the initial inference, then the Defendant must produce rebuttal evidence—and since the initial evidence was robust enough to support the initial inference, merely hypothesizing flaws will be insufficient, since this is not evidence that would lead a fact finder to reject the initial inference. That rebuttal does not need to take a particular form, but it must involve the production of evidence that is sufficient, if accepted, to overcome the initial inference established in the prima facie case. If that is done, then the competing evidence must be evaluated to determine if the plaintiff has

established that, in fact, the defendant has engaged in the alleged pattern or practice of discrimination.

The claim here turns on an inference that OFCCP asks me to draw—that the raw disparities at Oracle are caused, at least in part, by a regular pattern or practice of discriminatory treatment by Oracle. There are three broad areas to be considered in evaluating OFCCP's claims: the statistical evidence of discrimination, the evidence of a mechanism for a pattern or practice of discrimination, and the non-statistical evidence going to intent. Because the statistical evidence is the most important presented, I begin with the non-statistical evidence, then consider potential mechanisms of discrimination, and then turn to an evaluation of the statistical evidence.

4. Non-Statistical Evidence of Compensation Discrimination

Determination of liability in pattern and practice cases is "largely preoccupied" with the statistical evidence, but non-statistical evidence can provide "texture" to the statistics offered. *Robinson v. Metro-North Commuter R.R.*, 267 F.3d 147, 168 (2d Cir. 2001). While anecdotal and non-statistical evidence can be important in a pattern and practice case, it is not necessary and in some cases a strong statistical showing alone may suffice. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Hazelwood Sch. Dist.*, 433 U.S. at 307-08; *City of New York*, 717 F.3d at 84. The role of non-statistical or anecdotal evidence is to bring "the cold numbers convincingly to life." *Teamsters*, 431 U.S. at 339. The parties present a variety of non-statistical evidence going to discriminatory intent, to include the anecdotal witnesses, evidence of Oracle's diversity/inclusion efforts, evidence about Oracle's executives' knowledge of the alleged disparities and action/inaction, evidence related to Oracle's Affirmative Action Plan, and evidence concerning the compliance review and alleged concealment, and evidence related to investigations.

OFCCP maintains that non-statistical evidence, to include lean budgets, failure to correct disparities, and abandonment of its affirmative action and other regulatory obligations indicates that Oracle is engaging in intentional discrimination. PPB at 15. It contends that Oracle's top executives are intentionally discriminating based on race and gender in order to improve Oracle's bottom line. *Id.* at 28. OFCCP charges that Oracle executives knew that there were pay disparities and argues that there was discriminatory intent in not adhering to the Affirmative Action Plan requirements. *Id.* OFCCP further alleges that Oracle took steps to conceal the disparities by not conducting compensation audits and not centrally tracking compensation related complaints and investigations. *Id.* at 29. Oracle generally rejects OFCCP's assertions and contends that the non-statistical evidence does not support an inference to discrimination. DPB at 6-7, 24-28, 39-40; DRB 2-3, 7-8.

a. Anecdotal Evidence of Discrimination

Oracle argues that OFCCP failed to provide anecdotal evidence of intentional discrimination to supplement the statistical evidence. It observes that since OFCCP is not accusing lower-level managers outside of HR of wrongdoing, only anecdotal evidence relating to senior executives or human resource personnel is pertinent. But Oracle contends that OFCCP did not provide this evidence, and provided only meagre evidence that there was even centralized control or direction of pay decisions. DPB at 24-26; *see also* DPF at ¶ 58. Oracle contends that only three witnesses—Dr. Alexander, Mr. Pandey, and Mr. Mensah—offered evidence of discrimination, but that the evidence amounted to no more than subjective beliefs. It contends that OFCCP focused on fairness, not discrimination. It deems evidence about perceived fairness irrelevant, along with evidence about wage compression, because it doesn't lead to the conclusion that there was discrimination. It argues that the evidence presented related to lower level managers and was not of sufficient quality or

quantity to support an inference of a pattern or practice of discrimination. DPB at 26-28; *see also* DPF at ¶ 55.

OFCCP points in particular to Dr. Hanson-Garcia's testimony that Ms. Westerdahl, at some point in the 2000s, made a disparaging comment about women's pay and stresses that Ms. Westerdahl is responsible for HR and revamped its systems. It asserts that this is strong evidence supporting an inference to discrimination. PPB at 32-33; *see also* PPF at 46. In its reply, OFCCP accuses Oracle of misrepresenting both the role and content of the anecdotal evidence, which it clarifies was meant to illustrate the statistical evidence (rather than establish systemic discrimination) and maintains demonstrated "lived experiences of Oracle's discriminatory practice." PRB at 14-15. In support, it points to the testimony of the witness about their motivations for testifying. *Id.* at 15.

Taken together, I find that the anecdotal evidence does not support an inference that Oracle is discriminating against women and minorities. The deficiency was not the quantity and in a sense was not the quality either—the witnesses were generally credible and well-intentioned. The deficiency, rather, is that the witnesses presented by OFCCP were, with limited exceptions, not providing evidence of discrimination or discriminatory intent. Instead, they were sharing negative experiences or things that they found unfair at Oracle. But this is a discrimination case, not a generalized adjudication of whether or not Oracle has treated all of its employees fairly and properly. It is not my role "to act as a super-personnel 'department that reexamines an entity's business decisions.'" *Wright v. Railroad Commission of Texas*, ARB No. 2019-0011, ALJ No. 2015-SDW-00001, slip op. at 4 n.9 (ARB May 22, 2019) (quoting *Jones v. U.S. Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 2001-ERA-021, slip op. at 17 (ARB Apr. 30, 2004)); *see also, e.g., Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997) (citing *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986)). Nor is this case an avenue for me or the Department of Labor to take a turn directing the operations of a large technology company. Whether or not I would engage in a different action or treat people differently is not pertinent to this case *unless* it links up to an inference to discrimination by Oracle.

That link is missing in most of the anecdotal evidence presented. Ms. Klagenberg gave testimony about unfairness at Oracle, both generally in terms of the way that long-time employees fall behind in salary, and particularly in terms of treatment of a white male rising star who she held accountable by withholding equity for a mistake only to have superiors find additional equity. *See* HT at 136, 142-44. But the salient feature of this story was that the individual was a rising star who everybody liked—not that white males were not punished for mistakes while females and minorities were. That point was not present in the account. And while it may be unfair that loyal employees end up behind the market, that is not discrimination based on race or gender.[173] Ms. Klagenberg's specific evidence of discrimination was having heard complaints about 10 years ago about women's salaries. *See id.* at 137-39. That doesn't really support any inference of discrimination. Similarly, Ms. Ng's testimony in its details focused on unfairness, with any indication that there was a discriminatory basis left to the imagination, or at most suggested. *See id.* at 179-82. Ms. Chan's testimony was also telling on this point. Though she testified for Oracle, she also related her experience with salary compression and stagnation, which eventually resulted in an adjustment. *See id.* at 1536-38. Ms. Chan didn't believe her experience was the result of discrimination, while other anecdotal witnesses were seemingly unsure. But the experience matched and pointed to a non-discriminatory explanation, even if still facially unfair.

[173] Unless there was some disparate impact claim on that basis, i.e. if women were much likely to remain at Oracle than men, and thus fell behind. No such claim was pled, and no evidence to support such a claim was offered.

Ms. Shah believed she was underpaid, but the comparison she drew with a male colleague pointed to a dynamic found elsewhere in the record—Oracle's longtime employees fall behind in salary since the budget for salary increases does not keep up for the market. *See id.* at 218-22. This is confirmed by what happened next. Ms. Shah left but then returned to Oracle in a new role that paid $67,000.00 more than her previous role at Oracle and $20,000 more than her position at the time. *See id.* at 223-25. This is not indicative of discrimination—it actually leads *away* from the conclusion that Oracle systematically discriminates in compensation based on gender or race. The low pay was not driven by gender or race—those remained constant in Ms. Shah's stints at Oracle. The change resulted from leaving a long-tenured job that had fallen behind the market and then returning at market value in a role that uniquely fit Ms. Shah's skills and experience.

Ms. Boross also provided evidence of unfairness that supports the conclusion that pay growth for those at Oracle is difficult, since raises are irregular and insufficient, and that to procure a higher salary one might have to leave and then return. *See id.* at 266-68, 273-74. Mr. Pandey believed he was underpaid, but did not doubt that he was actually well paid for his group because some co-workers had been at Oracle since the 1990s and started with low base pay. *Id.* at 412-14. His experience was that promotions did not come with raises and that focal budgets were too small. *Id.* at 409-10. At one point he sent an article to a manager with the aim of suggesting that race had something to do with his pay, *id.* at 447-49, but this was presented as a strategy to procure a raise, not as actual evidence that Oracle was paying individuals like Mr. Pandey less because of their race. The actual evidence presented went to more generalized unfairness.

Mr. Mensah did suggest that his compensation and non-promotion were related to discrimination. *See* PX 501; PX 505; HT at 1010-11, 1013-14. But as presented, these were suspicions and did not come with indications that race was the reason for Mr. Mensah's understandably frustrating career path. Moreover, when Mr. Mensah drew comparisons, it was to more favorable treatment given women and men, Asians and Caucasians. *See* HT at 1013-15, 1033-34, 1037. If more context were filled in, this might be supportive of a case that Oracle treats Black employees less favorable than others, but that is not the case that OFCCP decided to bring. OFCCP's claim is that Oracle systematically discriminates against women, Asians, and African-Americans. Mr. Mensah's experience isn't consistent with that claim. More importantly, when Mr. Mensah provided the details underlying his negative experiences, they tellingly did not fill in suspicions of discrimination—instead they pointed to the conclusion that Mr. Mensah was poorly treated because of corporate infighting, caught between and exploited by different organizations. *See id.* at 997, 1040-42. Like the other witnesses put on by OFCCP, Mr. Mensah provided testimony going to show that he was not treated fairly, in some sense, by Oracle, but it does not lead me to draw a conclusion that intentional discrimination on the basis of race and/or gender by the alleged wrongdoers was at work.

OFCCP singles out the testimony of Dr. Alexander as support for its allegations, averring that her pay was 21% below the midpoint and less than a male colleague, despite receiving high reviews and having a patent. OFCCP represents that when she complained about her pay she received a cryptic denial in the investigation and then was retaliated against. PPB at 39-40; *see also* PPF at ¶ 58. Oracle observes that even on OFCCP's presentation, Dr. Alexander's experience would be an example of discrimination by a low-level manager, which cannot assist OFCCP here because it has disclaimed any wrongdoing by such managers. It adds that subjective beliefs about discrimination are not evidence, and that evidence of retaliation are not relevant to the claims at issue in this case. DRB at 6 n.4.

Dr. Alexander provided good evidence about Oracle's investigative procedures (which will be discussed below) and her experience would be anecdotal evidence in a retaliation case. She made an inquiry about her pay, which was immediately passed to her manager, and was followed by an angry reaction, denied promotions, and a lay off.[174] *See, e.g.*, HT 569-70, 574-75, 578-80. But OFCCP did not bring a retaliation complaint, either as a pattern or practice case or on behalf of Dr. Alexander. It brought a compensation discrimination case, and evidence suggestive of retaliation by a manager upset about HR scrutiny does not tend to show systemic discrimination by Oracle, and by top-level executives further up the chain of command. As to the compensation issue, the record points to two reasons for what Dr. Alexander believed to be lower than market compensation—the fact that she voluntarily relocated to the Bay Area and the fact that she remained with Oracle for a long time. *See id.* at 562-63, 575. Whether or not it would be fair to not provide a suitable cost of living raise to accompany a voluntary transfer or to let long-time employees lag behind the market, these are not indications of the discrimination OFCCP chose to allege.

OFCCP also points specifically to the testimony of Dr. Hanson Garcia as anecdotal evidence of discrimination at Oracle. *See* PPB at 32-33. Ms. Garcia's personal experience is not indicative of discrimination. She learned that some who reported to her earned more than she did, but there was no discriminatory dynamic to this and after a complaint was made, she received a raise. The one employee who continued to earn more than Dr. Hanson Garcia was female. *See* HT at 69-72, 92-93. Dr. Hanson Garcia was somewhat abruptly pushed out of Oracle, but based on her testimony, this in no way suggests discrimination. She proposed a restructuring that, among other things, would have reduced the role of her supervisor. *Id.* at 75-78. Whether such a fundamental restructuring would be wise or not, the proposal predictably was not well-received by her supervisors and resulted in the organization deciding to go a different direction. OFCCP stresses Dr. Hanson Garcia's recollection of a conversation during "chitchat" at some time in the mid-2000s in which Ms. Westerdahl allegedly made a remark to the effect that "if you hire a woman, she'll work harder for less money. *See id.* at 79-80, 96. This could be indicative of a negative attitude towards women within HR, and is the most direct anecdotal evidence presented. Ms. Westerdahl denied making any comment along those lines. *See* PX 26 at 338.

Oracle points out that Ms. Westerdahl denies making the comment attributed to her and stresses that Ms. Westerdahl does not make pay decisions for the thousands of employees at issue here. It avers that a single comment from roughly 15 years ago does not establish systematic bias. DPB at 26; *see also* DPF at ¶ 57. Oracle adds that Dr. Hanson Garcia never complained about or reported the comment belies any inference of discrimination, in that when she complained about her pay she received a sizable pay increase and the employees who earned more than her included women. DPB at 26 n.13. Oracle's reply challenges OFCCP's claim that Ms. Westerdahl set up Oracle's compensation system, pointing to evidence that Ms. Westerdahl was not involved in any compensation system at issue in this case. It accuses OFCCP of misrepresenting Ms. Westerdahl's role in setting up a computerized system to be used in making compensation decisions as somehow continuing control over those decisions. It adds that the comment at issue is over 15 years old and disputed by Ms. Westerdahl. DRB at 7-8.

I found Dr. Hanson Garcia's testimony about Ms. Westerdahl's statement somewhat sketchy and do not give it significant weight. To be clear, I do not conclude that Dr. Hanson Garcia was dishonest—she appeared to be forthright and well-intentioned. Rather, the nature of the testimony

[174] This is not to conclude that there was, in fact, retaliation. That wasn't an issue presented, and wasn't explored with competing evidence. Rather, the point is that taking the events at face value, they are suggestive of retaliation.

and the lack of important context reduce the weight of the evidence as support for the claims brought in this litigation. Dr. Hanson Garcia's memory was ambiguous—she recalled the topic of the meeting and attendees, but the dating was highly imprecise. She did not offer much information other than it was said and the context was missing, which might have been important for interpreting the import of the comment in a claim alleging a pattern or practice of discrimination against women and minorities occurring roughly a decade after the comment was made. The evidence here is unenlightening on the points that would allow me to understand the statement and draw the suggested conclusions.

I am also cognizant that Dr. Hanson Garcia never complained and apparently never mentioned anything about the comment to anybody until this litigation, which came after she was pushed out of Oracle by Ms. Westerdahl and Ms. Dodson. I am further cognizant of the other evidence concerning Ms. Westerdahl, including the impressions of other employees like Ms. Thrasher and Ms. Balkenhol, as well as her significant support of OWL. *See* HT at 1302, 1374; PX 26 at 338. I conclude that insofar as whatever was said would manifest a negative attitude towards women, it was out of character and not reflective of Ms. Westerdahl's values or management. For this reason, it is unnecessary to pin down exactly what was said when and in what context. OFCCP is attempting to show that Oracle is engaged in systematic discrimination against women and minorities. Convincing anecdotal evidence would display prevailing attitudes and management approaches, which would support the conclusion that Oracle's HR and top executives are collectively engaged in a pattern or practice of discrimination. An uncertain remark from 15 years ago that would be out of character does not support the inference urged.

Moreover, the record reflects that Ms. Westerdahl, even if she did harbor some discriminatory attitudes towards women, could not effectuate that intent. She is uninvolved in pay decisions in the three job functions at issue here. *See* HT at 1240-41. OFCCP stresses Ms. Westerdahl's supposed reforming of the entire HR system, but this repeated line of argument confuses two quite different things: 1) HR processes/procedures and 2) the substantive results. Ms. Westerdahl's role was to reform the infrastructure and processes through which managers make decisions. That is quite different from overseeing the content of those decisions, let alone playing a role in making any compensation decisions for the job functions at issue here.[175] There is no good evidence that the HR infrastructure is somehow discriminatory or that Ms. Westerdahl inserts herself into compensation matters in the relevant job functions. She simply isn't a relevant decision-maker for the decisions that matter in this case.

In its reply, OFCCP accuses Oracle of misrepresenting both the role and content of the anecdotal evidence, which it clarifies was meant to illustrate the statistical evidence (rather than establish systemic discrimination) and maintains demonstrated "lived experiences of Oracle's discriminatory practice." PRB at 14-15. This is a fair point, and I agree with OFCCP that in this pattern or practice case the anecdotal evidence plays a limited role and should not be discounted simply because it does not make out the full range of the allegations. But I am ultimately being asked to draw an inference as to whether Oracle is discriminating in the manner that OFCCP claims, and anecdotal evidence can play a notable role in that evaluation because it provides a vantage on the mindset, behavior, and intentions of the decision-makers alleged to have discriminated.

In support of the suggested inference, OFCCP points to the testimony of the witness about

[175] The evidence would take on more importance in a case alleging discrimination within the HR function or organization, since Ms. Westerdahl would play a more substantive role in those compensation outcomes.

their motivations for testifying. *Id.* at 15. But this gets things wrong. Motives and content are different. A witness who is motivated to testify to end discrimination but in giving testimony provides no evidence of discrimination has still not provided evidence of discrimination. This would be somewhat peculiar, but makes sense in light of a solicitation letter that represented that OFCCP had already shown discrimination and witnesses only needed to come forward to talk about their negative experiences. This can be clearly seen in the testimony of some witnesses—Ms. Hardman wasn't sure whether or not Oracle was discriminating, but opposed discrimination and thought it should end and so was willing to share her story, *see* HT at 645-46, a story that did not actually evidence discrimination, as opposed to more generalized unfair treatment. The somewhat misleading claim of already making the determination orients the motivation, but the actual content still comes from the lived experience.

As a whole, I find that the anecdotal evidence does not support an inference that Oracle is discriminating in the manner alleged. While the witnesses were generally credible, for the most part they were not providing evidence of discrimination—they were providing experiences of unfairness more generally in a manner that did not link up with the allegations at issue. Where that evidence did purport to make those connections, it was weak support for the suggested inference.

b. Evidence of Oracle's EEO Policies, Diversity Efforts, and Training

A disparate treatment claim looks to intent, and so non-statistical evidence going to an employer's non-discriminatory intent and affirmative action efforts is relevant to the claim and can serve to rebut a prima facie case of discrimination. *United States v. City of New York*, 717 F.3d 72, 85-86 (2d Cir. 2013). Oracle points to its anecdotal evidence to effect that employees do not experience discrimination, its diversity and inclusion initiatives, and its training and instructions to managers. DPB at 28 n.15; *see also* DPF at ¶¶ 56, 59-62.

The evidence concerning Oracle's EEO and anti-harassment policies, Oracle's diversity efforts, and relevant trainings were discussed in some detail above. *See* §§ V.H.1, V.H.2, V.H.5. I will not re-state that evidence here, as the underlying content is not in serious dispute. I find that Oracle has official corporate policies of non-discrimination and non-harassment, has an official commitment to EEO principles and affirmative action, makes a relatively robust investment in diversity efforts, and provides both mandatory and non-mandatory trainings in this area.[176] This supports a finding that Oracle does not have discriminatory intent, and is not engaged in a systemic pattern or practice of discrimination.

While this evidence is relevant and tends to support a finding that Oracle is not engaged in a pattern or practice of intentional discrimination, it is of limited import. It is likely that most if not all major corporations have policies and trainings of a similar sort and an official veneer of non-discrimination is compatible with an underlying pattern or practice of discrimination. So this evidence does not lead to any conclusion. Rather, it is one aspect of a larger picture going to Oracle's intent, culture, and the potential existence of a pattern or practice of disparate treatment in compensation. This aspect favors a finding for Oracle.

[176] Though not all employees remembered each training taken during their time at Oracle, I do not infer that the trainings, e.g. the Affirmative Action Plan trainings, were not provided or were not mandatory. Rather, it is more likely that for some employees they were simply not very memorable, or were completed quickly—a not unexpected outcome when busy employees are subject to multiple mandatory trainings.

c. Evidence of Gender and Racial Pay Inequities in Dive and Save Requests

OFCCP points to several dive and save requests in which the justification allegedly brought to light salary compression and astonishingly low compensation for highly rated female employees. PPB at 31-32; *see also* PPF at ¶¶ 43-45. It asserts that Oracle only allowed dive and save changes when there was a competitive offer, rather than to correct disparities. PPB at 32. In reply, Oracle contests the implication of the dive and save evidence and the existence of salary compression, arguing that the requests involve employees across demographic groups and as a whole could not have somehow alerted executives to widespread unlawful disparities. DRB at 7. Oracle also points out that off-cycle increases are made outside of competing offers, such as to address internal equity, reward performance, or redress dissatisfaction with pay. *Id.* at 7 n.5.

Section V.G.1 reviewed Oracle's policies and practices related to off-cycle adjustments in some detail—including training guiding practices, the accounts of managers who testified, and the large number of actual underlying requests and justifications for off-cycle adjustments that are in the record. That review showed that at Oracle, off-cycle pay adjustments are not strictly limited to "dive and saves" as that term would apply to situations where Oracle acts in the face of an offer from another employer. Even when labeled as "dive and saves," off-cycle adjustments were/are used to redress employee dissatisfaction with compensation, to pre-emptively discourage an employee from looking elsewhere, or to address internal equity issues.

The evidence does indicate that some employees were compensated in the lower part of (or below) the salary range and sizable adjustments were necessary to bring them up to "market" value, both as measured by Oracle's ranges and by the offers from competitors. For OFCCP's argument to work here, however, I must conclude that the requests indicate that Oracle's female employees in particular were subject to low compensation and salary compression *and* that Oracle's top executives were aware of this due to the requests. I find neither proposition plausible and so do not find that the dive and save requests support an inference to a pattern or practice of discrimination by Oracle's top executives or human resources personnel.

To begin with, there is nothing inherently discriminatory about a company using off-cycle adjustments to counter offers from other employers in order to retain employees.[177] An offer from

[177] Part of OFCCP's argument on this point draws the inference from evidence that executives—here Mr. Miranda—do not base approval decisions on race or gender to the conclusion that Oracle has "program rules" forbidding off-cycle adjustments to correct gender or racial disparities. *See* PPB at 32. This takes the evidence entirely out of context and is logically flawed. Oracle's policies forbid discrimination in compensation on the basis of gender and race. Mr. Miranda was not being asked whether he would correct a disparity that was based on gender and race if one were presented, let alone providing any "rules" for dive and save requests. There do not appear to be any rules and Mr. Miranda was only stating what should be a non-controversial point that he does not discriminate based on gender or race when he makes approval decisions. He was not presented with a situation, real or hypothetical, that OFCCP imagines in its brief, and it is disingenuous to contort his testimony in the way that OFCCP attempts. OFCCP's argument on this point only functions by assuming the conclusion—that there are systematic gender and race disparities in compensation that Mr. Miranda and others are aware of and are indifferent to—in order to characterize the banal statement affirming a principle of non-discrimination as indicative of intentional discrimination.

OFCCP's suggestions in this case that an anti-discrimination policy forbidding making compensation decisions based on gender or race is tantamount to discrimination is somewhat confounding. The idea, apparently, is that the affirmative action regulations compel making compensation decisions based on gender and race, and that a violation of the affirmative action plan is somehow a violation of the anti-discrimination regulations as well. The relationship between anti-discrimination commitments and affirmative action is complex and much disputed, and not something that this case need consider. As the point was presented by OFCCP, it does not provide good reason to conclude that Oracle is engaged in a pattern or practice of discrimination. OFCCP has simply taking a plain anti-discrimination principle, put it

another employer is an indication of an employee's value in the labor market, and if a company wishes to retain the employee, it may be necessary to pay market value. There is no evidence that Oracle was willing to do this for male but not female employees and so on. OFCCP is bothered that Oracle did not use dive and save requests to correct disparities, but this concern assumes the conclusion at issue—that there are disparities based on gender and race that need to be corrected. Oracle doesn't agree with that and offers evidence to favor another conclusion. Whether or not that evidence prevails, there is no genuine question on the record here that *Oracle* didn't believe that it was rife with unlawful disparities in need of correction. So the point that it used off-cycle adjustments more to address market-value issues rather than demographic disparities says nothing about Oracle's intent.

The issue in this limited section does not turn on the statistical evidence—it turns on the dive and save requests. I have reviewed all of the request in the record, and taken together I do not find that they indicate that there is any general pattern of salary compression and low compensation for female employees particularly or based on the fact that they are female. Nor do I find that they raise any red flags about racial disparities. They do indicate that Oracle employees can and do fall behind the market on compensation, which based on the requests and other evidence, is the result of salary increases not keeping up with the market, leading to salary compression. The result is the somewhat chaotic dynamic found in the off-cycle adjustments—an employee who is valued receives an offer significantly in excess of current compensation, and Oracle must make a counter-offer that makes significant increases in compensation. The off-cycle requests, if all reviewed by the same top executives, would put them on notice that Oracle's compensation over time tends to fall behind the market, creating the propensity for attrition or the need for the off-cycle adjustments here. But as discussed above, this case does not turn on general principles of fairness or how one might best run a large technology company—it is a case about discrimination on the basis of gender and race. Indications that Oracle's compensation is not keeping up with the market are not indications that there are unlawful disparities based on sex and race. OFCCP's persistent and seemingly intentional confusion of these two points seriously undermines its claims in this matter since it reveals a point in its argument that isn't supported by the evidence—that salary compression is a problem based on sex or race, rather than a problem generally.

OFCCP highlights three dive and save requests—PX 103, PX 105, and PX 316—to illustrate its point, but none of the examples evidence systemic disparities based on race or gender. PX 103 involves a female employee who, based on the description, was in a growing role and had direct reports earning more than her. Nothing in the document indicates that the comparatively low salary was the result of the employee's gender, or that the reports in question were male. PX 105 is very poor support for OFCCP's conclusion. It provides an account of *why* the salary compression occurred, explaining that the employee was a longtime employee of Oracle who had not engaged in job-hopping, which had hurt her salary growth. The employee also suffered from manager decision-making during the prior focal review in which the decision-makers knew that she and others would

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into a different context, and then re-interpreted it in a manner least charitable to Oracle, rendering the anti-discrimination principle and affirmative action plans hostile to one another. If Mr. Miranda or the other witnesses say that they take race and gender into consideration when they make compensation decisions, then they are discriminating by making compensation decisions based on an impermissible factor. But in OFCCP's telling, if they do not take race and gender into consideration in individual compensation decisions, then they are not adhering to affirmative action requirements and therefore discriminating on the basis of race and gender. So as OFCCP has constructed the requirements, either way Oracle is discriminating. This is not a fair reading of the testimony of the witnesses or the regulations, which stress the complementary nature of non-discrimination principles and affirmative action. *See, e.g.*, 41 C.F.R. § 60-1.4(a); 41 C.F.R. § 60.216(e)(1); 41 C.F.R. § 60-2.16(e)(2); 41 C.F.R. § 60.2.16(e)(4); 41 C.F.R. § 60-4.3(10).

be leaving the organization in a restructuring and thus provided very little of their budget for salary increases for these employees. The dive and save here highlights unfairness, but not discrimination based on gender or race. PX 316 is also not indicative of discrimination or a disparity based on race or gender. It involves an employee who was in the lower part of the range and the comparison in the organization who received an offer that was matched to bring the employee just over the midpoint of the range but well over the previous maximum salary in the particular organization. Nothing in this document indicates that the salary was low because of race or gender, let alone provide an indication that there was systemic disparities based on race or gender.

The examples offered by OFCCP only flag problems with racial or gender disparities if one begins with the ironclad premise that there are systemic racial or gender disparities at Oracle. If one starts with that assumption, then the evidence here provides some confirmation, just as *any* salary increase for a women or minority would provide confirmation of the assumption. OFCCP seems to have made that assumption very early on, but I cannot do so—I must evaluate the evidence without beginning with the conclusion. Moreover, on the record before me, it would be entirely irrational to conclude that *Oracle* believed that there were systematic disparities based on race or gender in its compensation. Oracle's managers, whether rightly or wrongly, did not share OFCCP's particular opinions about the company. The evidence of the dive and saves highlighted does not put anyone on notice that there are underlying racial or sexual disparities. Until OFCCP made the claim, it was not an inference that I considered as a potential reasonable conclusion. And this is without considering the rest of the dive and save evidence, which is considerable. Taken collectively, it would put an executive on notice that employee salaries lagged behind the market, but would not lead anyone to conclude that women and minority salaries lagged while white male salaries did not. I conclude that the dive and save evidence does not provide non-statistical support for the conclusion that Oracle is engaged in a pattern or practice of discrimination based on gender or race.

d. Evidence of Breach of Affirmative Action Obligations

OFCCP's post-hearing brief leans heavily on the claim that Oracle did not comply with its Affirmative Action Program/Plan obligations. It asserts that Oracle was required to monitor and examine its employment decisions and compensation systems for evidence of disparate impacts on women and minorities under 41 C.F.R. § 60-2.10(a)(2)-(3), provide the recourses to ensure compliance under 41 C.F.R. § 60-2.17(a), and "conduct in-depth analyses of its compensation system to identify and correct disparities; monitor its compensation records at all levels to ensure non-discrimination; conduct internal reporting on a scheduled basis; and advise top management of program effectiveness." Under 41 C.F.R. § 60-2.17(b)-(d). PPB at 3-4.

OFCCP contends that it is undisputed that Oracle did not perform the required pay equity analyses or comply with its Affirmative Action Plan obligations. It points to Ms. Holman-Harries testimony that her team completed no internal audit reports or tracking system for problem areas, and did not study Oracle's compensation system. PPB at 13-14; *see also* PPF at ¶¶ 50, 53. OFCCP argues that Oracle's claim that it complied in a decentralized manner is incorrect because the evidence shows that managers did not understand the requirements or have the information to ensure compliance because they only had compensation information for their reports. It adds that higher executives monitored for high performers not receiving increases in compensation, but did not review race and gender information in this process. OFCCP further contends that Oracle did not comply with the affirmative action requirements because it did not provide resources to correct disparities. PPB at 33-36; *see also* PPF at ¶¶ 47-49, 51-42, 54.

In its post-hearing brief, Oracle argues that OFCCP cannot prevail in this case based on alleged failure to comply with affirmative action requirements because this is an issue separate and apart from the burdens and elements of establishing discrimination claims on either a disparate treatment or disparate impact theory. It adds that affirmative action compliance was not an issue for trial and that OFCCP did not establish any substantive violations. DPB at 39-40. Oracle argues in its reply brief that OFCCP relies too heavily on alleged Affirmative Action Plan violations that are not at issue in this case, accusing OFCCP of attempting to replace Title VII law with regulations governing an area of compliance that OFCCP chose not bring in its complaint. It represents that OFCCP's arguments in this regard incorrectly state the requirements of the regulations and are based on unfounded assumptions about content and concealment that is not reflected in the record. DRB at 2-3.

This case involves allegations of discrimination, not allegations based on non-compliance with the Affirmative Action Program regulations found in 41 C.F.R. Part 60.2.[178] The Affirmative Action Program-related evidence is thus of very limited relevance. OFCCP generally presents its arguments in this guise, but at times appears to be attempting a tacit bait and switch, changing the nature of the complaint it chose to bring. Indeed, in OFCCP's "Summary of Argument" it goes so far as to frame the entire case as the proposition that judgment should be entered against Oracle based on the statistical evidence "for breaching its AAP and regulatory obligations by engaging in prohibited pay discrimination." PPB at 14. But that can't be right—OFCCP was master of its complaint and opted not to bring a complaint for breach of "AAP" obligations despite being on notice from early in the compliance review that Oracle did not subscribe to OFCCP's approach to compensation analysis.

As I understand OFCCP's argument in this case, it proposes that I find that Oracle did not comply with its Affirmative Action Program obligations, and that I find that this non-compliance supports the inference that Oracle is engaged in a pattern or practice of intentional discrimination against women and minorities because non-compliance could indicate generalized intent to discriminate. As OFCCP correctly points out, intentional disregard of or hostility to affirmative action requirements could provide some support for an inference to discriminatory intent. *See* PPB at 35 n.65. There are, however, a number of deficiencies with this line of argument and I conclude that the Affirmative Action Program evidence in this matter does not support the finding OFFCP seeks and is largely a distraction.

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[178] While the NOV referenced potential violations, in bringing this case into enforcement OFCCP made decisions and brought allegations of discrimination with companion record-keeping/access allegations. As discussed in some detail in the order on summary judgment, the SAC initially invoked the Affirmative Action Plan regulations, but I ordered clarification since it was important to understand whether OFCCP intended to take the case in a new, different, and expanded direction. OFCCP responded by eliminating the general references though retaining some references in the context of the procedural allegations that were part of the complaint. *See* SAC at ¶¶ 44-45, 47. In the order lodging the SAC over Oracle's objections, I explained that I understood the complaint to *not* be pursuing distinct Affirmative Action Plan allegations. This understanding persisted through discovery, and was set forth in the order on summary judgment, which explained, in some detail, that Affirmative Action Program compliance issues might remain relevant insofar as they related to the complaints of discrimination, but that the case did not involve distinct Affirmative Action Plan claims. Subsequently, OFCCP made an oral motion at the pre-hearing conference to amend its complaint on the eve of hearing to include new Affirmative Action Plan claims that it had decided not to pursue through the entire litigation to that point. I denied the motion, finding that it was far too late to be taking the case in a new and different direction. If OFCCP wanted to litigate Affirmative Action Plan/Program compliance, it needed to forthrightly make those claims in a timely manner and provide the accused contractor with fair notice and an opportunity to develop and present opposing argument and evidence.

To begin with, OFCCP's claims about the substance of the Affirmative Action Program, and Oracle's non-compliance with them, are by no means as plain as OFCCP repeatedly represents. OFCCP focuses particularly on some requirements found in 41 C.F.R. §§ 60-2.10 and 60-2.17. The former sets forth the basic aspects of a program, including a "diagnostic component" and "internal auditing and reporting systems" that are deployed to "monitor[] and examine[] its employment decisions and compensation systems." 41 C.F.R. § 60-2.17 requires designation of responsibility, identification of problem areas with in-depth analyses to include analyses of compensation systems to determine whether there are gender or race or ethnicity based disparities, action oriented programs to redress problems identified, and an internal auditing and reporting system to measure effectiveness.[179]

Oracle's Affirmative Action Plan and the lack of pay equity analyses were discussed above in Sections V.H.3 and V.H.4 and I will not repeat that discussion here. It is undisputed that Oracle did not comply—or even attempt to comply—with the compensation-related aspects of the regulations in a "centralized" manner in that it did not conduct compensation studies and pay equity analyses for the company as a whole from Ms. Holman-Harries' organization (or some other organization in HR). Any such analyses that it did conduct were done for the purposes of litigation, not to comply

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[179] 41 C.F.R. § 60-2.17 provides, in full:

> In addition to the elements required by §60-2.10 through §60-2.16, an acceptable affirmative action program must include the following:
> (a) *Designation of responsibility.* The contractor must provide for the implementation of equal employment opportunity and the affirmative action program by assigning responsibility and accountability to an official of the organization. Depending upon the size of the contractor, this may be the official's sole responsibility. He or she must have the authority, resources, support of and access to top management to ensure the effective implementation of the affirmative action program.
> (b) *Identification of problem areas.* The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:
> (1) The workforce by organizational unit and job group to determine whether there are problems of minority or female utilization (*i.e.,* employment in the unit or group), or of minority or female distribution (*i.e.,* placement in the different jobs within the unit or group);
> (2) Personnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities;
> (3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities;
> (4) Selection, recruitment, referral, and other personnel procedures to determine whether they result in disparities in the employment or advancement of minorities or women; and
> (5) Any other areas that might impact the success of the affirmative action program.
> (c) *Action-oriented programs.* The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to §60-2.17(b) and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.
> (d) *Internal audit and reporting system.* The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful affirmative action program:
> (1) Monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the nondiscriminatory policy is carried out;
> (2) Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained;
> (3) Review report results with all levels of management; and
> (4) Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

with the regulations or to otherwise open-mindedly inquire into potential disparities or problem areas. OFCCP treats this, at times, as tantamount to non-compliance, but the regulations themselves do not specify that compliance must be accomplished in a centralized manner, let alone follow the sort of analysis performed by Dr. Madden. 41 C.F.R. § 60-2.10 is abstract and short on details of exactly what these components and systems must look like, and how exactly a contractor is to monitor and examine its employment decisions. A contractor must analyze its compensation system to look for disparities per 41 C.F.R. § 60-2.17(b)(4), but the regulation is silent on what that analyses must look like. 41 C.F.R. § 60-2(d) requires an internal audit and reporting system to measure effectiveness, but doesn't detail in the slightest what that must look like, let alone specify that it occur through one centralized office. Oracle also persuasively points to three instances in which OFCCP represented in replying to comments on rulemaking that it was not mandating a specific method of compliance and left contractors with significant discretion in determining how to comply with the regulations. *See* DRB at 3 n.1 (citing 71 Fed. Reg. 35114, 35,119; 78 Fed. Reg. 13508, 13517; 81 Fed. Reg. 39108, 39,125).

This is not to say that Oracle's interpretation is proper or that Oracle would be found compliant. OFCCP did a nice job at the hearing drawing out the deficiencies in Oracle's approach. But I am not asked to evaluate those compliance questions. I am instead asked to infer discriminatory intent from non-compliance, but that would only be a plausible inference from glaring non-compliance and hostility. I do not find that sort of non-compliance and hostility in the record, even if Oracle's approach falls short. The regulations do not contain the sort of specific requirements that OFCCP now represents and there are at least good-faith disputes about what compliance should look like, with Oracle finding support for its position in OFCCP's own representations. Oracle took OFCCP at its word about flexible case-by-case means of compliance, and I do not see this as evidence of generalized hostility to affirmative action or suspect intent.

If Oracle is non-compliant, it is not in the obvious brazen manner that OFCCP suggests.[180] The conclusion OFCCP wants to draw is that Oracle is engaged in an intentional pattern or practice of discrimination against women and minorities. On its face, whether or not Oracle met the technical requirements of the Affirmative Action Program regulations has no direct relevance. If a contractor fails to comply with the Affirmative Action Program regulations, then it fails to comply with the Affirmative Action Program regulations. It does not thereby engage in a pattern or practice of discrimination. Overt hostility or total disregard for the Affirmative Action Program regulations could manifest a propensity to also tolerate or engage in discrimination, though even in that instance it would be somewhat attenuated support. Here there is no good evidence of overt hostility or total disregard, and so no support for the suggested inference that the non-compliance here also indicates

[180] Part of OFCCP's argument here relies on a repeated trope that Oracle is non-compliant because it tells managers not to make compensation decisions based on gender or race. *See* PPB at 34. OFCCP is treating what is plainly a non-discrimination policy as tantamount to a violation of its Affirmative Action Program regulations. But as discussed above, that can't be right, and it isn't. Nondiscrimination principles and affirmative action can be, and properly are, complementary. A general non-discrimination policy does not mean that a manager could not evaluate and make corrections for disparities based on gender or race that are not otherwise justified—since it is a correction based on merit and market value, this would be a manifestation of the nondiscrimination principle asserted by Oracle witnesses of not making compensation decisions based on gender or race (or other improper factors). OFCCP's stronger point here is that performing the evaluations is hard without gender or race information, which is not provided in Oracle's compensation tools. But this is a more nuanced and qualified point than the claim that Oracle violates the regulations as a matter of policy because it adopts non-discrimination policies. On the more limited claim, if Oracle is relying on its first-level managers to perform the analyses, they would most likely not need to be given the information within the tools. This, again, is not to say that this manner of compliance is adequate—it is only to point out that matters are far more complex than OFCCP is willing to admit.

non-compliance elsewhere. Rather, there is good evidence that Oracle and OFCCP's counsel have different views about what the Affirmative Action Program regulations require. There is also some evidence that Oracle's execution of its compliance may have been deficient. But assuming that last point, I still do not find any good support for an inference to discriminatory intent by Oracle.

As a whole, OFCCP's arguments surrounding the Affirmative Action Program regulations are unconvincing because to work they require assuming their conclusions and attribute knowledge to Oracle that it simply would not have had. In its reply brief, OFCCP asserts that Oracle's arguments about and use of prior pay indicate a "wholesale abandonment" of its Affirmative Action Plan obligations. PRB at 10 n.38. This argument is somewhat confusing, in part because for almost three years Oracle has forbade even collecting information/asking questions about prior pay. Regardless, the argument assumes its own conclusion in that it assumes that Oracle was relying on prior pay to set starting pay (a point Oracle hotly disputes) and that Oracle would have been aware of the disparities if it complied with is Affirmative Action Plan obligations. But this point is entirely speculative. It assumes an interpretation of the obligations that OFCCP's counsel have developed for the purposes of this case and assumes that if Oracle had been studying compensation in the manner OFCCP now suggests, it would have employed Dr. Madden's particular methodology. This last point is quite dubious—whether or not Dr. Madden's approach is proper, *Oracle* finds it improper and so would not have used it.

If there are significant gender and race based disparities at Oracle, *if* Oracle knew about them, and *if* it did not comply with its Affirmative Action Plan regulations to remediate the problem, then the lack of compliance would support an inference to intentional discrimination. But the existence of disparities is hotly contested and regardless of that outcome, *Oracle* did not believe there were disparities to correct. So the alleged non-compliance doesn't indicate intent. Indeed, this point gets turned around—it is, in part, the alleged non-compliance that would have prevented Oracle from learning of the disparities OFCCP insists exists. The non-compliance, then, actually undermines the very argument to discriminatory intent. At best, OFCCP could lead me to the conclusion that Oracle was not engaged in searching out disparities, but that is *far* short of the conclusion that it intentionally created or perpetuated disparities as a pattern or practice of discrimination.

The underlying structure of the argument here appears to be for OFCCP to retain all of its positions about disparities and discrimination, and then put themselves in the shoes of Oracle's leadership, resulting in the conclusion that to act as Oracle acted would have involved discriminatory intent. But Oracle's actual executives do not accept the positions of OFCCP in regards to the disparities and discrimination at Oracle. To infer intent from actions, it is the background beliefs of the actors that matter. The point doesn't turn on the merit of those assumptions and positions, it is simply about who holds them. The claim at issue requires me to draw inferences about Oracle's intent, so it is Oracle's point of view and understanding of the situation that matters. Once this is appreciated, the alleged Affirmative Action Program non-compliance does not provide support for OFCCP's claim.

e. Evidence of Concealment of Information

Next, OFCCP argues the discriminatory intent can be inferred by Oracle's executive's attempts to conceal disparities. OFCCP asserts that it would "strain credulity" to deny that the executives did not know about the disparities given the dive and save requests, internal complaints, and Oracle's obligations to study compensation. PPB at 36. It asserts that Oracle could have

performed Dr. Madden's analysis to reveal the disparities. *Id.* Further, it contends that by not performing analyses as required by the regulations, it was concealing its knowledge of the systemic disparities. *Id.* It adds that Oracle's HR systems hid compensation information from employees. PPF at § 55. OFCCP also argues that Oracle concealed its non-compliance by misrepresenting what it was doing to OFCCP. It accuses Ms. Catz in particular of not performing her oversight function. PPB at 36-37. Moreover, OFCCP avers that Ms. Holman-Harries group was set up to fail because it was understaffed and did not have the tools to comply. *Id.* at 37. It also points to the recommendations of Oracle's Board to not prepare pay equity reports. PPF at ¶ 60.

There are several aspects to this argument. Some do not really make sense. As discussed above, Oracle does not allow employees to see the compensation of other employees who are not their reports and does not publicize its salary ranges. But it is a stretch to call this "concealment" and if it is concealment, it is not of the sort that would tend to lead me to infer that there is any discriminatory intent by Oracle. I am also somewhat flummoxed by the chain of reasoning surrounding claims of concealment of disparities. At one point OFCCP asks that I infer discriminatory intent because Oracle's executives were not studying compensation as required. But then OFCCP seems to contend that because Oracle's executives were required to do so, or could have done so, they had actual knowledge of the pay disparities, leading to an inference of discriminatory intent. But the executives either knew about the alleged disparities or they didn't. They can't not have known because they weren't looking when OFCCP wants me to infer that they were non-compliant and thus had some discriminatory intent, but then suddenly have known when OFCCP wants an inference that they did nothing in the face of knowledge, indicating discriminatory intent.

The thread through this series of claims seems to be the claim that Oracle must have been doing secret studies to gain knowledge of the disparities, but then did not do regulatory or other studies in order to conceal what it found. But the record does not support this highly complicated series of speculations. The only pay equity studies Oracle did were done in preparation for litigation and correlated temporally with the path to litigation in this case. Regardless of what they showed, they could not have come early enough to provide Oracle with the knowledge it then attempted to conceal by not doing compensation studies. Moreover there is no evidence that any such studies would have showed the disparities OFCCP claims. Oracle *could* have engaged Dr. Madden or someone else to do a study of her sort, but it didn't do so. Whether or not I find Dr. Madden's approach convincing, *Oracle* did not and does not agree with that approach and did not / does not think that it indicates the existence of troubling disparities. So even had they done so in preparation for litigation as a way to try to understand what OFCCP was up to, I would still not be led to the conclusion that Oracle knew about the disparities and sought to conceal or suppress them. Again, this line of argument relies on OFCCP and its attorneys putting themselves into Oracle's shoes and asking what intent would be involved to act in the manner that Oracle acted. But Oracle does not see things in a way at all similar to OFCCP and its attorneys and this chain of reasoning leading to an inference to discriminatory intent must fail.

The record does suggest that Oracle is reluctant to investigate potential disparities in a centralized or company-wide matter. Through this litigation, Oracle has opposed that sort of approach, in its Affirmative Action Program compliance it avoided such an approach, and its Board has on several occasions recommended voting against a shareholder proposal to conduct a centralized pay equity study. *See* PX 264 at 124-26; PX 450 at 63-64; PX 451 at 91-92. This reluctance, however, is, on the record here, driven by a combination of genuinely held belief that such an analysis would be improper for the company and fear of litigation—not a concerted attempt

by Oracle's leadership to conceal pay disparities that they already know exist.

The last facet of OFCCP's argument looks to Oracle's behavior as to OFCCP in the compliance review and alleged concealment of information. It is potentially a more serious argument, but ultimately no more convincing. The events in the compliance review were discussed in outline in Section V.B above. They are not directly relevant to this case, but needed to be reviewed as background and because OFCCP suggests that Oracle's behavior is in indication of intent. Having reviewed the events in the compliance review and the quick transition to litigation in the Fall of 2016 and first half of January 2017, I do not find that Oracle was engaged in concealment of information from OFCCP. Oracle did fail to provide all of the information requested on the timelines requested, but I am not left with any sense that Oracle was trying to "pull one over" on OFCCP.

Rather, I am left with the sense that OFCCP behaved in a manner designed to produce adverse findings and lead to either complete capitulation by Oracle or litigation. Over the course of the review, OFCCP demanded an excessive amount of information, refused to give explanations, and imposed facially unreasonable, arbitrary deadlines for the provision of huge collections of data. At the same time, while OFCCP's witnesses acknowledged that the compliance review should be collaborative and that asking questions was reasonable, OFCCP refused to provide Oracle with information about what it was up to and why it needed all of the information it was demanding. And while OFCCP now accuses Oracle of concealment for having difficulty keeping up with a steady and increasing stream of demands, OFCCP doesn't seem to have been able to keep straight what it was seeking and what it had been given, or complete tasks like preparing interview notes for signature until months after the interviews. OFCCP conditioned, on several occasions, even meeting with the agency on the provision of a position statement that its witnesses acknowledged wasn't required and pronouncing that Oracle was liable when it couldn't meet impracticable, arbitrary demands.

OFCCP's approach to investigation is a matter for OFCCP discretion. It is not my role to set agency policy or direct agency conduct. But OFCCP has invited scrutiny of its behavior in making the claim that discriminatory intent should be inferred from Oracle's behavior and alleged concealment of information during the compliance review. I find no basis for such a finding and no good evidence to support the inference suggested. Insofar as the evidence from the history could be used to draw inferences about motivations, it would not be an inference that Oracle was engaged in a concerted scheme to hide a pattern or practice of discrimination at its headquarters by withholding information.

f. Complaint Investigations

Oracle holds out its internal investigations as indicative of its good intentions. DPB at 28 n.15. OFCCP, on the other hand, argues that Oracle's procedures for handling internal complaints were inadequate and worked to conceal pay inequities from employees, which was also done by keeping salary ranges from employees. It criticizes involving lawyers so that the investigations would be privileged, uniformly finding no discrimination, and using the budgetary factors to justify inequities. PPB at 37-39; *see also* PPF at ¶¶ 56-57. It points in particular to the testimony of Dr. Alexander about her experience, averring that her pay was 21% below the midpoint and less than a male colleague, despite receiving high reviews and having a patent. OFCCP represents that when she complained about her pay she received a cryptic denial in the investigation and then was retaliated against. PPB at 39-40; *see also* PPF at ¶ 58. OFCCP is also critical of the lack of

coordination between Ms. Baxter and Ms. Holman-Harries, and the limited source of complaints investigated by Ms. Baxter. PPF at ¶ 59. OFCCP asserts that this experience is consistent with the evidence of discrimination in case, including statistical evidence of discrimination, breach of Affirmative Action Plan obligations, and concealment of its discrimination. PPB at 40.

Oracle's internal investigations process and evidence relating to particular investigations reflected in the record was discussed above in Section V.H.6, as well as in the anecdotal evidence provided by Dr. Alexander (§ V.I.8). As a whole, it provides some limited support for OFCCP's suggested inference. The evidence surrounding the investigations does not reflect well on Oracle. Collectively it suggests that HR Investigations at Oracle, at least as to compensation, are not an effective means of investigating, let alone correcting, potential inequities or discrimination. The findings are conclusory and un-evidenced, the process is cloaked in secrecy, and the outcome appears to be preordained. The experience of Dr. Alexander is troubling, and should concern Oracle's leadership. In her case there actually were plausible explanations for what appears to be comparatively lower pay. But the investigation inspires no confidence and resulted only in alerting Dr. Alexander's manager to her good-faith worries, opening the door to retaliation. Dr. Alexander's ultimate conclusion—that she should advise colleagues to avoid HR—was sound and I found her grievance that HR improperly handled her complaint compelling.

The underlying dynamic that emerges is that Oracle treats any complaint as a legal threat, and immediately involves counsel to protect the company, and preserve privilege over its any investigation or non-investigation. At the same time, those who make inquiries are identified to management, inviting retaliation. The process of investigation itself is opaque, but the aim seems to be for Oracle to cover its tracks and protect itself legally—a veneer of due diligence with a seemingly uniform result of no wrongdoing. A concerned employee at Oracle would be more prudent to take a complaint or issue outside the internal processes, since those processes appear to be designed as a way to neutralize a potential threat, not forthrightly redress any problem.

While I agree with OFCCP rather than Oracle about the quality of Oracle's internal investigations, I do not find this point to be very powerful in the context of the case here. I am not adjudicating the adequacy of investigations or the handling of Dr. Alexander's or any particular complaint. OFCCP seeks to have me infer from the evidence concerning investigations, together with other evidence, that Oracle is engaged in a pattern or practice of intentional discrimination. The underlying reasoning here is that Oracle is aware of unlawful disparities but is covering them up by inadequate self-serving investigations, indicating an intent to discriminate. But that is not the inference that is supported by the record. There is no good evidence that Oracle is aware of the disparities alleged, and so the inference to a cover-up falls through. Rather, the inadequacies of the HR investigations suggest that Oracle is highly concerned by litigation and orients its practices to neutralize threats. That sort of avoidance is not an indication of consciousness of liability—litigation is not pleasant and is worth avoiding of its own accord. So while in some larger scheme this evidence does not reflect well on Oracle and its intentions, it is small support for the suggested inference in this case.

g. Evidence of Budgeting Decisions

OFCCP argues that Oracle's executives were concerned about the budget and wanted to keep compensation budgets lean, and asserts that these executives knew that this would result in employees receiving less compensation than they should under Oracle's compensation system. PPB at 28. OFCCP charges that Oracle executives knew that there were pay disparities. *Id.* OFCCP

points to evidence that budgets at Oracle were lean and that sometimes there were no yearly focal reviews or bonuses. That made it impossible to keep employees within their salary bands. OFCCP asserts that the lean budgets were used to pay top performers, rather than correct inequities. *Id.* at 29-30; *see also* PPF at ¶ 38-39, 41-42. It contends that the budgets were controlled via guidelines to management and through the approval process. PPB at 30-31; *see also* PPF at ¶ 40. Oracle replies that OFCCP's accusation that its executives discriminate for budgetary reasons lack support, with the claim coming back to an assertion that lean budgets are set, top performers are rewarded, and wage compression occurs, none of which is indicative of discrimination by the alleged wrongdoers. DPB at 7.

There is no question that Oracle's leadership is budget conscious and that the company is interested in making money. Oracle is a corporation. It is undisputed that budgets for focal reviews are limited and that in some years the reviews did not occur. But this is not in and of itself indicative of discrimination or an intent to create or perpetuate disparities. It would be discrimination if Oracle's executives decided to cut costs by paying women and minorities less. And that is the sort of inference OFCCP urges. But for that reasoning to hold, it must be the case that Oracle's executives knew about the disparities alleged or sought to create them by non-compliance. That is the crucial missing piece here, and a common refrain throughout the consideration of the non-statistical evidence. There is evidence that the executives are budget-conscious, but that requires no explanation—Oracle is a corporation that runs on a budget. There is evidence that the lack of salary growth led to incumbent employees falling behind the market as compared to new employees, resulting in salary compression. But there is no good evidence that would link this to gender or racial disparities, let alone discrimination by Oracle. Unfair treatment, in some sense, of long-time employees is not discrimination based on gender or race, unless a lot of unstated details and explanations are filled in. OFCCP didn't adequately do this, and any account that could be given is purely speculative.

OFCCP's suggested addition to Oracle's interest in profit—that discrimination is the business strategy—is unsupported. It hasn't shown that Oracle's leadership had any knowledge or belief that there were systemic disparities based on gender or race, or that they knew that non-compliance would save money and perpetuate disparities. At this point, OFCCP's case comes down to conjecture and rhetoric, but I cannot decide cases based on posturing, even where that posturing fits the policy goals of the Department of Labor. For OFCCP's argument supporting a disparate treatment pattern and practice case to work in this respect, I must assume a great deal of knowledge by Oracle of contested facts, and infer the existence of secret intentions and strategies that are not manifested in the evidentiary record. I thus do not make the suggested inference or find that the evidence of budgeting decisions supports OFCCP's theory.

h. Conclusion: No Convincing Non-Statistical Evidence of Discriminatory Intent

Having reviewed the non-statistical evidence of discrimination and considered the arguments of the parties, I find that it provides very little support for OFCCP's case. The anecdotal evidence generally favored Oracle and most of OFCCP's arguments relied on assumptions about Oracle's knowledge and intentions that are not borne out in the evidentiary record. There is no good evidence that Oracle engaged in an effort to conceal disparities that it does not believe exists or engage in budgeting decisions in a discriminatory manner. The evidence concerning Affirmative Action Program compliance is mixed, but it does not support the suggested inference to a pattern or practice of disparate treatment discrimination. Violation of the Affirmative Action Program regulations would not establish violation of the anti-discrimination requirements, and the inference

suggested by OFCCP was missing important pieces that would go to Oracle's knowledge and intent. Last, the evidence of record did not paint a flattering picture of Oracle's internal investigations, but this is very limited support for the suggested inference to a pattern or practice of disparate treatment based on gender or race. I conclude that as a whole, the non-statistical evidence does not support an inference that Oracle is liable for compensation discrimination on a pattern or practice disparate treatment theory.

5. Mechanism of Systemic Discrimination

OFCCP is alleging systemic discrimination. It asserts that Oracle has a pattern or practice of discriminating in compensation against women in three job functions (Product Development, Support, and IT) and against Asians and African-Americans in one job function (Product Development) at its large headquarters facility. Moreover, it maintains that the discriminatory actors, the wrongdoers, are limited to a small part of Oracle's management—the top executives and human resources personnel. Oracle contends that OFCCP must establish a pattern or practice of discrimination—that Oracle treats some individuals less favorable because of their sex or race as its standard operating procedure—and that to do so OFCCP must provide common evidence of discrimination, or the glue that shows that there is a pattern or practice. DPB at 3. OFCCP does not contest that there must be some mechanism of discrimination, but contends that it has shown that there are potential—and actual—mechanisms of discrimination for the alleged wrongdoers.

This case is not a class action and OFCCP never needed to seek class certification under Rule 23 (or a state law equivalent) to proceed. Rather, it is a claim premised on a clause in federal contracts. It is, in a sense, an "automatic" class action in that OFCCP brings the claim in its own name but seeking relief based on a systemic pattern or practice of discrimination as to defined "classes." While there was no need for class-certification to be sought, on the merits OFCCP's claim does need to address a sort of commonality requirement—to find that Oracle's top executives/HR professionals are engaged in a pattern or practice of discrimination, there needs to be some "common contention [] of such a nature that it is capable of class wide 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). Put otherwise, there needs to be some "glue" or "general policy" or discrimination, *id.* at 352-53, that *is* the common pattern or practice of the alleged wrongdoers underlying the claim. OFCCP's case is ultimately based on an inference to intentional discrimination. In determining whether that inference is warranted, the possibility and likelihood that the alleged wrongdoers *could* be acting to cause the alleged discrimination is relevant. If they have no means to discriminate, then the inference must fail. And even if engaging in a pattern or practice of discrimination is possible, if the mechanism is implausible or highly unlikely, the suggested inference will be weaker.

OFCCP argues that Oracle's compensation system is centralized in terms of situating employees with respect to system job title, PPB at 9-11, and as relevant here, in providing for a chain of centralized executive level approval of compensation decisions, *id.* at 11-12. It maintains that it is undisputed that "top executives" must approve pay decisions, with any delegation of authority accompanied by a chain of approval reaching through HR and upper management all the way to the CEOs. It points out that Oracle has adopted centralized automated systems to manage these approvals. Moreover, it contends that top executives set budgets for compensation decisions. It adds that in some instances, executives and managers do not further delegate the decisions to lower managers. Top executives may modify or reject compensation decisions and managers are

instructed not to communicate decisions until there is final approval. *Id.*; *see also* PPF at ¶¶ 10-14.[181]

Oracle argues that OFCCP cannot establish a pattern or practice of discrimination because it did not demonstrate some common mode of discrimination or glue that links the compensation decisions at issue in this case. Oracle points out that despite claiming that Oracle discriminates as part of a standard operating procedure, OFCCP only alleges discrimination in three of sixteen functions. But Oracle does not manage, set budgets, or make compensation decisions by job function. And since the job functions are not equivalent to lines of business in reporting up through the same leadership, it is unclear what explanation could exist for systemic discrimination in only these job functions. DPB at 22; *see also* DPF at ¶¶ 15-16. Oracle contends that the record shows that compensation decisions are made by lower and first level managers, who OFCCP is not accusing of wrongdoing. It contends that the approval process involves a sanity check at the higher levels, where even "egregious" offers are questioned but not rejected. DPB at 22-23; *see also* DPF at ¶¶ 18-19, 21-22. Oracle asserts that it lacks centralized decision making on compensation[182], such that OFCCP's analysis aggregates the decisions of many managers and do not establish that managers generally engage in discrimination or that there is any common, uniform disparity. And, per Oracle, without a common policy or practice linking the disparate compensation decisions, the aggregated statistics cannot show a pattern or practice of intentional discrimination.[183] DPB at 23-24.

In its reply, OFCCP claims that Oracle did not rebut the evidence of "highly-centralized" control of compensation decisions, pointing again to evidence that executives set budgets for compensation decisions, gave guidance in making those decisions on at least some occasions, and were part of an approval process of compensation decisions that also included HR. OFCCP contends that it has shown that Oracle's executives knowingly set low budgets and use the compensation system to discriminate against women and minorities. PRB at 10-11. OFCCP avers that the alleged failure of Oracle's executives to not follow its Affirmative Action Plan obligations and the concealment of this failure shows centralized control. *Id.* at 12. It also points to the class certification order in *Jewett* as showing that decision-making is centralized. *Id.* As to the point that despite claiming systemic discrimination it is only alleging discrimination in three of sixteen job functions, OFCCP relies on its prosecutorial discretion, lack of investigatory evidence, and pattern and practice cases in which only subsets of jobs at an employer were at issue. It also observes that more than 2/3 of Oracle's HQCA workforce is in the three job functions at issue. *Id.* at 13-14.

Oracle replies by stressing that its compensation system is decentralized and provides managers with a great deal of discretion, accusing OFCCP of misconstruing these facets of the record. It contends that OFCCP is simply wrong in claiming evidence of high-level control, point to the testimony of managers about pushing down budgets and conducting only high-level review in

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[181] OFCCP's evidence for these points is the testimony of Mr. Miranda, Mr. Webb, Mr. Bashyam, and Mr. Loaiza. *See* PPB at 11 n.15.

[182] Oracle's description of focal reviews stresses that guidance is high-level and related to budgets and general guidelines. It avers that first-level managers are the decision makers with the approval process functioning as a sanity check with rare (or no) changes at higher levels. DPF at ¶¶ 24-26. It makes the same points as to equity and bonus awards, seeking a finding that Oracle's decision-making on compensation is decentralized. *Id.* at ¶¶ 27-29.

[183] Much of Oracle's argument here concerns the legal point—whether commonality of some sort is a necessary component. Given OFCCP's position and the arguments pursued, this ends up being a non-issue; the dispute is really over the factual question of whether or not Oracle has centralized decision-making in the manner that would allow a pattern or practice of discrimination attributable to the alleged wrongdoers.

approvals, with recommendations rarely if ever being rejected. DRB at 5-6. Oracle also contends that the record shows that its top-executives are not approving compensation decision—rather, the approvals go through Ms. Balkenhol and her team. *Id.* at 7.

OFCCP's theory of the case requires drawing an inference that the disparities found cannot be otherwise legitimately explained and so are more likely than not the result of intentional discrimination on the basis of race and/or gender.[184] The alleged wrongdoers are Oracle's high-level executives and human resources department, not lower level managers within the job functions at issue. If, however, it is not possible for those alleged wrongdoers to be accomplishing any discrimination, OFCCP's theory must fail—the disparities would have to have some other explanation since even if the wrongdoers harbored some discriminatory intent, they would have no opportunity to actualize it. Moreover, the less opportunity the alleged wrongdoers have for engaging in the alleged discrimination, the less plausible OFCCP's inference is. Even if it is somehow possible for the accused agents of discrimination to shape compensation to the degree OFCCP alleges, if that is itself unlikely and there is inadequate evidence that they are, *in fact*, exercising their powers to shape compensation outcomes in a way that could be discriminatory, OFCCP's suggested inference becomes less plausible.

Oracle's compensation system has been discussed throughout the fact-finding above and is somewhat complicated. A great deal of ink has been spilled over whether or not Oracle has compensation guidelines, policies, philosophy, etc. and over whether the system is centralized or decentralized. Most of these disputes involve arguing over words or talking past one another. Oracle is a big, complicated company and it has a compensation system that has both centralized and decentralized features. I find that it is mostly decentralized. I have reviewed a great deal of high-level guidance and training (especially in § V.D.2 above)[185] that could be described as Oracle's compensation guidelines or philosophy or principles. There is a sense in which Oracle *does* have compensation policies, if a "policy" is understood as a very general guideline rather than a directive. Here, Oracle's compensation guidance is exceedingly general and often banal. Some of it could be described as HR jargon, no more than banal statements or adages that give no concrete guidance to the decision-makers beyond what could charitably be described as rules of thumb.

I further find that line managers are the primary decision-makers in matters of compensation.[186] They formulate the offers and the proposals for compensation changes and awards. Though nominally the parties dispute this point, that really isn't where the argument is. I do not take OFCCP to be challenging the point that line-managers make the initial proposals and

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[184] At the outset, some of OFCCP's arguments are difficult to countenance. The alleged failure to adhere to Affirmative Action Plan obligations resulted from Oracle's lack of centralized analyses of compensation and delegation to lower managers. Whatever the merits of that argument, it cannot at the same time establish that there was centralized control. The obvious reason for Oracle's attempt at delegating the Affirmative Action plan responsibilities to lower managers was the lack of centralized decision-making. Since *they* were making the decisions, Oracle had no clear way to engage in a centralized Affirmative Action Plan compliance program. OFCCP deems that noncompliant, claiming that Oracle must have a centralized compliance program. But that wasn't at issue, and I simply do not follow how the claim that Oracle violated the regulations not at issue by decentralizing compliance at the same time establishes that Oracle in fact had centralized control.

[185] *See, e.g.*, JX 22; JX 24; JX 25; JX 70; JX 107; JX 111; JX 114; JX 126; JX 127; JX 140; JX 143; JX 149; PX 28; PX 30; PX 32; PX 51; PX 141; PX 152; PX 415; PX 416; PX 420; DX 22; DX 112.

[186] Evidence supporting this point is found throughout the record; Oracle's managers consistently explained that line managers are the primary decision-makers. *See, e.g.*, HT at 1093-94, 1158, 1198-99, 1402-05, 1407-08, 1440-41, 1443-44; JX 22 at 4-7; JX 102 at 93-96; JX 106 at 6.

that these serve as the basis for the compensation results. OFCCP is instead focusing on other aspects of Oracle's compensation system. While I don't find serious dispute that the primary decision-makers are the line managers, I also don't find serious dispute that they are not the *sole* decision-makers. Other actors matter since compensation is subject to budgets, a set of instructions, and an approvals process. Each of these potential mechanisms requires separate discussion.

First, could the alleged wrongdoers be discriminating through the budgeting process for compensation programs? In each of the global compensation programs, budgets are set by top executives, and then further allocated by line of business heads. *E.g.* PX 153 at 4-5; HT at 1223-26, 1233-34; JX 10 at 5; JX 153 at 5; JX 139 at 3-4. The evidence of how budgeting decisions were made, however, makes it very implausible that it could be a mechanism of discrimination. Ms. Waggoner was not a decision-maker, but was involved in the budgeting decisions. She credibly explained that these decisions get made at high levels of generality in reference to total allocations, allocations in countries, and allocations for lines of business as a whole. *See, e.g.*, HT at 1224-26, 1231-32; PX 24 at 265-66. Mr. Kurian, when he was at Oracle, would make budget decisions with reference to the performance or groups and how important or critical those groups were to the overall organization, and what they were delivering. PX 12 at 208-09. Mr. Miranda reviewed budgets with reference to sub-lines of business and then made judgments about how to further allocate to his teams. He considers compression within certain groups, performance of groups, the role of the job in the company and the competitive landscape, and the level of attrition to competitors. HT at 1090-91, 1097. Mr. Bashyam receives and further distributes budgets with reference to the strategic nature of the products and lines of business. HT at 1443. Mr. Loaiza seeks to distribute budgets to award star performers and those critical to the organization. *Id.* at 1484; PX 21 at 274, 285-86.

In each of these cases, the budgeting decisions are made at far too high a level of generality to plausibly be the means of discrimination by Oracle. There is no evidence that they are budgeting in a discriminatory manner or that they would even be in a position to act on discriminatory intent—there does not appear to be a way for them to know the demographic make-ups further down the line that would enable discriminatory distributions. As a potential mechanism of discrimination, it is unlikely, implausible, and not supported by any evidence.

Could the alleged agents of systemic discrimination be acting through the instructions given in some compensation processes? Global compensation processes come with instructions. But these are generally quite high-level instructions such as avoiding the "peanut butter" approach, comparing similar employees, focusing on top-performers with low compa-ratios, and the like. *See, e.g.*, JX 78 at 12; JX 142 at 4; *see also* HT at 1230-32; PX 22 at 277-80. Mr. Miranda, for instance, gave very general guidelines like the percentages of people to receive increases in a group, with more specific guidance given only when he is individual experience with an employee. HT at 1091-92. Similarly, Mr. Webb, Mr. Bashyam, and Mr. Loaiza received and gave very general guidance. HT at 1408-09, 1423, 1444, 1461, 1478-79. Ms. Chan's experience as a lower level manager was also that the instructions given, especially for the U.S., were general. HT at 1550-51. Bonus instructions advise awarding performance and contribution to the company, as well as cautioning that the budget is limited. *E.g.* JX 142 at 8. Equity instructions direct focusing on top talent and those the company wants to retain. For the U.S., instructions provided percentages and minimum grants, but not further details. *E.g.* JX 143 at 10; HT 1094-96, 1233, 1410; PX 146 at 1-2.

Again, the evidence related to the sort of instructions that are given do not provide any indication that they are used as a way to discriminate as a pattern or practice (rather than in

potentially quite limited exceptional circumstances), or that they even could be used to discriminate. Not only is there no inkling that there is discrimination within the instructions, the *sort* of instructions given are too abstract and high-level to convey discriminatory intent. And again, at the level of the instructions and the instructors, there is no good evidence that they would even know enough about demographic make-ups to give instructions in a discriminatory manner. So as before, it is technically possible that instructions could be used as a mechanism of discrimination, but there is no evidence that they are in fact being so used, and it is unlikely that they could be so used.

Third, is the approvals process a likely mechanism of discrimination by the alleged wrongdoers? Based on the evidence, this is also highly unlikely. A great deal of evidence was presented at the hearing and in the exhibits about the approval process. This evidence and the way approvals are conducted were discussed above in §§ V.C.4, V.E.4, V.F.2, V.F.3, V.F.4, V.G.1. Taking this evidence as a whole, both the way witnesses described the process and the underlying approvals in the record, I find that the approvals at the top levels at issue in this case are high-level reviews for accuracy, budgeting, and "sanity." The process generally moves quickly and at the highest levels occurs through proxies—Ms. Balkenhol's team. Race and gender information is not provided with the approvals. The line managers/hiring managers make the initial decisions. Those decisions are almost always approved and almost never (if ever) rejected, with instead questions being asked if there is a concern.[187] Ms. Chan's experience as a line manager was consistent with this. She saw herself as the primary decision maker and the approval process only involved changes adding increases after discussion with her manager. HT at 1546-49.

The approval system is thus, on the record here, an unlikely means of systemic discrimination. OFCCP's argument, *see* PPB at 11-12; PRB at 11-12, stresses the fact that an approval system exists, but does not squarely meet the core question—whether that approval system is a plausible mechanism of discrimination by the alleged wrongdoers. At most, it points to pieces of evidence indicating that there is some review, at lower levels more searching, and that there are instructions followed by an approval process. Taking these claims at face value, they are still very poor support for the conclusion that OFCCP wants me to reach—that Oracle's HR professionals and top executives are engaged in a pattern or practice of discrimination across three job functions, and that the approval system is a mechanism of this pattern or practice.

The evidence is clear that as a general rule, approval is very high-level review and that the alleged wrongdoers wouldn't have access to the sort of information that they would need to effectuate any discriminatory intent. There is also no evidence of discriminatory intent by those reviewers. Workflows flow up to Ms. Balkenhol and her team. Are they engaged in systemic discrimination? No evidence supports that inference and it isn't something that OFCCP seriously describes. OFCCP seems to imagine Mr. Ellison, Ms. Catz, and the late-Mr. Hurd reviewing all decisions and effectuating discriminatory schemes, but there is no evidence of that either and once the actual review system is understood, these executives aren't even actually reviewing most decisions at all and when they do so, it is a very quick global approval. Is it lower-level top

[187] *See, e.g.*, HT at 1198-1201, 1226-30, 1231-34, 1250-52, 1258-59 (Ms. Waggoner); HT at 1289-1300 (Ms. Balkenhol); JX 102 at 16, 106, 109, 112-13 (Ms. Waggoner); PX 22 at 105-09, 121-24, 134-35, 292-93 (Ms. Waggoner); PX 24 at 113-15, 117-19, 161-62, 167-69, 196, 267-68 (Ms. Waggoner); HT at 1080-87, 1092-94, 1100, 1118-19, 1121-23, 1150-51 (Mr. Miranda); JX 22 at 4-7 (Ms. Gordon); PX 16 at 97-98 (Ms. Holman-Harries); PX 12 at 177-78, 193-94, 218-20 (Ms. Cheruvu); HT at 1402-05, 1407-12, 1420-21 (Mr. Webb); HT at 1440-46, 1451-53 (Mr. Bashyam); HT at 1472-82, 1486-87 (Mr. Loaiza).

executives? Again, there is no evidence of this. The only evidence suggesting discriminatory animus came from a roughly 15 year-old comment from Ms. Westerdahl, but that wasn't intrinsically powerful evidence on its own and Ms. Westerdahl isn't even involved in the compensation decisions that are at issue in this case (and she denies making the statement).

OFCCP's claim that the alleged wrongdoers are engaged in some discriminatory scheme via the approvals process lacks evidentiary support, beyond mere possibility, and is speculative. Moreover, the approval actions leave traces and there are data files in this case containing approver actions. *See, e.g.*, DX 310. If there is any regular pattern or practice of rejecting or returning workflows (or global-program recommendations), they should be apparent in the evidence and susceptible to statistical analysis. Even if limits on the information could not reveal any gender or racial dynamics to the actual approval process as a whole, the records would at least show that there is more than isolated interference and changes in the approval process.

These are questions of fact and evidence, not speculation, and it is insufficient for OFCCP to rest on a claim that it is metaphysically possible that the alleged wrongdoers are discriminating through some mechanism that could be used to effectuate intentional discrimination as a pattern or practice. OFCCP rightly points out, *see* PRB at 11 n.40, that it does not have to establish a mechanism in a disparate treatment claim. But it does have to establish an inference, and in evaluating the inference OFCCP urges, I must consider the likelihood that the mechanism could be used and is being used in the manner suggested. I have considered each of OFCCP's alleged mechanisms and find them all implausible. Though Oracle's compensation system has centralized aspects—high level guidance, general budgeting and instructions, and an approvals process—the decision-*making* is predominantly decentralized when it comes to things like determining starting compensation in an offer, recommending focal changes, recommending bonuses and equity, and recommending an off-cycle increase. OFCCP maintains that those recommendations are not discriminatory, but that the high-level managers in some way interfere (before or after) to produce a pattern or practice of discrimination against women and minorities in the job functions at issue. But given the mechanisms available, I find this unlikely as a possibility and find no good evidence that they actually *are* using these mechanisms in a discriminatory manner.

6. Statistical Evidence of Compensation Discrimination[188]

OFCCP's suggested inference that Oracle has engaged in a pattern or practice of disparate treatment in compensation is premised primarily on statistical evidence. As discussed above in the legal framework, statistical evidence can, on its own, establish a prima facie of discrimination. But 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

[188] I do not attempt to consider and adjudicate every dispute between the experts or between the parties relating to statistical evidence. Rather, I limit my discussion to the central points that are material to the resolution of this case. For instance, I do not discuss below the dispute in the *Daubert* and summary judgment motions concerning the proper measure of total compensation and the manner of accounting for equity awards. There are different methods for valuing equity compensation, with various strengths and weaknesses. *See* PX 325 (Radford survey of options). The different choices of the experts here can be (and were) debated. But it is not actually be important for the resolution of the case. *See, e.g.*, HT at 801-02. If Oracle is engaged in a pattern or practice of discrimination as alleged, it should show up in either measure—a notable difference might point to potential discrimination in far, far more narrow case, but not as the complaint was presented here. Despite the focus on these differences in the pre-hearing motion practice, neither expert seemed to find the difference in approach critical or even a basis for the difference of opinion.

discrimination—the required showing in a pattern or practice case. To make that showing, the statistical analyses must have sound methodology and explanatory power, and should eliminate the most common nondiscriminatory explanations, focus on the proper groups for comparison, and yield statistically significant results. *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984). A statistical analysis that omits consideration of critical factors will not make out a claim for discrimination. *EEOC v. General Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 582 (9th Cir. 1989). The statistical analysis, then, must be evaluated for basic adequacy to determine whether it supports an inference to discrimination. If it does, then Oracle must come forward with rebuttal evidence—not just speculations—that casts sufficient doubt on the proof to defeat the inference, such as by showing that the disparities do not exist or in fact have other explanations. *General Tel.*, 885 F.2d at 582-83; *Segar*, 738 F.2d at 1267-70.

The content of Dr. Madden's statistical analyses and Dr. Saad's critiques were discussed above. That discussion in §§ VI.A – VI.F, as well as the credibility findings in §§ VII.C.1 and VII.C.2, are incorporated herein and will not be repeated in detail. In broad summary, Dr. Madden opined that women in the relevant job functions were paid 18% to 24% less than men, Asians earn 12% to 18% less than white employees, and African-Americans earn 14% to 40% less than white employees, though this combined the steering and compensation discrimination aspects of the analysis. PX 1 at 5-6; HT at 705-10. With respect to Column 8, which controlled for Dr. Madden's measures of education, age, tenure, job descriptor, management, and global career level—and so effectively job code/title—she found 4.6% to 6.3% differentials, with 4.27 to 5.21 standard deviations adverse to women in the aggregated three job functions. PX 1 at 15-19, 62. In the analysis of Asians in the Product Development function as compared to white employees, Dr. Madden's Column 8 found disparities ranging from 3.8% to 7.9% with standard deviations of 2.67 to 5.29. PX 1 at 28-31, 69. In the analysis of African-American as compared to white employees in the Product Development function, Dr. Madden found no statistically significant disparities in Column 8, though she opined that this was due to the small number employees rather than the absence of compensation discrimination. PX 1 42-43, 76. Dr. Saad generally opined that Dr. Madden and OFCCP used an overly simplistic model that did not properly compare employees doing similar work, used poor measures of variables, and omitted important variables. Refinements and improvements of the models made the systemic disparities disappear, undercutting any suggested inference to intentional discrimination. *E.g.* JX 104 at 76; *see also* JX 103 at 6-7, 20-21, 142-45 (opinion in original report).

To determine whether or not the statistical evidence supports an inference to a pattern or practice of intentional discrimination, I consider whether Dr. Madden has drawn the relevant comparisons, accounted for the most common or critical nondiscriminatory factors, and yielded statistically significant results. OFCCP's post-hearing argument on this claim focuses on Dr. Madden's Column 8, which yielded statistically significant results for women in the three job functions and Asians in the Product Development function, but not African-Americans in the product development functions. *See* PX 1 at 62, 69, 76. Statistical significance alone, however, does not support an inference of discrimination—a basically flawed model with statistically significant results would not support an inference. In this case, the predominant disputes are over the construction of the model.

In Sub-Section VIII.A.6.a, I review the arguments of the parties concerning the import of the statistical evidence, which points to several core areas of dispute. In Sub-Section VIII.A.6.b, I address an initial worry about the level of aggregation in Dr. Madden's analysis. In Sub-Section VIII.A.6.c, I consider whether or not the model is making the relevant comparisons of employees

doing similar work, which is a question of whether it is comparing similarly situated employees. In Sub-Section VIII.A.6.d, I consider whether Dr. Madden adequately accounted for the most common or critical factors and the ability of the model to account for the major factors affecting pay. In these sub-sections, I find the model deficient. This is not the end of the discussion. Dr. Madden (and OFCCP) provided a basis for the apparent deficiencies by explaining that the large-scale aggregation eliminated the need to provide more fine-grained comparisons and controls. This explanation is evaluated in Sub-Section VIII.A.6.d. I conclude that it is not convincing and instead reveals a critical assumption that runs through the analysis.

Stated briefly, Dr. Madden and OFCCP's assumption that there are not systematic differences in qualifications or skills at a group level functions as an assumption that there has been no discrimination, are no disparities, and are no imbalances adverse to women and minorities until employees arrive at Oracle. But this is not plausible as an assumption in an employment discrimination case and doesn't take seriously the systemic inequities coursing through society, instead proceeding on the basis that Oracle alone can be responsible for the inequities that exist in its workforce. While the statistics indicate that there are broader inequities manifested at Oracle, the model does not differentiate between inequities that are the product of actions, choices, or trends that pre-exist employment by Oracle and actions taken by Oracle—e.g. a pattern or practice of compensation discrimination. Possibilities are not proof and Oracle can be held responsible only for the discrimination that it engages in. The existence of inequities outside of Oracle would not in any way excuse discrimination by Oracle, but the question to be answered is whether Oracle is actually discriminating and thus should be held responsible. To do so, a sound model would provide a sound basis to infer that Oracle actually is a discriminatory actor. OFCCP and Dr. Madden's analysis assumes away and thus leaves open the critical underlying questions about *which* inferences should be drawn and thus is ultimately a poor basis for inferences about systemic discrimination.

a. Claims and Contentions Regarding the Statistical Evidence

OFCCP argues that Dr. Madden's Column 8, which effectively controls for system job title, similarly situates employees and reveals statistically significant disparities, licensing an inference of discrimination. PPB at 15-19. OFCCP contends that it is undisputed that Oracle maintains a centralized job coding system—system job titles—that determines which employees are similarly situated for the purposes of pay. It avers that salary ranges are assigned to system job titles, representing Oracle's assessment of market value as well as the link between external and internal equity. OFCCP points to evidence that Oracle considers it important for compensation purposes to place an employee in the correct system job title and that Oracle views those job titles as defining the skill and level of responsibility of an employee. OFCCP contends that within a job title and salary range, distinctions are made based on skill, performance, and experience amongst the already similarly situated employees. It also points to the way that Oracle integrates new acquisition employees by focusing on system job title.[189] PPB at 9-11; *see also* PPF at ¶¶ 15-20. OFCCP

[189] In a note, OFCCP points to the class certification order in the *Jewett* case, claiming that it supports the conclusion that even under the more stringent standard in Equal Pay Act cases, the analyses here similarly situate employees, adding that job duties do not need to be the same to meet this standard. PPB at 9 n.8. Oracle dismisses the recent class certification order in *Jewett* on the grounds that it is not a merits finding and left open crucial fact issues that must be decided here. It deems the decision not relevant here, adding that it is based on a different cause of action. DPB at 25 n.12. I do not give the order in the *Jewett* matter weight here. It is a suit in a different forum, under a different law, with a different record, and in a different procedural posture. The *Jewett* case will no doubt be decided based on the evidence and argument in *Jewett* as well as the procedures and substantive law that apply to that action. This case will be decided based on the evidence and argument presented here in light of the applicable law in this action.

concludes that Oracle's system job title provides a granular sorting of similarly situated employees, with experience and education—factors Dr. Madden controlled for—used to place employees within a range. *Id.* at 18-19. In OFCCP's view, there is no need to further consider how to similarly-situate employees because Oracle's compensation system already provides the means of doing so. *Id.* at 19.

OFCCP further argues that Oracle has failed to rebut its statistical analysis showing intentional discrimination. It asserts that Oracle must do so via factors that are actually used to set pay and asserts that Oracle did not even attempt to perform its own independent analysis. As such, in OFCCP's view, Oracle cannot rebut OFCCP's statistics and cannot show that any additional factor actually provides an alternative explanation. It avers that Oracle cannot rebut the statistical evidence with hypothetical flaws. PPB at 19-20. It maintains that Oracle cannot rely on work on different products as a criticism of Dr. Madden's analysis because it does not keep records of assignment to particular products. Further, OFCCP asserts that the evidence shows that Oracle does not set pay based on product, since job codes are not associated with product and product is not mentioned in the materials as the basis to set pay. OFCCP adds that Oracle's policy is to not make compensation changes when employees shift between product and that numerous witnesses testified about working on different products at the same time or changing the products they worked on frequently. *Id.* at 20-21. It charges Oracle with "post-hoc" attempts to insert product as an explanation in variance in pay when the record indicates that Oracle hires skilled individuals to work on a "vast and ever-changing array of products," with education and experience, not product skills, being critical to the value of employees to the corporation. *Id.* at 21-22 (emphasis removed).

Next OFCCP contends that Oracle does not, in fact, pay for job performance. It points to evidence that some strong performers were underpaid, that performance evaluations are not required at Oracle leaving no basis for analysis of the relationship of performance to pay, and that when individuals are promoted they generally do not receive any pay raise. Hence, it concludes that variance based on performance cannot be used to rebut Dr. Madden's statistics. PPB at 22-23. In a note, OFCCP points to Dr. Madden's critiques of Dr. Saad's analysis, arguing that patent controls have very little effect, Dr. Saad's cumulative leave variable has a faulty tenure measure, and that Dr. Madden's job descriptor variable captures specialization while there is no evidence that a "major" variable would make a difference in the result. *Id.* at 23 n.40.

Oracle argues that Dr. Madden did not attempt to compare similarly situated employees and instead used her own version of human capital theory whereby only experience and education at time of hire matters, and any other differences are based on discrimination. DPB at 9-10; *see also* DPF at ¶¶ 32-36 (Oracle's characterization of Dr. Madden's analyses); *id.* at ¶¶ 42-43 (Oracle's summary of Dr. Saad's critique of Dr. Madden). Oracle contends that none of the columns in Dr. Madden's chart similarly situate employees. DPB at 10. It understands Dr. Madden's opinion to be that Column 5, controlling for race, gender, the measure of education, and the measures of experience (age and tenure), is the analyses that establishes discrimination. But Oracle argues that it omits the actual work performed by the employee at Oracle and so cannot similarly-situate employees. *Id.*

In addition, Oracle argues that Dr. Madden's education and experience controls are far too simple to use to draw conclusions. Education is level of degree without any consideration of subject, school, or relationship between the area of the degree and the work at Oracle. It contends that these points matter at Oracle for compensation and points in particular to the testimony of Dr. Alexander, who received a doctoral degree that made her uniquely valuable for a particular project at

Oracle. Oracle further argues that Dr. Saad showed that there are disparities in the areas of education individuals pursue, and that it is not responsible for disparities in compensation that result from disparities pre-existing employment at Oracle. Oracle adds that the education data was missing for half of Dr. Madden's data set, yet she assumed that the missing employees all had the same education for the purposes of her analysis. DPB at 11; *see also* DPF at ¶ 47. Next, Oracle argues that Dr. Madden's experience variable is inadequate because it is a function of age, which does not provide any information about whether or not the life activities of the individual had a relationship to the current work. It points to evidence that the type and relevance of prior experience matters at Oracle. DPB at 11-12. It concludes that the controls crafted by Dr. Madden do not actually control for education and experience as they matter for compensation and do not similarly situate employees. *Id.* at 12.

Oracle further argues that Dr. Madden's Column 6, which adds the "job descriptor" control does not similarly situate employees. It avers that Dr. Madden initially opined that this control was endogenous and hence problematic due to Oracle's control, but then altered her view such that job descriptor was a proxy for area of education and experience. But Oracle argues that it is inadequate in this respect. It provides a broad bucket for general area of work, but does not provide any direct information on the area of prior experience or education. Oracle contends that the job descriptor variable should be disregarded because Dr. Madden isn't using it to similarly situate employees and that OFCCP cannot because it is not qualified as an expert in labor economics. DPB at 12-13.

Moreover, Oracle contends that Dr. Madden's Columns 7 and 8 do not similarly-situate employees. It avers that in Dr. Madden's opinion, these columns should not be used because they are endogenous and concludes that OFCCP cannot rely on them to show discrimination because doing so would contradict the views of its own expert. DPB at 13-14. Oracle substantively argues that job code/title, which is ultimately what Column 8 controls for, does not similarly situate employees because employees in the same job code do "vastly different work." They work on different products, are part of different teams, and are in different areas of Oracle's business. Oracle contends that the result is that employees in the same job code have different sorts of skills and are compensated based on differences in the labor market for those skills, which is reflected in intentionally broad salary ranges. It deems Dr. Madden and OFCCP's argument that job code identifies similar work as an inaccurate and misleading assumption. *Id.* at 14; *see also* DPF at ¶¶ 10-13.

To support these points, Oracle points to the testimony of Ms. Waggoner, Mr. Miranda, Mr. Bashyam, Mr. Loaiza, and Mr. Webb. DPB at 14-16. Oracle also points to the testimony and experience of several anecdotal witnesses who provided details about their particular skills and job at Oracle—Ms. Chan, Mr. Adjei, Ms. Chechik, Dr. Alexander, Ms. Hardman, and Ms. Klagenberg.[190] *Id.* at 16-17. Oracle charges that Dr. Madden was aware of these differences within job codes, as well as the large salary ranges that applied. It argues that omission of the differences within job codes are material because they undermine inferences that can be drawn from the model and the statistically significant findings. Per Oracle, Dr. Saad's adjustments, to include adding organization, resulted in the statistically significant results largely disappearing. Further, Oracle argues that the low

[190] Oracle also refers to Dr. Saad's cluster analysis for this point. *See* DPF ¶ 46. I do not find this analysis particularly convincing or important. It is a quasi-scientific attempt to make out a point about the variance in skills sought for different positions within a job code. Its methodology remains somewhat obscure to me, but there is no need to delve into the details or consider grievances over production. The underlying point is a factual question about the variance of jobs within a job code/title at Oracle, and there is a great deal of factual evidence in the record going to this point without having to make it a quasi-scientific analysis in word clusters.

R-squared for Dr. Madden's models indicates that they have poor explanatory power, which is increased significantly with Dr. Saad's additions. DPB at 17; *see also* DPF at ¶¶ 44, 49-50. Oracle contends that Dr. Madden relies on "flawed and oversimplified assumptions" leading to a misleading model that courts have warned against. "Because there is no basis to assume that employees with the same job code perform similar work, and because in fact that assumption directly contradicts the overwhelming evidence, Dr. Madden's statistics fail to sustain OFCCP's claims." DPB at 18.

Next, Oracle argues that Dr. Madden's analyses do not account for the major factors influencing pay at Oracle or account for its affirmative defenses. It holds that the record shows that pay at Oracle depends on performance, skill, and competencies, some of which cannot be reduced to quantitative inputs. It avers that Dr. Madden did not consider any of this information or these factors. This resulted, per Dr. Saad, in omitted variable bias and unreliability, since Dr. Madden was not adequately measuring education or experience and was not measuring other factors that matter. DPB at 18-19; *see also* DPF at ¶ 48. Oracle adds that because Dr. Madden's models are overly aggregated, there is not an easy fix, since the factors that influence pay and explain pay differences can vary from job to job. It points to Dr. Saad's testimony that the over-aggregation impairs the inferential value of the model, since it has the effect of obscuring legitimate differences that exist within narrowly defined groups. DPB at 20-21; *see also* DPF at ¶ 45. It concludes that "[a]s a result of these omissions and mis-specifications, Dr. Madden's statistics are incapable of demonstrating that any pay differences are caused by discrimination, rather than legitimate factors that affect pay" and that "[t]heir failure to account for the major factors that impact pay at Oracle and the legitimate explanations for the differences in pay among the employees at issue conclusively demonstrates OFCCP has failed to meet its burden under Title VII." DPB at 21.

OFCCP argues in reply that system job title, represented in Column 8 of Dr. Madden's analyses, contains all factors that Oracle systematically uses to make compensation decisions and thus Oracle cannot point to any factor missing from Dr. Madden's analysis. It deems Column 8 as containing the most granular information, and claims that any other factor lacks recorded information and so cannot be used. It represents that Oracle does not in fact base compensation on other factors like performance reviews, product, or patent. PRB at 3-4. OFCCP argues that Oracle has failed to meet its rebuttal burden with respect to any other factors because it does not show that the factors are used in compensation decisions and does not show that any suggested factor makes a difference for compensation on a group level. *Id.* at 4-5. As to cost center, OFCCP relies on Dr. Madden's view that it tends to destroy the power of the analyses because it adds too many variables and divides employees into too small of groups. It relies on *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir 2002) for the proposition that aggregated statistical data are superior to subdivided data. PRB at 5-6.

OFCCP contends that the remaining factors suggested by Oracle (cumulative leaves of absence, education major, and patent bonus) fail for similar reasons in that Oracle does not show how they are used in compensation decisions and does not demonstrate how the cure the disparities. OFCCP points to Dr. Madden's claim that they do not cure disparities.[191] PRB at 6. In reply to the

[191] OFCCP makes a confusing argument about cumulative leaves of absence, stating that since Dr. Saad in other studies found some negative correlations between tenure and compensation, the curative effect of cumulative leaves of absence only demonstrates discrimination. PRB at 6-7. This is oversimplified, assumes the conclusion, and takes points out of context. The relationship of tenure to compensation, in some instances negative, suggests that the role of tenure is not as simple as Dr. Madden and OFCCP assume, and that the aggregation of disparate parts of Oracle's workforce is problematic because it obscures different relationships in different areas. There is also a ready explanation for the

claim that Column 8 cannot be relied upon because Dr. Madden disavowed it as endogenous, OFCCP contends that this misconstrues Dr. Madden's views and its theory. Column 8, it maintains, is a sub-part of the discrimination at issue, in addition to other discrimination inferred from earlier columns. *Id.* at 7. As to the claim that Dr. Madden overly-aggregates data, OFCCP replies that since it has shown that Oracle's compensations are centralized, aggregation is proper and the cases relied upon by Oracle to the contrary are inapposite. *Id.* at 12-13.

In its reply, Oracle argues that OFCCP is incorrect that job title is sufficient to similarly situate employees, pointing to cases holding that this alone is insufficient.[192] It also contends that OFCCP's claim that job titles are granular and that large concentrations of employees in job titles like Software Developer 4 and 5 indicate lots of employees doing the same work as unsupported by the record, which actually supports the opposite conclusion—that job titles aggregate employees engaged in different work. Oracle stresses that throughout the compliance review and litigation it has maintained and explained the job titles do not appropriately similarly situate employees, accusing OFCCP of "abicat[ing]" its burden by assuming that job titles do something they do not. DRB at 8-9.

Oracle further argues that OFCCP has not produced a model accounting for the major factors contributing to pay. It rejects OFCCP's claim that Dr. Madden has incorporated education and experience, arguing that Dr. Madden's measures of these factors are flawed and it is absurd to claim that what matters for pay at Oracle is type of degree, age, and time in company. DRB at 9-10. It asserts that age, an unlawful basis for compensation decisions, is not a compensation factor, but relevant prior experience is, something not measured by Dr. Madden or OFCCP. *Id.* at 12. Oracle accuses OFCCP of constructing a false dichotomy between intentional discrimination and a decision by Oracle that women and minorities are inferior in skill, arguing that the obvious explanation to consider is the existence of disparities that exist prior to Oracle. *Id.* at 10. Oracle further points to evidence that product matters for pay. It offers cost centers as a proxy for product, at least in the job functions here, and contends that Dr. Saad's analyses properly controlled for organization while Dr. Madden and OFCCP did not even try to examine how product might influence pay. *Id.* at 10-11. As to evidence that changes in organization do not come with a pay increase, Oracle notes that transfers of these sorts often occur within product lines, it possesses a separate business reason for not making adjustments at the time of transfer, i.e. to prevent poaching, and pay adjustments can

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tenure-compensation correlation—the evidence tends to show that Oracle's focal reviews do not keep pace with changes in the market, while new hires are brought in at market value. In domains where market value increases rapidly, like "hot" skills, this dynamic would reasonably produce a negative tenure-compensation correlation. OFCCP seems to think that the cumulative leaves of absence control has some important bearing here, but it is a far more fine-grained control that cannot support the sweeping conclusions OFCCP draws in this section.

To put the point from a different angle, OFCCP's criticism of Dr. Saad's refinements of its model relies on my accepting Dr. Saad's point about the problem with aggregating the model over a group of disparate employees. This would result in my finding the refined measure problematic, but I would also be finding OFCCP's and Dr. Madden's models problematic due to the level of aggregation, so the result would not be in favor of OFCCP.

[192] Oracle cites: *Forsberg v. Pac. Nw. Bell Tel. Co.*, 849 F.2d 1409, 1414 (9th Cir. 1988); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 791 (7th Cir. 2007); *Kassman v. KPMG LLP*, 416 F. Supp. 3d 252, 283, 289 (S.D.N.Y. 2018); *Rabe v. United Air Lines, Inc.*, 971 F. Supp. 2d 807, 824 (N.D. Ill. 2013). The lesson of these cases is that job title is not necessarily enough to similarly-situate employees. I do not understand OFCCP to be arguing a contrary legal proposition, and I do not take Oracle to be arguing the stronger point that job titles are categorically insufficient to similarly situate employees, or even the somewhat weaker point that they are not pertinent consideration. Job titles matter, but Oracle's correct point is that they are not all that matter and that it is the actual content of the job that is important for similarly situating employees. The dispute, then, is factual, not legal and turns on findings about the nature of the work at Oracle and the factors that matter for compensation.

and are made later in the focal process. *Id.* at 11 n.9. Oracle also argues that performance matters for pay and accuses OFCCP and Dr. Madden of ignoring its role. It points to evidence in training, guidelines, and experience of performance influencing compensation. *Id.* at 11.

b. An Initial Worry About the Level of Aggregation

Initially there are worries about the level of aggregation in OFCCP and Dr. Madden's analyses. Dr. Saad opined that OFCCP's SAC model incorrectly over aggregated employees doing dissimilar work. This results, even with controls, in measuring average impact and obscuring potential underlying variability within the groups being analyzed. *E.g.* JX 103 at 8, 14-15. He observed, for instance, that the relationship between tenure and pay differs between some organizations, a difference that gets lost in the aggregation. *See* JX 103 at 49-52; HT at 1628-29, 1696-97.

Dr. Madden's analyses grouped all women in the Product Development, Support and IT job functions for a single analysis. All of the Asians in Product Development were aggregated for another analysis. And all of the African-Americans in Product Development were aggregated for a third analysis. *See, e.g.*, PX 1 at 14, 27, 40, 62, 69, 76. Dr. Madden's rebuttal report nicely states the rationale—her question was disparities that arose with respect to how an employee arrived at Oracle, so any endogenous characteristics reflecting Oracle's placement/assignment of that employee were not properly considered in selecting the group for analysis. *See* PX 2 at 10-11. At the hearing she added that the lower number of women in support and IT justified a larger aggregation, since that would increase precision. HT at 778.

Dr. Saad took issue with this approach, arguing that it included employees doing very different sorts of work in the same aggregated analysis based on assumption that any differentiation by type of work performed was tainted by Oracle's involvement in the process. He deemed this circular, assuming discrimination as a reason not to similarly situate or control for the factors affecting pay and then concluding that there was discrimination due to a disparity in an analyses that didn't similarly situate employees and didn't control for the major factors effectively. JX 104 at 8-9; HT 1597, 1694-95. In addition, he observed that aggregating across job functions was improper because OFCCP's initial analyses had only found disparities in 3 of 16 job functions, indicating that there were meaningful differences between them that required separate treatment. JX 104 at 18-19.

Dr. Madden combined all employees in the identified "classes" into one pool for analyses and then attempted to similarly situate them using controls. So for women, there is one analysis of the combined three job functions at issue—Product Development, IT, and Support. This could potentially skew the analysis. If there are imbalances in the distribution of women among the three job functions and the job functions have different average levels of compensation, parts of the analyses will be quite deceptive, reflecting imbalances in the job function, not imbalances in compensation within the sort of work performed. By Colum 6 Dr. Madden is controlling for job function since it is a part of job family, but since the group for analysis was aggregated from the start, the analysis is measuring average differences in the pool as a whole, and any differences in trends or levels of disparity between the job functions will get obscured. So, for instance, an alarmingly high disparity in IT combined with no disparity in Support could result in an average middle of the road disparity that might lead to an inference of discrimination (or not), but would do so improperly because the actual dynamic is more nuanced and favors a mixed inference.

This particular worry does not apply to the compensation analyses of Asians and African-Americans. Only one job function was at issue, so Dr. Madden did not aggregate across job

functions. There are still, however, reasons to worry about the practice since Dr. Madden did aggregate within job function, and thus across job family/descriptor, global career level, job title, organization/line of business, etc. OFCCP and Dr. Madden approached this case through job function, but the record is clear that job function and organization/line of business do not align—that is, someone in the Finance function or Product Development function is not thereby part of what would could be called the Finance organization or the Product Development organization. Function is based on the sort of work performed, not the chain of command and placement of an employee within the company. *E.g.* PX 22 at 84-86. This is a case about compensation and compensation decisions. For the purposes of compensation, decision-making at Oracle is done through organization/line of business, not function. OFCCP and Dr. Madden approached the issues differently, looking at function and then using controls to similarly situate employees.

There is a danger here. Trends that effect compensation in different ways in different jobs or levels get obscured and washed out because the result of the analysis measures averages. So if, for instance, at some levels or positions tenure negatively correlates with compensation—something that could occur in any area where the market has grown much faster than Oracle's provision of salary increases—while at other levels or positions the more expected relationship holds, the trends will blend and get lost in the wholly aggregated analysis. Perhaps more importantly, because the analysis starts with function and adds controls from there, it will be blind to statistically significant influences on compensation that apply at the organization level. For instance, if Mr. Loaiza's organization is discriminating against women and/or minorities to a statistically significant degree but other organizations in the product development space are not, Dr. Madden's approach is unlikely to be able to identify the discrimination, since she aggregates in a manner that departs from the way compensation decisions are made. Even were Dr. Madden to control for organization, which she does not, this sort of trend would remain undetected, since the control would provide information about the relationship between organization (and the other factors) across the entire aggregation—either one or three job functions depending on the analysis—not about the relationship between race/gender and compensation in each organization.

In response to the worry that Dr. Madden overly-aggregates the data for analysis, OFCCP replies that since it has shown that Oracle's compensations are centralized, aggregation is proper and the cases relied upon by Oracle to the contrary are inapposite. PRB at 12-13. OFCCP relies on *Paige v. California*, 291 F.3d 1141, 1148 (9th Cir 2002) for the proposition that aggregated statistical data are superior to subdivided data. PRB at 5-6. But *Paige* is at best mixed support for OFCCP's position. It holds that "aggregated statistical data may be used where it is more probative than subdivided data. 291 F.3d at 1148 (citing *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1339-40, nn.7&8 (9th Cir. 1987). Aggregated data is "particularly appropriate" when there are small sample sizes. *Id.* However, the aggregated data was proper in that case because "[t]he plaintiffs demonstrated [] sufficient commonality among the duties and skills required by [the positions at issue] to justify aggregation." *Id.* Moreover, disaggregation is not necessary when the aggregated groups "may be presumed to be similarly situated and affected by common policies. *Id.* (quoting *Eldredge*, 833 F.21d at 1340 n.8). *Paige*, then, is not support for the proposition that aggregated data is superior—that depends on whether or not the employees within the aggregation are similarly situated and share sufficient commonality. I have already found that Oracle's compensation decisions are mostly decentralized.

With respect to the three job functions taken together, they are almost certainly not similarly situated even on OFCCP's framing of the case. OFCCP already divided employees by job function alleging systemic discrimination in some but not others, and limiting its race-based complaints to

one job function. If, as Dr. Madden seemed to assume, the employees in Product Development, Support, and IT could all be analyzed together, then she should have analyzed them together for Asians and African-Americans as well. And *other* job functions should have been included. There is a reason for not doing this—OFCCP contends that there is systemic discrimination in some job functions but not others. But if I accept this point, I am still left wondering why Dr. Madden appropriately combined three job functions in one of her analyses without any investigation of or basis for concluding that the employees were performing similar work and had sufficient commonality.

Dr. Madden aggregated within job function in each analysis. Aggregation is appropriate where there are sufficient commonalities, but that is not a point that Dr. Madden or OFCCP ever adequately motivated or explored. Dr. Madden's actual basis for doing so comes out in her reports, and the stress on not including "endogenous" factors since they could be a means of discrimination. She was interested in evaluating how employees were treated based on how they arrived at Oracle. But one implication of this is that Dr. Madden was not designing a model to study compensation discrimination with respect to employees performing the same work. At one point in her rebuttal report, Dr. Madden suggested that she was not attempting to similarly situate employees with respect to the work that they perform. She candidly explained that she and Dr. Saad were studying different questions, with Dr. Saad studying compensation differences within a job while she studied compensation differences with respect to employees as they arrived at Oracle. PX 2 at 10-11. The point was echoed at the hearing. *See* HT at 711-12, 874-76. If taken at face value, this would indicate that Dr. Madden's opinion is weak support for a compensation discrimination claim, even if it might support a steering discrimination claim. The rationale for aggregating employees in the manner she did is that *nothing* about the sort of work the employee performs at Oracle matters for what Dr. Madden sees as what is necessary to similarly situate them for purposes of her analysis.

Dr. Madden's report can still be used in a compensation discrimination case, which OFCCP has attempted to do with reference to Column 8. But the level of aggregation is an initial worry, and creates potential problems for the inferences to be drawn. Dr. Madden did not attempt to similarly situate employees for the purpose of analysis, she attempted to do so within the analyses. Though there is a great deal of evidence in this case, the dynamics and implications of this analytical choice was not explored in detail, beyond the initial worries that came out above. They raise some red flags for the inferential power of the analyses, but not necessarily ones that would undermine inferences that might be drawn. The more hotly disputed questions concern how Dr. Madden's analyses used controls to attempt to similarly situate employees and how well she accounted for the major factors affecting compensation. I turn to these questions next.

c. Similarly Situating Employees With Regards to Work Performed

The parties dispute both what it means for employees to be similarly situated and whether or not Dr. Madden's analysis in some manner similarly situated Oracle's employees. Oracle stresses that for OFCCP's statistics to give rise to an inference of a pattern or practice of discrimination, the model used must similarly situate employees in all material respects. DPB at 4-5. It points to OFCCP regulations and EEOC guidance to the effect that to similarly situate employees, a model should consider tasks performed, skills, effort, responsibilities, working conditions, job difficulty, qualifications, and other relevant factors. Job titles are not controlling, and attention must be paid to the actual job content and duties, as well as the actual experience, education, performance, and market demand for the employees. *Id.* at 5-6. Oracle argues that if a statistical analysis is not properly structured so as to compare similarly situated employees, then it cannot give rise to an

inference of discrimination. *Id.* at 6. Oracle also argues that in order for a regression analysis to give rise to an inference of discrimination it must include all of the major factors impacting pay, since otherwise the analysis does not provide a basis to determine that the difference found is the result of discrimination rather than a legitimate factor that Oracle uses. *Id.* at 6-7.

OFCCP contends that an evaluation of which employees are similarly situated in this case must follow 41 C.F.R. § 6-20.4 and Title VII case law. It maintains that this means that only objective factors may be used to similarly situate employees, a defendant must identify the factors used and provide the data to be analyzed, must document and maintain the factors it uses to determine compensations, and must actually be using the factors in setting compensation that it maintains similarly situate employees. PPB at 7-8. Further, the factors must be consistently used in a non-discriminatory manner and must actually rather than hypothetically make a difference in the analysis. *Id.* at 8. OFCCP asserts that job titles are "highly relevant" and are used to similarly-situate employees. *Id.* at 8-9. It adds that the similarly situated standard here is provided by the regulations and Title VII caselaw, not the stricter standard used in Equal Pay Act cases. *Id.* at 9.

In reply, Oracle accuses OFCCP of muddling and contorting the standard by focusing on pay factors rather than job factors. Oracle argues that to be similarly situated, employees should be performing suitably similar jobs. It also contends that OFCCP has invented a standard that any factor that similarly situates employees must be documented and provided by a contractor. It asserts that in this case it has provided OFCCP with enormous amounts of data and has explained the flaws in OFCCP's statistics and approach. It maintains that similarly situating employees requires more than simply job title and that attention must be paid to the content of the job. DRB at 4-5.

The implementing regulations for EO 11246 provide some guidance:

> 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."[193] *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

[193] Title VII—and this case—involves a looser standard of similarly situated than Equal Pay Act cases. 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. *Spaulding v. University of Washington*, 740 F.2d 686, 700-01 (9th Cir. 1984). Equal Pay Act cases impose a sort of strict liability—intent is not an element—and require a higher degree of similarity.

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's framing seeks to limit what can count as "material respects" to "objective" factors and factors that the contractor in some sense officially identifies as used and provides data for analysis. However, the standard from the regulations and Title VII caselaw does not impose these additional strictures or glosses. The regulations begin by making the standard case specific and listing things like "tasks performed, skills, effort, levels of responsibility, working conditions" that are not easily objectified or of a naturally of the sort that would be amenable to the provision of easily analyzable data. OFCCP's addition to the standard relies instead on the Affirmative Action regulations and obligations to maintain records. *See* PPB at 7. The underlying inference here is that only factors properly recorded and used in Oracle's Affirmative Action Plan compliance can be used in analyzing a discrimination case. This has the implication that if Oracle is not complying with the Affirmative Action Plan regulations, it is effectively barred from opposing any claim from OFCCP about which employees are similarly situated. This does not work. OFCCP provides no authority for this inference—all of the citations are to the Affirmative Action Plan regulations. Violation of those regulations would be an Affirmative Action Plan violation. That does not imply that Oracle also is discriminating against employees, or that it is somehow barred from defending a discrimination claim.

At the same time, I do not quite follow Oracle's accusation that it is "job factors" rather than "pay factors" that should be used to similarly situate employees, with the implication being that the analysis must situate employees by reference to aspects of their jobs even where those differences do not matter for pay. That sort of factor, however, would be an immaterial factor in the analysis. This is a compensation discrimination case and I am asked to decide whether or not Oracle is intentionally discriminating based on gender or race in compensating employees. For a statistical analysis to study that question adequately, it should compare employees who are doing similar work in the respects that matter for compensation. That is what makes a factor material. The content of a job matters for compensation in most instances, so it needs to be accounted for in making the comparisons.[194] The fact that an employee is assigned to the 4th floor rather than the 3rd floor or starts at 8:30 a.m. rather than 9:30 a.m. generally do not matter for compensation purposes, and so do not need to be accounted for in making the comparisons.[195] The material "job factors" in a compensation analysis are the "pay factors" because those are the aspects of the job that matter for compensation and so must be considered when drawing the relevant comparisons among employees.

OFCCP contends that by Column 8 Dr. Madden has done so, since at this point she is effectively controlling for job title, which represents Oracle's manner of similarly situating employees in the most granular manner and is used to set salary range, integrate new employees, and make the connection between internal and external equity. *See* PPB at 9-11, 15-19. Initially,

[194] If a hypothetical company were to adopt a compensation policy such that the same pay scale applied to every job, regardless of the task performed, skill, level of responsibility, etc., a statistical analysis of compensation would not need to account for those factors, since they do not matter for compensation. That case does not arise, and certainly does not arise here, because companies do not have such compensation policies.

[195] By contrast, if a company were to adopt a compensation policy in which these things mattered (say the working conditions on the 3rd floor were substantially more onerous, or earlier start times imposed burdens and additional ramp-up work), then there would be good reason to include them as material factors.

OFCCP's argument conflates necessary and sufficient conditions, i.e. a necessary component of similarly situating employees with a completed analysis that is sufficient to similarly situate employees. There is no dispute at this point that in order to make the relevant comparisons for the compensation discrimination claim, it is necessary to at least compare employees in the same job title. OFCCP gives good reasons why: it is how Oracle sets up salary ranges and has designed its job "architecture." But that does not lead me to conclude that job title is the end of the analysis. If there are *material* differences within job title with respect to "tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors,"41 C.F.R. § 60-20.4(a), to properly similarly situate employees for comparison those other factors should be considered.

Dr. Saad opined that job code does not adequately situate similar employees because employees performing a variety of different work are included within the same job code. Based on his review of the evidence, including requisitions, Oracle employees in the same job title work in disparate organizations involving different products and skill sets. The job codes are given very broad salary ranges. *E.g.* JX 103 at 11-12; *see also* JX 103 at 21-44; HT at 1622-26. He believed that since product/service worked on matters for profitability of the company, it also mattered for compensation and so should have been accounted for. *E.g.* JX 103 at 85-86.

Dr. Saad's rebuttal accused Dr. Madden of deriving her results with an assumption of discrimination that she used as a reason to not control for any factors that were job-related because of the possibility that Oracle might be discrimination. JX 104 at 6-7, 10-11; *see also id.* at 53-55. He also opined that Dr. Madden's Oracle-related variables were insufficient to similarly situate employees. *Id.* at 7. By the end she controlled for job code/title, but in his view employees in the same job title in different organizations are doing very different sorts of work on different products (with different levels of profitability and importance) involving different skills. *Id.* at 7, 16-18; HT at 1593-96. He stressed the broad variance in pay within standard job title, the use of only general descriptions for job titles, and the contrasting detailed level of description in the requisitions specifying the particular work involved and particular skills needed for different jobs within the same job title. JX 104 at 63-66. In his view, it is important to understand the company in developing a model, and the claim here involved groups at a company doing a variety of different work at different levels, in different jobs, in different organizations, and working on different products. HT at 1620-24. Since the sort of work performed is a major factor influencing pay, it is important in a compensation analysis to similarly situate employees with respect to the sort of work performed. Dr. Saad concluded that the breadth of the ranges and disparate work within a job code made it insufficient to similarly situate employees with respect to their work. HT at 1599, 1638-41, 1657-61.

Dr. Madden acknowledged that job codes map onto salary ranges that are broad in order to account for differences in skills. HT at 898-99. She admitted that in not taking organization or product line into account as a factor explaining compensation, she was assuming that work on different products requires the same level of skill. *Id.* at 929-30. She did not study this point to determine if different skills were required or if skills were fungible between jobs within the same job code. *Id.* at 933-34. While she acknowledged that the requisitions and hiring justifications pointed to narrower sets of skills and duties, she found this information unusable because it was in narrative form and would reflect what the hiring manager happened to be thinking. *Id.* at 937-39, 961-63. But Dr. Madden and OFCCP nonetheless maintain that job code is sufficient to similarly situate employees with the respect to the work performed in a manner that allows for inferences to be drawn.

The underlying dispute here is a factual question about compensation at Oracle. It depends on whether or not Oracle employees in the same job code are performing similar work in the material respects that matter for compensation. Job titles are an indication of the similarity of skills and abilities required, but it is the real nature of the work and the skills and abilities that actually are required to perform it that ultimately matters. *See, e.g.*, *Coward v. ADT Sec. Sys.*, 140 F.3d 271, 275 (D.C. Cir. 1998); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 791 (7th Cir. 2007). The experts disagreed on this point, but the issue is not one of expert opinion, it is one that must be determined with respect to the evidence concerning the work at Oracle.

I do not find OFCCP's invocation of salary ranges convincing. They do indicate that Oracle considers job title important for comparing employees in terms of compensation, but it remains an open question as to whether, say, a job title in a particular organization is placed in a different part of the range due to the nature of that particular job and organization, rather than the skill, education, and experience of the employee holding it. Oracle's salary ranges have very large spans. In the Software Developer family, spans increase with global career level to well over $100,000.00 in the individual contributor positions and almost $200,000.00 in the manager positions. Span as a percentage of midpoint is over 50%. *See* DX 117. With a range this broad, it cannot provide more than high-level guidance on placing a candidate and comfortably allows for differentiation both in relation to candidate-specific factors and to job-specific factors, like the skills and experience needed for the particular position.

Neither are OFCCP's arguments about acquisitions convincing. Oracle does bring on employees in acquisitions by providing them with Oracle job titles (or creating new ones), *see* § V.G.6 *supra*, but to conclude from this that job title is the only thing that matters in situating employees for compensation purposes requires already assuming that job title is the end of the process of integrating employees into Oracle for compensation purposes and that the nature of the work in the job at the acquired company (and relation to compensation) can be captured in job code. These are the questions at issue in the dispute between the parties here and thus OFCCP's argument on this point begs the question.

In addition, I find Oracle's invocation of Dr. Madden's preference for Column 5 or Column 6 to be a bit of a blind alley. Dr. Madden's report saw Column 5 as the important indicator of discrimination. At the hearing this was modified to prefer Column 6. Oracle's idea is that OFCCP cannot now argue that Column 8 is the proper way to similarly situate employees because this would be contrary to Dr. Madden's views. But why not? Dr. Madden preferred Column 5 or 6, but partly because in her analysis she was looking at strictly compensation discrimination and steering discrimination together as one, with the method of discrimination further specified in her model. I find that the more natural way to evaluate the claims is to distinguish methods of discrimination. That difference in analytical approach doesn't render the analyses invalid, it just shapes the order and manner in which it is considered. OFCCP also need not adopt every statement of Dr. Madden—if her analysis provides the basis for a theory that she herself, as a non-lawyer, did not articulate, OFCCP may continue to pursue that theory, even if it means disagreeing with part of its experts ancillary opinions about how the law ought to be. Moreover, even if OFCCP were obliged to adopt all of Dr. Madden's views and those views meant that Column 8 was improper for the properly understood compensation discrimination claim, nothing would prevent OFCCP (or Dr. Madden) from making an alternative argument based on Column 8, that I would then evaluate like any other.

The core factual question here is whether or not things that cut across job codes/titles like line of business, organization, and product matter for compensation at Oracle. Dr. Madden never

attempted to compare employees with respect to these more finely grained job-related factors. OFCCP contends that this is unnecessary, since those factors do not matter for compensation.[196] Oracle contends that they matter a great deal, such that two employees sharing the same job title but in a different organization and working on a different product or products are performing different work and are not comparable with respect to compensation.

Oracle presented rather overwhelming evidence that product and organization matter for the nature of the underlying job, and that they are relevant to compensation. Oracle is organized along lines of business and organizations that are defined in reference to the individual in the chain of command leading a group. *E.g.* HT at 1193-94 (Ms. Waggoner); *id.* at 1067-70 (Mr. Miranda); 1466 (Mr. Loaiza). Budgeting decisions about compensation, hiring decisions (both requisitions and offers), and approvals of compensation decisions (global and otherwise) flow through the chain of command in an organization or line of business. This is a case about compensation, and allegations (here) that Oracle makes compensation in a discriminatory manner. In analyzing that allegation, it makes good sense to approach the analysis by reference to how Oracle organizes itself and how it makes compensation decisions.

Ms. Waggoner credibly testified that job titles are "very general and very broad," give the area of work "in very broad general terms," and give only a "very general sense" of the duties of the employee. Oracle has close to 140,000 employees doing an array of jobs, and the formal job architecture sorts those jobs into 1,600 "broad buckets" that give a "general sense of the job. HT at 1164-67. She explained that product and management hierarchy provide more fine-grained information about the duties and responsibilities of a particular employee in the three job functions at issue. *Id.* at 1167-68. While each job title is associated with a description and requirements, hiring managers include further descriptions and requirements beyond what the Global Job Table provides. *Id.* at 1174-82. Moreover, job code provides a salary range, but this is just the starting point for compensation decisions and positioning an employee in a range based both on factors about the employee and factors about the particular job internally. These include comparisons to other workers in the organization and the sort of skills and experience that are required for the job and work on the product—internal equity—with jobs on old legacy product commanding less than new cutting edge products, and thus jobs in some areas ending up in different portions of the range. HT at 1188, 1196-97, 1207-08; JX 102 at 90-94; PX 22 at 255-56, 280-82; PX 24 at 144-47, 178-83.

As discussed above in §§ V.C.3 and V.E.4 *supra*, Mr. Miranda (HT at 1071-89, 1153-55), Mr. Loaiza (HT at 1468-75), Mr. Webb (HT at 1391-1404), and Mr. Bashyam (HT at 1433-40, 1447-50) testified at length and in detail about how employees with job titles in different organizations and lines/sub-lines of business are engaged in different sorts of work, have different sorts of skills, and face different sorts of challenges. They share only a general title, but do different sorts of work on different sorts of components. They are not fungible. Moving between roles requires new learning and new skills. When hiring for a position in a particular organization, Oracle is looking for

[196] A trend in OFCCP's arguments in this case has been that if more fine-grained comparisons are needed to similarly situate employees, then the aggregated analysis would lose its power, or the analysis would need to be completed in a less aggregated way. This might be so, but is no reason to find that the more fine-grained distinctions are not material and important. The analysis must meet the realities of the contractor and compensation system—OFCCP cannot dictate that every government contractor, a significant portion of the American economy, change their way of doing business and compensating employees so that each compensation system fits into a neat, manageable, fully aggregated statistical analysis of OFCCP's liking. If things like organization and product matter for making meaningful comparisons between employees about compensation at Oracle, then OFCCP needs to deploy analytical methods to account for what matters in the compensation system.

particular skills and experience and will post requisitions reflecting those differences. Moreover, the job market varies for different skills and expertise. Some sorts of skills related to product or product types are in high demand, while workers capable or working in different areas are easier to find. What is sought in a requisition will vary by sub-line of business and compensation offers will vary within a job title because different skills are involved and the market varies.

This testimony was credible and entirely reasonable. Oracle is a large corporation that is a sort of conglomeration of different lines of business and organizations. It actively acquires other companies, adding new portfolios with different product lines to its business. *See* DX 108; DX 109; DX 251 at 2. It markets hundreds of different products and owns thousands of patents. DX 254; PX 290 at 8-19; DX 251 at 2. It provides products and services to over 400,000 different customers in countries across the world. DX 251 at 1. Its work is highly technical and its workers are highly skilled. Point being, Oracle is not a neatly and tightly defined company with one line of business or line of products. It is broadly in the technology sector, but offers a broad range of products in this sector. It is reasonable to conclude, at first blush, that any global categorization of jobs across lines of business will, by necessity, conglomerate jobs involving different work. This might be immaterial if this case involved a single facility with a more narrow focus, but the case involves a headquarters facility with roughly 16,000 different employees across Oracle's various operations. *See* DX 40 at 2-4.

These points were also reinforced by the anecdotal witnesses in their discussions of their jobs at Oracle. For instance, Ms. Ng testified that when employees started working on a particular product, they needed training to learn how to do the work on that product. *See* HT at 194-96. Ms. Shah worked on multiple products, but all in cloud computing and in joining and rejoining Oracle, the jobs were particularly tailored to her expertise. *Id.* at 210-15. When she returned to Oracle for the last time, her pay increased substantially in a job that was "perfectly in tune with my experience" and specially designed for her *Id.* at 224, 229-30. Dr. Alexander's job required familiarization with the product and involved unique skills that she was well suited to provide. *Id.* at 585-88. Ms. Hardman's work involved multiple products, but to do the sort of work her team did with those products required an extended learning curve of a year to a year and a half. *Id.* at 640. Mr. Adjei was hired into a Software Developer 3 positions that involved particularized skills for work on a particular product. He could not transfer the skills needed for his job to another software developer position at the same level, and even on his team the employees with the same job titles did different sorts of work based on their particular expertise. *Id.* at 1502-08, 1511-12. The nature of the work within Ms. Chan's team varies within job title. *Id.* at 1542-44. Mr. Yakkundi explained that product support engineers did different sorts of work in different organizations because they were supporting different products. The work requires a very specific set of skills. *Id.* at 1899-1902. Ms. Chechik moved internally several times, but the work changed as well and required different sorts of skills. *Id.* at 1920-22, 1925-28.

The witnesses working in the three job functions at issue, whether anecdotal or factual, whether they testified on behalf of OFCCP or Oracle, were uniformly impressive in their level of knowledge and skill. They spoke about their particular jobs and the particular skills and tasks involved, not just an amorphous general category. The management witnesses credibly described how they saw their organizations and the differences between organizations and within sub-organization as to the nature of the work performed and the sorts of skills and experience required. The employee witnesses spoke about their particular work and how their skills and experiences fit into the work in their particular organization or sub-organization, and sometimes to their particular role on the team. If different sorts of skills and experiences are required for work on particular

products/product lines and in particular organizations and lines of business, it is reasonable that the market for those employees will differ as well. The testimony at the hearing leads to the conclusion that they do.

In addition, the record indicates that in high-level budgeting decisions for focal reviews and the like, executives considered not just performance of different groups but also the import of those groups to the larger organization and how critical their work was. *See, e.g.*, PX 12 at 208-09 (Ms. Cheruvu discussing Mr. Kurian). Mr. Miranda does not provide equal budgets to his sub-lines of business—he makes differentiations based on compression in groups, performance of groups, and factors considering the role of the group and jobs in the company with reference to the competitive landscape and attrition to competitors. HT at 1090-91, 1097. Mr. Bashyam receives and further distributes budgets with reference to the strategic nature of the products and lines of business. HT at 1443. Instructions for global process focus on retention of critical employees. *E.g.* JX 70 at 10. Bonuses turn in part on individual performance and in part on company or particular line of business performance. *E.g.* JX 143 at 7. They are used, in part, to reward projects that are critical to the company. *E.g.* JX 142 at 8.

Hence, compensation growth in the global processes would vary by sub-line of business depending on the overall contribution of that sub-line of business to the larger organization and the company as a whole. Different groups contribute differently to Oracle's profitability, because certain products or product lines are more profitable or involve areas of strategic growth. The record supports the reasonable conclusion that Oracle focuses resources in those areas. This further supports the conclusion that organization and product or product line matter for compensation and that two employees with the same job title are not necessarily equal in Oracle's eyes, since the more fine-grained skills and location of the employee in the company matters for the value the company attaches to the employee. This fits with the evidence discussed in Section V.D.2 regarding Oracle's general compensation philosophy and approach, which included the contribution to Oracle's performance as a factor to consider in compensation. I accept this point—there is no good reason in the record not to do so—and thus find further support for the point that organization and product/product-line matter for compensation and for similarly situating employees.

OFCCP is critical of many of these points, taking umbrage that Oracle is not using focal reviews and other global processes to correct the disparities that it believes exist, and generally suggests that there is unfairness here, both in respect to budgeting favoring some organizations rather than others and with respect to not allocating more money so that focal reviews can bring more employees back to market value. To be sure, something feels hardnosed about Oracle's approach. If Oracle makes decisions with the budget and profitability in mind and judgment calls about how important a given organization and/or employee is to the company, employees who are not-high performing, or not in a critical organization, or in an organization requiring skills and abilities that are plentiful in the job market are likely to see little or no compensation growth and fall behind the market. This would naturally lead to attrition, but it is attrition that Oracle seems to accept.

While hardnosed and in some sense perhaps unfair, this is not discrimination. I do not sit as a super-personnel board, and I am not authorized to play tech-company executive. The record does not reveal any underlying gender or racial dynamic at work, or any evidence that in making those high-level decisions Oracle has opted to view organizations as less important because they contain more women, African-American, or Asians. Regardless of perceived fairness, the compensation system should be evaluated based on the non-discriminatory factors that matter. In terms of the

statistical analysis, I find that organization and product/product line matter for similarly situating employees since they are non-discriminatory factors that matter for compensation and relate to the nature of the job and placement in the company. Employees with the same job title do different sorts of work involving different sorts of skills that are valued in different ways by Oracle and the market, depending on the particular organization within which they work.

The various justifications in the record reinforce these points. The hiring justifications in the record (discussed in § V.E.4 *supra*) focus on the particular skills and experience needed for the particular job, with the points highlighted varying with far more granularity than job title. This fits with the general point stressed by the witnesses—jobs at Oracle are materially different by organization or line of business even where they share one general systems job title. The dive and save justifications (discussed in § V.G.1 *supra*) focus *both* on the performance of the individual and the importance of what the individual is doing to the corporation and organization. This indicates that Oracle attaches more value to certain placements within the company based on the profitability of the organization, priority of the organization in the business plans, and competition in the market for individuals who are able to bring the skills needed to work in particular organizations. Promotion justifications (discussed in § V.G.4 *supra*) reinforce that the particular role of an employee and particularized skills matter to Oracle. The justifications are highly individualistic and detailed, focusing not just on individual skill and proficiency, but the way that the individual's role impacts the organization and company as a whole. These justifications focus on specifics relating narrowly to products and organizations, not one standard template and set of criteria for, e.g., a move from Software Developer 3 to Software Developer 4. Taken together, the justifications leave me with the firm impression that in viewing employees in terms of value and compensation, job title is just a basic starting point and that the factors that really matter are more fine-grained, relating to the particular work of the employee and his or her place in the company.

OFCCP criticizes Oracle's focus on organization and product as a post-hoc attempt to justify differences. *See* PPB at 21. But this is far from a novel point. Early in the compliance review, Ms. Holman-Harries suggested to OFCCP that "[b]ecause of the diversity in products sold at Oracle, job group or job title have little bearing on an employee's pay." JX 20 at 1. Ms. Gordon and Ms. Holman-Harries suggested to OFCCP that they analyze compensation by looking at supervisor code. JX 22 at 19. Documentary evidence also supports the importance of line of business, organization, and product. A document from Oracle regarding pay analysis recommends looking at supervisor to evaluate pay since this will group employees based on similarities in the line of business and products related to their jobs, since the particular part of the company and products related to a job make differences for compensation. PX 52 at 1. In making and evaluating offers, salary ranges are just one component, with the skills of the employee and the placement of the salary within the more narrow organization also considered. *E.g.* JX 150 at 10. Ms. Waggoner highlighted this point, explaining that in formulating offers, hiring managers have the salary range but are really looking at internal comparisons on the team or within the organization in order to locate the narrower range of salaries and place the new hire based on skill, experience etc. HT at 1196.

The various trainings discussed above consistently point to considering "internal equity" in making compensation decisions. Though OFCCP's approach would treat this as equity at the job title level, that is not what Oracle is actually instructing its managers to do—at the hiring and initial approval levels, those internal equity comparisons are made—and could *only* be made—among the members of an organization reporting up to an individual manager. OFCCP has been critical of Oracle's limitation of information such that broader comparisons cannot be made across job title or in the broader organization/line of business (or function). But the underlying question at issue is

which comparisons should be made. Oracle, in its consistent practice, sees the comparisons of internal equity occurring in a more fine-grained manner within a team or organization working on a product or product line. OFCCP does not have to believe Oracle, but this is a case about Oracle's compensation system, so facts about how that system functions and how Oracle instructs its managers to think about internal equity are relevant and somewhat probative. Moreover, repeated references to considering the skills of an employee would, in the context of a line manager making compensation decisions, refer to the sorts of fine-grained skills relevant to work in a particular organization and on a product or product-line.

Review of the off-cycle salary increase or dive and save requests (*see* § V.G.1 *supra*) is also good evidence of the relevant pool of comparisons. They contain salary range information, but also include "benchmark" comparisons, sometimes at several levels of granularity providing salary information for employees in the same job code reporting to managers in the chain of command including the employee in question. It is clear that Oracle genuinely treats comparisons within organization and line of business as the appropriate way to similarly situate employees. This practice fits with and reinforces the clear testimony at the hearing that organization and product matters in compensation since the labor market rewards different areas within, say, software engineering, differently and some areas are more profitable to Oracle, and thus receive more resources.

This conclusion about jobs at Oracle is not peculiar to Oracle or to the technology industry. It is a reasonable description of any sort of highly skilled or professional work. Attorneys in a firm may share titles based on partner/associate/other status, but hourly rates and compensation is likely to vary widely not just by skill, but by area of law. Some fields of law pay more than others. Similarly, some medical specialties are more lucrative than others. This is likely to be true of most professional and technical fields. When different sorts of skills and experiences are required to perform a position, the market for that position differs. In higher education, markets likely differ, partly based on outside demand for individuals in a particular field. So in making comparisons, it is sensible to account for field-based variances. There is no reason to think that software development or other work at a technology company is any different from other fields involving specialized skill and knowledge. What is more, Oracle has provided clear and convincing evidence that it is no different and that factors about the job that OFCCP and Dr. Madden have ignored are in fact quite important.

Dr. Madden's opinion cannot assist OFCCP on the critical question. Dr. Madden admitted that she did not do any job analyses or evaluation of jobs at Oracle to determine if employees were doing similar work. Instead she used Oracle's job codes, since she believed that this represented what Oracle believed were the same jobs. HT at 862-64. But Oracle does not believe that employees in the same job code are engaged in similar jobs for the purposes of compensation. Job title/code is an HR system designation. Again, there is good evidence that it is a necessary component of similarly situating employees, but this does not indicate that it is sufficient to do so. If Dr. Madden used it and relied on Column 8 in the compensation-discrimination claim, and did so because she understood that it represented Oracle's beliefs about which employees perform the same work, then there is no reason not to pay attention to Oracle's complete account of which employees are performing the same work for the purposes of compensation. Once that is done, organization and line of business matter, and they matter a great deal since a job code extends across groups that are engaged in quite different sorts of work on different products involving different skills and in different job markets. This could be incorrect—and Dr. Madden and OFCCP argue that it is—but that argument cannot rely on Dr. Madden's opinion—she did not independently conduct an analysis and was reliant on Oracle.

OFCCP points to a number of considerations to support a contrary conclusion. It argues that product cannot matter for compensation because Oracle does not keep product assignments on record. PPB at 20. It is correct that employees in the job functions at issue here do not require a formal product association, like those in the sales-related functions. *See* DX 112 at 11. The suggested inference, however, does not follow as a matter of course. Oracle does keep records of organization qua cost center as well as organization qua supervisor. Compensation decisions are made by supervisors, and supervisors up and down the line are given budgets partly based on the perceived importance of their organization and the need to increase compensation for those employees. OFCCP seems to operate under a presumption that if there is no easily analyzed evidence that directly pertains to a factor, it cannot matter for compensation. But that is not a plausible presumption to make, and not even Dr. Madden made it—she described her analyses as adopting proxies for specialization in the absence of records easily analyzed. I don't see why the same could not hold for the factors Oracle deems important here.

OFCCP also contends that product cannot be important for compensation because product is not part of the compensation system, is not mentioned in the Employee Handbook, and is not part of the compensation trainings. PPB at 20. The first claim begs the question—this whole discussion has queried whether a factor not included in the HR architecture matters for compensation. There is no rule OFCCP has invoked that forbids this. Simply saying that it isn't part of an HR architecture doesn't advance the issue, or give me any reason to discount the weight of evidence discussed above. I also don't perceive the important of the Employee Handbook on this point—it at most provides high-level statements and truisms.

The reference to the trainings is a better point, but ultimately fails to convince. I have reviewed a great many trainings. They are designed for line mangers who are making decisions about compensation *within* a line of business or organization, comparing groups of employees working on the same product and product line and having more similar sorts of skills. It is no surprise then that "product" isn't explicitly mentioned—it wouldn't really make sense in the actual context of the trainings. The difference would be seen at higher levels of management and analysis. Moreover, implicitly organization and product/product lines do take on an importance in these trainings in the guidance to pay market competitive salaries—which could differ based on the sort of product at issue—a point too obvious to need stating. It is also seen in the repeated references to internal equity and comparisons among peers who are already working in the same organization and on the same product or product lines. Internal equity in this context must mean more fine-grained comparisons to other employees working on the same products or product lines and doing similar work involving similar skills. If job code/title were sufficient to make comparisons, then the trainings would focus on the range and level of skill without instructing managers to look at more narrow internal equity.

In a note, OFCCP points to Dr. Madden's argument that if product mattered for pay, employees would simply move to a higher paying product, since the compensation would affect both the supply and demand curve. PPB at 20 n.31. But again, the crucial assumption in this line of reasoning is that employees *can* move from organization to organization in a unified labor market. If the different products or organizations require different backgrounds and skills, then the sort of movement posited by Dr. Madden could not occur. But when Oracle contends that organization and product matter, it is just saying that different sorts of skills and experiences are required such that they are different labor markets. Dr. Madden's reasoning thus begs the question.

More convincingly, OFCCP points to testimony from witnesses who worked on multiple

products. PPB at 21. It adds that Oracle's products are ever-changing and employees must work on an array of products. *Id.* This would be strong evidence if Oracle needed to establish that each and every product were distinct in terms of compensation. But it doesn't need that point, and I don't take it to be urging that conclusion. Some products are unique, others fall into product lines. At the hearing, two points struck me about the witnesses who worked on multiple products. First, they involved a similar line of products that invoked the same sort of skills. The exception was perhaps Mr. Webb, who moved between systems administrator and database administrator roles—but this required him to attain a whole new set of skills. *See* HT at 1397-98. Mr. Bashyam had been able to move between areas as well, but only due to his long career at Oracle. *Id.* at 1438. If product line, as seen in some level of organization matters for compensation even where particular product in the line does not, systems job title still fails to similarly situate employees.

Second, where employees testified about working on multiple products (e.g. Ms. Hardman, Mr. Mensah), they still explained the *specialized* role that they played across those products, and that others on the team played. So while I conclude that some employees work on multiple products, while others work more narrowly, depending on the team, organization, and particular role of the team in the larger organization and line of business, I still find that granular specialization matters and that the nature of a particular job at Oracle goes beyond the system job title or job code and instead depends on organization or line of business, which more particularly defines what the employee does and what skills are required—and derivatively the market for that type of work and those skills.

OFCCP stresses Oracle's internal transfer policies and practices as evidence that product and organization do not matter for compensation. It contends that they do not matter because pay does not change when an employee transfers or starts working on a new product. PPB at 20-21. This has some evidentiary support. Trainings provide that the starting point for internal transfer is no change in pay. *See, e.g.*, JX 25 at 1; JX 114 at 31; JX 147 at 48. Ms. Esteva, for instance, did not experience immediate pay changes when she worked on different products. *See* HT at 312. Mr. Pandey's pay didn't change when he transferred internally. HT at 399-401. Ms. Hardman works on multiple products and her compensation didn't change when changing or adding products. HT at 610-13.

The evidence concerning salary changes with transfers was discussed above in Section V.G.3. The situation is actually more nuanced—while Oracle has some sort of general practice of not changing compensation with transfers within the company, this is starting point and exceptions are made. Promotions, as discussed, in Section V.G.4, are even more nuanced. Though in some sense there is a policy of promoting without a salary increase, this appears to be an idealized HR imposition that envisions salary increases prior to promotion that bring an employee into the appropriate range for the promotion. The reality does not always (or even often) match this, and the promotion justifications and some of the dive and save requests (discussed in Section V.G.1) indicate that Oracle does in fact increase salary with promotions in some instances.

In the case of transfers, there is a compelling justification for the starting point policy—Oracle wants to prevent internal poaching of employees, which would increase its costs, disrupt operations, and create internal ill-will. This is not tantamount to a determination that employees who transfer are fungible and that all organizations are viewed the same in terms of compensation. Rather, an employee who transfers to a more valuable organization can procure pay raises after the initial transfer. *See, e.g.*, HT at 1211-12. Tellingly, Ms. Esteva was at least led to believe this about taking an internal transfer. *See Id.* at 303-04. Ms. Hardman also did not receive a pay change with a

transfer, but it allowed her to receive increases in the future. *See id.* at 622. The evidence, then, does not provide strong support for OFCCP's desired conclusion. It is an indication of equal value, but once put in context as to why the rule exists and the way that compensation can change over time with a change of organization, it is weak evidence that does not overcome the testimony and other indications in the record that line or business, organization, and product or product lines do matter for compensation.

OFCCP's reply brief refers back to its original arguments and stresses the claim that since Oracle did not track product assignments, it should be barred in some manner from arguing that product matters for compensation. *See* PRB at 3-5. But as comes out in the notes, *id.* at 3 n.9, this is really a reversion to the attempted replacement of a compensation discrimination case with an Affirmative Action Plan compliance case, since what OFCCP is actually arguing is that Oracle didn't comply with the Affirmative Action Plan regulations and should be forbidden from defending a compensation discrimination claim based on factors that do matter for compensation but weren't analyzed in a systematic manner. But again, if Oracle violated the Affirmative Action Plan regulations—a point that is not manifest—then it violated the Affirmative Action Plan regulations. One violation is not another. Moreover, OFCCP's argument here comes down to the emphasized claim that Oracle did not list product as a "systematic" factor it used to make compensation decisions. *Id.* at 3. But this whole long discussion is about whether or not the systematic HR categories are sufficient to draw the relevant comparisons between employees working in different jobs and Oracle's position from the compliance review onwards has been that they are not. The line of argument assumes that Oracle has a unified compensation system that parallels its HR job "architecture," but this is the point at issue and one that the weight of evidence leads me to reject.

OFCCP seems to presume that any factor that cannot neatly be fit into a broadly aggregated study of a compensation system with very limited and general defined controls cannot matter for compensation purposes. But this gets things backwards. A statistical analysis of a compensation system should track the reality of the compensation system. OFCCP and Dr. Madden cannot impose facts on Oracle so that the preferred mode of analysis can accurately describe those facts—rather, the actual facts about Oracle inform what a convincing analysis should look like, and how it should be structured. While OFCCP does point to some evidence and considerations favoring a finding that organization, line of business, and/or product do not matter for compensation purposes, that evidence requires me to take one part of a large picture, take it out of context, and then draw a generalized inference about Oracle, at least as to the three job functions at issue, that is contrary to the clear weight of the totality of the evidence.[197]

I must weigh competing evidence, and draw inferences accounting for all of the evidence in context and synthesized into a larger picture. I must make a fair-minded appraisal of the evidence. Most of the evidence, and the evidence concerning Oracle's actual function, points to the conclusion that individuals in the same job code do different sorts of work involving different skills in different compensation markets and thus that line of business, organization, and product(s) matter for drawing the relevant comparisons among employees. If OFCCP wants me to ignore that evidence,

[197] For instance, internal transfers do not come with an immediate change in compensation—if I ignore the rationale for the rule as an anti-poaching measure, bracket the possibility for growth in the new organization with reference to internal equity among new peers and more value to the company, and focus on this point alone as defining what it means to be similarly situated for compensation purposes, then I would reach the conclusion OFCCP urges. That sort of approach requires me to interpret the evidence in question, and the record, in a manner that is least charitable to Oracle. OFCCP may choose its own approach in investigations and litigation (and it can get some traction on a summary judgment standard), but this is a decision on the merits.

seize on the pieces of evidence that could be interpreted otherwise, and then find in its favor, it needs to provide a good reason to discount the contrary evidence and testimony. OFCCP has not done that, and has not given me a good reason to read the evidence in the way it suggests. The points in the record it relies on can all be put into context and synthesized with the overwhelming evidence from Oracle about the ways that jobs differ, and differ in ways that matter for compensation. Taking the record as a whole, that is the most plausible conclusion and I find that it is more likely than not that job code/title does not similarly situate employees for purposes of compensation and does not provide for comparisons between the relevant groups of employees.[198]

This conclusion is bolstered by the statistical evidence. Dr. Saad believed that organization/cost center provided a general relationship to the sort of work that an employee did and provided some link to the product worked on. This was based on evidence from Mr. Miranda and Dr. Saad's review of requisitions, which suggested that organization could function as a proxy. It substantially increased the explanatory power of the model. And it resulted in no pattern of statistically significant disparities. HT at 1622-24, 1694-95; *see also id.* at 1811-26; JX 104 at 78-82 (tables). Dr. Madden opined that using organization or cost center to similarly situate employees was improper because the variable was endogenous and reflected Oracle's assignments. She also claimed that organization did not indicate product line. Moreover, she concluded that product line should not matter because employees with greater skills would move to more profitable lines of work. She added that organizations are fluid and change, transfers do not come with changes in pay, and adding the organization control reduces precision because there are a large number of organizations. HT at 746-49, 751, 753, 776-79.

Dr. Saad, however, did an analysis indicating that individuals ended up in the organization applied to at a high rate and that there were no statistically significant variances here by race or gender. Employees would move to higher paying work, but only if the same skills were involved. Further, there was far less movement among organizations than Dr. Madden believed, with the large majority remaining in the same organization through a year. He explained that he was not dividing groups for analysis since organization was a control used across a large group. Moreover, adding more controls was not problematic if those controls improved the explanatory power of the model, which it did in this case. HT at 1697-1703.

OFCCP and Dr. Madden are critical of Dr. Saad's use of organization on the grounds that it is a tainted Oracle variable and could mask discrimination. Controls that incorporate illegitimate, discriminatory reasons should not be included in a regression analysis. *See, e.g.*, *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459, 470 (8th Cir. 2004). But the proposition that organization is tainted in this way is an assumption, not evidence, and Dr. Saad's study of how people end up in organizations indicates that there is not discriminatory assignment in that regard. OFCCP and Dr. Madden were content to use a proxy that was Oracle-related—job descriptor—when it could be used to bolster their preferred conclusions. They cannot now take an inflexible line against a similar control just because Dr. Saad used it and it leads to conclusions supporting Oracle. The real

[198] This is *not* a conclusion that Oracle's operations and jobs are too varied and complex to be analyzed in a meaningful way for compensation discrimination purposes. *Cf.* PRB at 4. Relevant comparisons could be drawn, and the record indicates that Oracle draws those comparisons on a narrower basis, looking at organization as defined by some level of supervisor when measuring internal equity. I do not need to consider what the appropriate level of comparison would be, or if it would be proper to disaggregate analyses. It suffices here to find that job title/code is not sufficient to similarly situate employees in reference to the material compensation factors related to the nature of the job. There is significant daylight between the use of job title/code and the assertion that analyses is impossible, since there are a variety of other more fine-grained analyses that might be done.

question is whether it is, in fact, a tainted control. If it is, then it shouldn't be used, and the increased explanatory power would be illusory. But there is no evidence that it is tainted and all indications point the other way.

Dr. Saad used cost center, a financial/accounting designation, to control for organization and derivatively product. Cost center is not the same thing as organization necessarily, or a direct indication of the product worked on. Organizations or lines of business are functional designations describing employees working for a particular individual. They thus exist at different levels of specificity. Mr. Kurian's organization included Mr. Miranda's organization, which included its own sub-organizations. Organizations may work on more than one product or service, both depending on the level of specificity and the product line in question.

OFCCP and Dr. Madden criticized Dr. Saad's use of organization as cost center along these lines. But Dr. Saad's use was meant as a proxy, not a direct measure, so merely observing a difference does not really join the issue. The real question is over whether cost center is a *good* proxy for a factor that matters. I find, based on the clear weight of evidence in this case, that workers in one job code but in different organizations qua lines of business are performing different sorts of work involving different sorts of skills because they are working on different products or lines of product. I also find that these variances are material for compensation. Some organizations are more important to Oracle than others and the job market for different skills varies.

Organization in the sense of cost-center is not a perfect proxy, but it is a fairly good proxy for organization in the sense of line of business in these functions since the financial buckets attempt to mirror the organizational structure. OFCCP's basis for ignoring organization in either sense is that it is not an HR classification, but this was unconvincing—if structural differences in the company matter for compensation, they should be accounted for even if the HR system doesn't classify them in the same manner. Moreover, another manner of creating a proxy for organization qua line of business would be supervisor code, which is something that HR would track and could have been used. Lines of business and sub-lines of business are defined by leadership. That provides another potential proxy for organization/line of business and the product or products that workers in a particular area work on, including the particularized skills required for that work.

Whether or not it would be a better proxy than cost center is an open question, and one I do not need to answer. OFCCP made no attempt to account for the more fine-grained differences in the nature of the work performed, limiting the value of its statistical models. Dr. Saad did so using a proxy, leading to different results. Without any reason to believe that organization implicitly includes gender or race measures (and is thus tainted), the fact that it improves explanatory power leads to the conclusion that it *is* capturing a material factor that matters for compensation.

d. Adequately Accounting for the Common or Critical Non-Discriminatory Factors Affecting Compensation[199]

The last section discussed the way in which Dr. Madden's controls attempted to situate employees such that comparisons were being made between employees doing similar work with respect to the "job factors" that matter for compensation. The next issue is whether Dr. Madden has effectively controlled for the major factors affecting pay with respect to employee qualifications—i.e., non-discriminatory factors that matter for compensation as between employees doing similar work.

Dr. Madden applied a version of human capital theory whereby compensation is linked to productivity, which is measured by education and experience. She sought to control for education and experience at the time of hire, as well as tenure. *See* PX 1 at 7-9; HT at 713-14. Her education measure, added in Column 4, was type of degree and was missing for about half of the population. Experience was measured by an age metric, added in Column 3, and then a tenure metric, time at Oracle adjusting for leaves of absence, added in Column 5. *E.g.* PX 1 at 14-19; HT at 717-18, 880-84.

Dr. Saad concluded that OFCCP and Dr. Madden's measures of education and experience were inadequate and poor proxies. *E.g.* JX 104 at 7; HT at 1596-98. The education control was limited to degree level, without regard to major or specialization. It was missing for a majority, and the missing data was not randomly distributed. JX 104 at 14-16. Dr. Saad opined that this resulted in a poor measure of education, especially since area of specialization varies demographically and

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[199] A prominent line of argument in OFCCP's post-hearing filings is that Oracle does not pay for performance, and so performance should not be accounted for as a factor in analyzing compensation. *See* PPB at 22-23; PRB at 4. This drew a predictable strident response from Oracle. *See* DRB at 11-12. The claim is surprising since paying for performance is a regular theme in the training materials, "policy" documents, and testimony of the witnesses about compensation. The basis for OFCCP's assertion is that Oracle does not require regular "objective" performance reviews, and as such, cannot pay for performance. This is not a sound argument and reveals a sort of dogmatic blindspot in OFCCP's approach to the case. I am not pointed to any legal rule that dictates that a contractor *cannot* pay for a factor as a matter of fact unless OFCCP finds that factor suitably "objective" and susceptible to easy statistical analysis at a high level of aggregation. This is part of a running theme in the post-hearing argument that imposes one reading of the Affirmative Action Plan regulations and then parlays the alleged non-compliance into a sort of default on an employment discrimination pattern or practice case. It is especially peculiar here because paying for performance is such a central feature of compensation guidance at Oracle. In making findings about what matters for compensation, I look to the facts about what matters for compensation, not post-hoc self-sealing principles that dictate conclusions contrary to the weight of the evidence.

Moreover, there is "objective" data on performance that could have been used. Oracle does not require performance reviews as part of the formal review process—*see* § V.G.2 *supra*—but it does include numerical performance ratings as part of its global compensation programs: focal reviews, bonuses, and equity awards—*see* §§ V.F.2, V.F.3, V.F.4 *supra*. This data was usable—Dr. Madden actually did use performance rating in her stock award analyses. *See* PX 1 at 68, 75, 78. So even if the argument were a valid one, it just wouldn't apply in this case.

The point, however, ends up being inconsequential. As OFCCP recognizes, *see* PRB at 4 n.11, Dr. Saad's revisions of the SAC's and Dr. Madden's analyses did not add a performance measure. On this particular point, the "Aggregation Assumption" in the next section appears reasonable. If employees are similarly situated and factors involving skill and experience are included, there is no good reason to believe that performance will systematically vary based on gender or race. Oracle hasn't produced any evidence suggesting otherwise, so I do not find any particular fault in Dr. Madden's analysis for not including a performance measure, even if it would be absolutely essential in an individual case. I ultimately find that the Aggregation Assumption as used by Dr. Madden is not plausible and ends up producing an analysis that does not confront the difficult questions presented by the raw disparities. But as narrowly applied to this point, it is plausible.

could have been included, and that the missing data created issues with the analysis, both because not all data was actually missing and because the analyses indicated that the missing data was not randomly distributed. *Id.* at 44-50; HT at 1643-46.

In addition, Dr. Saad opined that OFCCP and Dr. Madden inadequately measured experience via age because age is a poor proxy for the experience that matters to a company like Oracle—the important factor is relevant experience. He was also critical of not accounting for leaves of absence or periods of unemployment. *E.g.* JX 103 at 12-13, 79-84; JX 104 at 14-16. Dr. Saad argued that in highly complex and varied jobs like those at Oracle, the sort of skills and experience are important for compensation, but this was something Dr. Madden did not attempt to consider. JX 104 at 50-52. As to the tenure control, Dr. Saad proposed measuring tenure with reference to time in current job as well as time at Oracle or non-U.S. Oracle affiliates, since this better reflects the amount of experience in the job and experience with Oracle. He also opined that OFCCP improperly excluded time at Oracle acquisitions. *E.g.* JX 103 at 13-14, 52-53.

The factors that must be considered, the "material" factors, are those that matter for the determination of compensation. Education and experience are included within those factors. Dr. Madden took a very broad-based approach, using rough measures of experience and education, which she took to derivatively measure skill. Dr. Madden acknowledged at the hearing that Column 5 could show disparities resulting from group differences in areas of specialization in education and experience, as well as particular skills. HT at 737-38. Oracle contends that this renders the measures insufficient. 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.

I find that Dr. Madden's measures of experience and education are very rough estimates and poorly capture the sort of education and experience that matters for compensation at Oracle. The basis for this conclusion overlaps largely with the discussion above. Jobs at Oracle require particularized skills. Employees with education that fits the particular area of the job and experience in the same sorts of products or involving the same sorts of skills are, all else being equal, more productive and more valuable to Oracle. Oracle does not hire for degree level or age—its requisitions and hiring justifications demonstrate that it is interested in more narrow skills and experiences. The justifications for off-cycle increases and promotions focus narrowly on the particular areas of expertise and skills, not the sort of generalized level of education, age, and time at Oracle measures used by Dr. Madden. The anecdotal evidence also supports the conclusion that more particularized measures of education and experience are needed. For example, Dr. Alexander's job at Oracle was a tight fit for her particular area of her doctorate degree and work as a doctoral student. *See* HT at 585-88. Mr. Adjei's narrow area of prior experience mattered greatly in qualifying him for his job. *Id.* at 1502-06. My general impression from the Oracle employees who testified is that they were valuable to Oracle and in their particular positions because of the particular education, skills, and experience that they brought to the table.

OFCCP and Dr. Madden do not dispute these points directly in that they do not contend that compensation decisions actually turn just on type of degree, age, and time at Oracle. I find that Dr. Madden's controls are crude proxies for the factors that matter. This is not the end, however, since OFCCP and Dr. Madden make two distinct responses to the import of this point: 1) Column 6's job descriptor measure can be used as a proxy for the area of specialization in education and experience; and 2) the differences that matter are group differences and the more fine-grained factors that matter for individual compensation system can be bracketed at the group level because there is not variance by group. Both points would independently blunt the force of Oracle's critique

and improve the inferential power of the model. I consider the first argument here and the second argument in the next section, since it also provides a potential response to the concerns about similarly situating employees with respect to the type of work performed discussed above.

At the hearing, Dr. Madden contended that her Column 6, controlling for job descriptor, could be used as a way to measure area of specialization in education and experience. She agreed that job descriptor was not a way to similarly situate employees, but contended that job descriptor and job code could reflect the particular training and experience of an employee. *E.g.* HT at 737-40, 882-87, 921-24, 950. Dr. Saad believed that this was a change in opinion, since job descriptor is an endogenous variable, and that it was a poor proxy for area of specialization, since Dr. Madden used current job descriptor, not that at hire, and the better course was to look at the resumes, which were available, which would provide a better measure. HT at 1635-38.

Looking to resumes might create other issues, including potential lack of data and concerns about coding the resumes in a manner that would enable statistical analysis. But I agree with Dr. Saad that it could have been done to yield some analysis—there is a substantial amount of information in the record that could have been coded for use in a statistical analysis, even if that analysis would not be perfect in some respects. I also agree with Dr. Saad that Dr. Madden shifted her opinion, presenting Column 6 at the hearing in a manner that was not done in the reports. This point was discussed above as to credibility. It indicates that Dr. Madden was keen to fix a potential deficiency in her reports, and repurposed what she had consistently described as an endogenous factor into a proxy for an exogenous factor. Given the stridency with which she opposed using endogenous factors in a compensation analysis and the reliance on the distinction as a way to criticize Dr. Saad's refinements, this was somewhat discreditable. Dr. Madden's shift undermines her critique of Dr. Saad in important ways—if she is permitted to use an endogenous variable as a proxy, Dr. Saad should be permitted to do the same. Nonetheless, the merits of the issue are independent of Dr. Madden's shifts—if job descriptor is a good proxy for specialization in prior experience and education, then it could be used to control for those factors, and improve on Dr. Madden's controls in Columns 3-5.

The basis for believing that job descriptor is a good proxy for specialization is Dr. Madden's "professional experience" and the reasonable inference that most of the time an individual will apply to and be hired into positions that involve/require the sorts of specialized education and experience that he or she possesses. But whether or not this is correct, there is a more fundamental deficiency in using job descriptor as a proxy in this manner. It is a variable that relates to the broad sort of work done at Oracle. It could, then, be part of the steps used to similarly situate employees as to the job they perform at Oracle. That would be a straightforward usage—the aim is to compare employees performing similar jobs, so as (part) of the analyses one controls for the sort of job performed, which is very generally gauged by job descriptor or job family.

However, that is not what Dr. Madden and OFCCP are claiming to do at this point in the analyses. They claim that job descriptor can be used as a proxy variable to measure that area of education and prior experience. This is a factor that relates to the employee, what Dr. Madden called exogenous, rather one that relates to the nature of the job, what Dr. Madden called endogenous. The idea in this proxy is that we can gauge the area of education and prior experience by looking at the area in which the employee works at Oracle, since all things being equal we can expect that, for the most part, employees will work in their areas of prior specialization.

Whether or not this is true, or really the degree to which it is true, this approach is deficient

here since the variable is now simultaneously measuring both a factor about the nature of the job and a factor about the background of the employee—or as Dr. Madden would put it, an endogenous and an exogenous factor that both matter for the analysis. But from a compensation standpoint, it would be far better to measure them independently, since it is the potential (and degree of) *mismatch* between these two that is likely to matter for compensation. One thing we really want to know when we control for prior area of experience and education is whether *differences* between employees in areas of specialization and experiences who are performing the *same* work make a difference for compensation outcomes. So, for example, take two employees in software development. If one employee majored in philosophy and has 10 years prior experience teaching at a private high school while another majored in computer science and has 10 years prior experience at an Oracle competitor, how does their compensation differ?

Dr. Madden's way of measuring specialization *cannot* measure the impact of mismatches or address that simple example. Since Dr. Madden is using the sort of work performed at Oracle as a proxy for specialization, there can never be mismatches between the two, and the analyses is blind to the potential divergence, and the way that might impact compensation. Since the two employees are performing the same sort of work as measured by job descriptor/family, Dr. Madden's proxy is automatically assigning them the same background specializations, which is also measured by job descriptor/family. But if area of prior specialization in education and experience are major factors influencing compensation as between employees performing similar work, then a measure must be used that does not simultaneously work to similarly situate employees with respect to the nature of the work performed.

Dr. Madden has responses here. Most of the time the two are likely to match to some degree. That is all well and good, but the point of adding the measure was to test what impact mismatch might have. Job descriptor, on the interpretation of Dr. Madden's model given for the purposes of the compensation discrimination claim, is already being used to similarly situate employees with respect to the nature of the work performed. More compellingly, Dr. Madden can point to her level of aggregation—asserting that mismatches in individual cases do not matter because at a group level they wash out. That general line of argument will be considered below, but even accepting it on its face, it raises peculiar questions here. If that is right, then the point should apply more generally to eliminate the need to measure area of specialization entirely, since those differences don't matter at a group level. But then the whole detour into job descriptor as a proxy is a sideshow. Indeed, Dr. Madden's opinion prior to hearing took this line—she relied on an "aggregation assumption" on this point to excuse the potential need to account for differences at the group level, with the job descriptor as proxy line of argument newly deployed at hearing. If this is the response to the worry about simultaneously measuring area of work and area of prior specialization, the work is really done by the "aggregation assumption," not the use of a job descriptor control that can inform how area of specialization affects compensation within jobs at Oracle.

To meaningfully test whether area of specialization in education and experience makes a difference for compensation among employees performing suitably similar jobs at Oracle, it should be measured in a manner that is independent of the nature of those jobs—that would allow a way to independently determine whether the compared employees are performing similar work *and* whether they possess similar education and experience in that line of work. Otherwise the conclusion is foregone and there can be no testing of whether there is a mismatch, whether the mismatch has demographic variances, and what difference the mismatch makes (or doesn't make) for compensation. Since Dr. Madden's proxy is also a more direct measurement of the nature of the

work, it is a poor way to gauge the impact of area of education and prior experience in this case and in this analysis.

The parties also dispute the propriety of other refinements and controls as proposed by Dr. Saad. He opined that refinements using additional variables like organization/cost-center, patent-bonus, time in current job, and tenure at non-U.S. Oracle affiliates are relevant and were not included by OFCCP even though they could have been. *E.g.* JX 103 at 13-14. In his view, patent bonuses could serve as a proxy for innovation and expertise. JX 104 at 86-88. Dr. Saad opined that once the various errors in OFCCP's analysis are corrected, the significant results largely disappear. His refined model in the original report added controls for Oracle tenure, cumulative leaves of absence, time in standard job title, organization, patent bonus, leave of absence in current year, and arrival at Oracle via acquisition or experienced hire. *See* JX 103 at 14, 18-19, 89-106, 125-31; *see also* JX 104 at 62.

Similarly, in his rebuttal report, Dr. Saad refined Dr. Madden's analysis and added controls, resulting in the disappearance of systemic disparities. JX 104 at 7-8. He disaggregated job functions, altered the total compensation measure away, used revised age and tenure measures, and attempted to better compare similar employees by controlling for standard job title, organization, and patent bonus. Dr. Saad believed this was an inappropriate manner to study compensation at Oracle due to the high degree of aggregation from the start, but even so his refinements of the approach produced shrinking disparities to mostly statistically insignificant levels as well as a number of positive relationships by gender and race, undercutting inferences that Oracle is systemically discriminating in the manner alleged. JX 104 at 70-72; *see also id.* at 78-82 (tables); HT at 1675-80, 1685-95, 1703-08.

Dr. Madden was critical of Dr. Saad's additional controls because they reflected endogenous factors that could mask discrimination in, for instance, promotions, which would taint time in current job as a tenure measure. *See* PX 2 at 4-5, 8; *see also id.* at 11-32; HT at 743-46, 75, 960. Even patent awards were suspect, since Oracle potentially controls the circumstances of procuring a patent and receiving an award. PX 2 at 5, 16-18; *see also* HT at 743-45, 764-65, 925-26. In her view, Dr. Saad effectively "washed out" the disparities by including too many controls that distributed the women and minorities into smaller groups, undermining the precision of the model. PX 2 at 28. Dr. Madden was critical of Dr. Saad's method of accounting for cumulative leaves of absence, which she saw as a control for mothers. She also controlled for leaves of absence and opined that the proper way to do so was via a modification of the tenure measure. HT at 766-77, 969.

Dr. Saad, however, found no evidence that Oracle was steering women and Asians away from patents, and determined that Oracle's awards of patent bonuses to those groups exceeds national averages for patents awarded. JX 104 at 66-69; HT at 1692-93. And as discussed above, he found no evidence that Oracle was discriminating via organization because almost all employees are hired into the organization to which they apply and there are no demographic disparities in deviations from this general rule. He argued that the appropriate variables to use in a study should depend on the underlying facts about what matters for compensation, without making assumptions one way or another. The appropriate number of variables depends on what is being analyzed. HT at 1776-81, 1799-1800. Dr. Saad believed that his refinements were proper because they improved the explanatory power of the model and better predicted pay. They also resulted in no statistically significant pattern of disparities by race and gender. *See* HT at 1703-08.

It is not necessary to consider each of Dr. Saad's refinements in detail. Organization made the biggest difference, and I found above that it was appropriate as a way to better situate employees

doing similar work within the analysis (in lieu of doing so prior to the analysis by disaggregation). I find that the patent bonus control is also proper. Innovation and production of new technology is an appropriate factor to consider in compensation—it reflects the value of the employee to Oracle, and in the market. Dr. Madden resisted accepting it on the grounds that it was (partially) in Oracle's control. But Dr. Madden simply assumed Oracle *might* use it discriminatorily and Dr. Saad's empirical study yielded no evidence that Oracle was *actually* doing so. The point in question is factual and should be decided with reference to empirical study, not abstract dogma. Especially in light of Dr. Madden's willingness at hearing to repurpose job descriptor as a proxy for area of specialization, I see no good reason not to accept patent bonuses as an appropriate control.

Other controls are more debatable. Dr. Madden criticized Dr. Saad's method of accounting for leaves of absence as discriminatory, but since she also made adjustments for leaves of absence relative to tenure—knowing that mothers take more leaves of absence—the charge is more rhetorical than substantive. Nonetheless, it also isn't clear that cumulative leaves of absence would be a factor that actually and legitimately matters for compensation. Some of the refinements may be improvements, though with others it isn't so clear. For instance, adjusting tenure to account for time at a non-U.S. affiliate of Oracle makes sound sense and appears to be a better measure—but it is not clear to me how much of a difference or how important this actually is in the analysis.

The larger issue with the various additions and refinements is whether or not they "slice and dice" or introduce too many control factors, washing away the disparities with over-complication. I take the points of both experts on this point and acknowledge the danger. However, the end result of the statistical model is supposed to be an inference as to whether or not Oracle is discriminating with respect to compensation as alleged by OFCCP. To best inform that inference, the model should make the appropriate comparisons and account for the major factors influencing pay. A simple model with a high degree of precision is only a virtue if it is accurate—if it actually captures the major legitimate factors influencing pay. If a simple and precise model does not do this, then the inferences it supports will be weak—or it just won't support any inferences at all.[200]

So if to account for the major factors influencing pay and make the appropriate comparisons in the sort of highly-aggregated model Dr. Madden and OFCCP adopted it is necessary to introduce a number of additional factors because of the underlying facts about what matters for compensation at Oracle, this is simply the result that the underlying facts about the company being analyzed requires. The statistical model should be constructed to analyze the realities of compensation at the contractor, so if the particular nature of the job or fine-grained skills *do* matter for compensation, the model should find a way to study it. Preconceptions about the preferred mode of analysis should not be used to dictate facts about compensation and thereby gerrymander a preferred conclusion by constructing a model that does not respond to the underlying reality. As a matter of fact, Dr. Saad's model did increase the explanatory power and thus does appear to account for more of the factors that do influence pay. This does not, on its own, indicate that inferences should not be drawn from Dr. Madden's model, but it does suggest that Dr. Saad was offering some legitimate improvements.

Dr. Saad was highly critical of OFCCP's models as lacking explanatory power, partly shown in scatterplots indicating that the model poorly predicted pay and partly with reference to the R-squared measure. He opined that this indicated that OFCCP was missing important factors that matter for pay, a point also indicated by OFCCP's inconsistent results across the 16 job functions. *See* JX 103 at 45-53, 56-70. Dr. Saad also argued that Dr. Madden's analyses, in both Columns 5 and

[200] *Cf.* PX 456 (article making the general point quite clearly).

Column 8, were poor predictors of pay outcomes, indicating that they were missing factors relevant to compensation. JX 104 at 36-50. He made this point with scatterplots and with reference to the R-squared measure, which indicated that Dr. Madden's Column 5 only explained about 20% of the variation and her Column 8 explained only 69% of the variation, indicating that things were missing. *Id.* at 43-43; HT at 1662-67, 1670-73.

Dr. Madden opined that R-squared did not matter and was not important because the model was not trying to predict individual outcomes or measure individual variance, it was attempting to measure group differences. HT at 826-28, 956-57; *see also* PX 324 (excerpt of "A Guide to Econometrics" 4th ed. bv Peter Kennedy warning against over-reliance on the measure). Her point here was that if the unaccounted for factors affecting individual outcomes do not vary at the group level, the poor explanatory power of the model as to individuals does not matter in a case like this, which alleges a pattern or practice of discrimination across entire groups. Dr. Saad acknowledged that it would be incorrect to give too much weight to R-squared, but opined that it did matter and was included in the literature. It should not be pursued for its own sake, but should also not be ignored since it measures the predictive power of the model. HT at 1673-74, 1782-84, 1788, 1863-64.

This discussion leads to a somewhat inconclusive result. I accept Dr. Madden's point—as Dr. Saad did—that explanatory power isn't the be all end all and should not be pursued for its own sake. But I do not accept that it doesn't matter at all. Neither did Dr. Madden, since she used R-squared when it was favorable to her opinions. *See* PX 1 at 51. The model is supposed to be a model of compensation, and if it isn't explaining compensation outcomes, something important is missing. Dr. Saad's refinements, and in particular adding organization to similarly situate employees within the model, provide a good part of that something. The real dispute, as I see it, is whether the "something" that is missing in Dr. Madden's model is a "something" that matters for drawing inferences about systemic disparities and discrimination. If it is, then Dr. Madden's model is deficient and poor support for any inference. But if it is not, then it doesn't need to be included in the model of compensation for this case. Dr. Madden's rationale for not adding more factors, or more fine-grained measures of the factors she included, or job-related factors more fine-grained than job code, was her opinion that these things did not systemically differ between the demographic groups at issue and so did not need to be included within the model. I turn next to this proposition.

e. Does the "Aggregation Assumption" Render the Model Convincing Despite Apparent Deficiencies?

The last two sections found that Dr. Madden's analyses does not similarly situate employees with respect to the material compensation factors related to the jobs they perform and that Dr. Madden's controls for employee qualifications are rough metrics, leaving out important aspects of what matters for compensation at Oracle. This is not the end of the analysis, since Dr. Madden's opinion was largely premised on a view that it is proper, and advisable, to bracket individual differences that matter for pay—which could include the organization/line of business/product(s) worked on and the qualifications that employees bring to the job—in an aggregated, group-level analyses. If this view is sound, then the deficiencies discussed above become less important and would not necessarily significantly reduce the inferential power of the model as to the claims in this particular case.

Dr. Madden's opinion is premised on a foundational principle that qualifications that are

equivalently distributed among demographic groups cannot impact the measured disparity and thus need not be considered when comparing outcomes for groups rather than individuals. Factors that matter individually but not for groups should not be considered because they would render the model less precise. *See* PX 1 at 8-9, 48. This point is sound. Dr. Madden then added an important "Aggregation Assumption":

> In the absence of evidence to the contrary, I assume that employees are equivalently qualified by gender and race. No presumption that one group's "unmeasured" qualifications, or jobs, are on average "inferior" to those of another group should be made, when the groups have, on average, equivalent measured qualifications. I assume that employees of the same age, time at Oracle, educational level and work area do not systematically differ by race or gender in their qualifications. Therefore, to quantify racial or gender disparities in compensation, it is only necessary that we control for *systematic* differences by race or gender that remain after we have controlled for all other differences that exist by group.

PX 1 at 48; *see also* HT at 714-16, 864-66, 826-27. In her view, this assumption functioned in the same manner as a clinical study. It licensed not controlling over additional factors that affected compensation, since the variation in those factors, whatever they might be, were washed out by the aggregation. PX 1 at 49-50; *see also* HT at 828-29.

Dr. Madden's rebuttal report contains a version of the same plainly stated assumption: if there are disparities measured in the statistical analysis after controlling for her exogenous factors, there is 1) discrimination in assignment; 2) discrimination in compensation; or 3) a hypothesis of systematic "inferiority" of women or minorities. PX 2 at 4-5. Dr. Madden took issue with Dr. Saad's analysis because it attempted to control for too much (in particular organization). And she accused Dr. Saad of subscribing to a belief in the "inferiority" of women and minorities. *Id.* at 10-11.

Dr. Saad disagreed with the clinical trial analogy, arguing that studying pay at a company is not like clinical trials of a drug in controlled conditions, with the analogy making the same assumption that there were not systematic differences between demographic groups. JX 104 at 14; HT at 1609-11. In contrast to a clinical trial, assignment into groups here was not randomized in a manner that would render group differences irrelevant in large enough sample—the demographic divisions were already set and the point of the analysis was to look at the relationship between compensation and those groupings. He deemed Dr. Madden's approach anti-empirical in that it assumed away variables without testing, contrary to her practice in actual research. JX 104 at 40-42.

Outside of the analogy, Dr. Saad was critical of Dr. Madden's use of the Aggregation Assumption to excuse using deficient measures of education and experience. JX 104 at 14-16. In Dr. Saad's view, Dr. Madden failed to similarly situate employees and in a group analyses could only account for averages, masking potentially important differences. Proper controls would have ameliorated this, but Dr. Madden declined to use them because she assumed that all factors she does not measure are evenly distributed across groups. But Dr. Saad noted that this assumption could be equally applied to the factors that Dr. Madden did measure. He believed that the Aggregation Assumption needed to be tested, not assumed. And he argued that the point was not one about inferiority—it was simply about the potential for group-level differences due to a variety of causes. JX 104 at 31-33. While he agreed that some factors could be bracketed at a group level, he opined that doing so should be based on empirical testing, not assumption, and that factors that legitimately

affect pay should actually be analyzed to see if there are group difference. For instance, he found that things like organization and patent activity did vary by gender, indicating that they should be controlled for in a compensation analyses at a group level. *Id.* at 34-36. Moreover, based on studies of the population, Dr. Saad found that areas of specialization in education varied demographically. *Id.* at 44-50, 109-10; HT at 1646-47. Dr. Saad explained that if the Aggregation Assumption were correct, then Dr. Madden's analysis would work, but that if it were incorrect the result would be an inadequate model. Thus, it should be tested. For him, the point wasn't about inferiority; it was simply about differences that might exist at a group level, like the potential difference that Dr. Madden did control for in her analysis. HT at 1607-09.

To begin with, I am persuaded that Dr. Saad is correct that Dr. Madden's clinical trial analogy is inapt and deceptive. In a clinical trial, groups are randomly determined so that the variances that might matter for the result are evenly distributed at a group level. There is no random distribution here. The *question* at issue is whether there are systemic disparities in compensation associated with race and gender and, if so, whether those disparities are the result of discriminatory actions by Oracle or some other factor that varies by gender and race that is not within Oracle's control or the result of Oracle's actions. No clinical study would put all individuals of one race and gender in the control group and the others in a test group unless there was *already* a determination that those factors do not matter for the outcome. Here, whether or not some preexisting inequity or imbalance matters for the outcomes is an open question—indeed, the crucial question—so distribution of groups of comparison along racial or gender lines is not at all like a clinical trial. In fact, the very use of the analogy suggests that Dr. Madden's critical conclusion is already being assumed because she frames the issue as premised on the conclusion that there aren't any systemic inequities outside of Oracle's actions.

The Aggregation Assumption is incredibly powerful and plays an essential role in Dr. Madden's reasoning, and derivatively OFCCP's argument. Dr. Madden does not compare individuals performing the same sort of work. But she can excuse this by claiming that at the group level the distribution evens out, so the variances in the underlying individuals do not matter. Dr. Madden uses poor measures for the factors she does attempt to control for. But she can excuse this by reasoning that the particular background, education, experience, and skills, etc. that do matter for compensation are evenly distributed across groups and do not need to be accounted for in the model. But why should one accept the Aggregation Assumption? Dr. Madden adduced no evidence for it, it was simply a starting foundational principle. The result is that Dr. Madden never seriously inquired as to whether or not the inequities and imbalances found at Oracle are the product of discrimination by Oracle or pre-existing inequities and imbalances—that latter possibility was assumed away.

At the hearing, Dr. Madden initially denied making the Aggregation Assumption and when corrected averred that isn't necessary, but that it was a good starting point "as an American." HT at 872-73. She didn't explain what this meant. Oracle employees do not join Oracle at birth. Questioning the Aggregation Assumption has nothing to do about innate differences or claims of inferiority. Questioning the Aggregation Assumption means accepting the possibility that there are systemic inequities, imbalances, and discrimination that pre-exist Oracle, for instance in our educational system, in our institutions of higher education, and in sociological factors affecting the skills that individuals develop and the endeavors they undertake.

Dr. Madden's analysis in Column 1 shows that there are disparities—the start of the analysis is a "raw" disparity—both in compensation and (in some cases) representation. That disparity could

be due to chance, it could be due to discrimination by Oracle, 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 from a policy standpoint, and could point to discrimination that should be redressed. But it would not be Oracle's discrimination or something to be remedied in a legal claim for discrimination made against Oracle. Oracle cannot be held liable here for disparities that it cannot control and does not cause or exacerbate. It can only held liable for *its* discrimination.

Even accepting Dr. Madden's point on her own terms, there *is* evidence of unequal distribution of factors that matter for pay. Dr. Saad pointed to sociological evidence about specialization. The factors Dr. Madden did control for—despite the Aggregation Assumption that could have dispensed with any controls—had impacts on the analysis. And appropriate factors that Dr. Saad controlled for, like organization, significantly impacted the analysis both in terms of explanatory power and the disparities that resulted. This is all the more reason to test the assumption, not use it to insulate a pre-analysis conclusion from criticism. Dr. Madden and OFCCP are attempting to establish a conclusion, provide evidence that warrants an inference that it is more likely than not that Oracle is discriminating against its employees by gender and race in the job functions at issue. A probative statistical model should be founded on facts and empirical testing, not assumptions and rhetoric. There is, or should be, no dispute that there are inequities, unacceptable inequities manifested at Oracle and in society more broadly. But this case presents a far narrower question—whether *Oracle* is responsible because it is discriminating against its employees. For a model to be convincing, the underlying assumptions about the even distribution of factors that matter for compensation should be tested and based on evidence, not assumed, especially when there is evidence that there is not even distribution.

The Aggregation Assumption was presented as something we should accept as "Americans," such that questioning it was automatically a commitment to racial or gender inferiority. But it is no such thing. The point of the model is to permit inferences that the disparities in the question are the result, at least in part, of discrimination by Oracle, rather than pre-existing inequities, including inequities that could result from discrimination by other actors. In that light, what the Aggregation Assumption is really doing is working as an assumption that women and minorities are not subject to discrimination or inequities until they arrive at Oracle. But that is not believable and represents a benighted attitude about the serious underlying broader problem.

The existence of discrimination and inequity elsewhere is decidedly not a license for discrimination by Oracle or any employer. But this case is trying to establish that Oracle is discriminating, that *it* is playing a part in producing the inequities we see, even in Column 1 of Dr. Madden's charts. To answer that question, it is important to construct a model that can provide good evidence about the particular contribution of the alleged discriminatory actor and hold an employer responsible for the discrimination it is engaging in, if any. Hence, it is important to make the relevant comparisons among employees and take account for the major legitimate factors influencing compensation. Dr. Madden did not do this, resulting in a statistical model that does not provide a good basis for drawing inferences since it does not seriously test whether the disparities found are due to actions by Oracle or pre-existing actions and inequities.

OFCCP might prefer a sort of strict liability law that would hold employers responsible for any disparities that remain after rudimentary controls are applied. But that is not the law that exists at this time—to draw an inference to discrimination, a model should make the relevant comparisons and control for the major legitimate factors. *See EEOC v. General Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 582 (9th Cir. 1989); *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984). The bridge between the raw disparities and the conclusion that Oracle should run through an accurate statistical model. But here the Aggregation Assumption is doing the real work, leaving the critical underlying question unanswered. Again, a disparity does not establish discrimination, *Penk v. Or. State Bd. Of Higher Educ.*, 816 F.2d 458, 461 (9th Cir. 1987), and actionable discrimination requires a disparity that is the result of an employer's actions or in the employer's control, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651-52 (1989). I find that there is no good reason to accept the Aggregation Assumption on the scale proposed by Dr. Madden since it begs the important question, assuming away the possibility that systemic inequities are not the product of Oracle's decisions, the very question that the model is supposed to be testing.[201]

7. OFCCP Has Not Established a Pattern or Practice Disparate Treatment Compensation Discrimination Claim

OFCCP accuses Oracle of widespread systemic discrimination in compensation against women in the Product Development, IT, and Support job functions and against Asians and African-Americans in the Product Development job function. "However, 'J'accuse!' is not enough in court. Evidence is required." *EEOC v. Bloomberg L.P.*, 778 F.Supp. 2d 458, 461 (S.D.N.Y. 2011). 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 v. Or. State Bd. Of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987). After reviewing all of the evidence presented, statistical and otherwise, in the light of governing law, I find that OFCCP has not established its complaint by a preponderance of the evidence.

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[201] As part of her justification for not attempting more fine-grained analysis, Dr. Madden argued that there was no data that could be used in a statistical analysis to control for more particularized skills, for instance. *E.g.* HT at 754-55, 789, 963, 939. I do not find this to be a good excuse for not constructing a model that makes appropriate comparisons and accounts for the major factors that matter for pay. Dr. Madden's claim is doubtful and OFCCP cannot both bring sweeping claims of discrimination and then excuse a failure of proof on the grounds that proving the sweeping claims would be too hard. I am not persuaded that OFCCP and Dr. Madden simply could not develop a more accurate model for want of data. There is a massive amount of data in this case produced from Oracle. Coding of descriptive information and use of proxies could have enabled further analysis. Though this might have been burdensome and there is margin for error in any process, the record contains the building blocks for far more fine-grained analyses than that performed here. Dr. Saad *did* construct means of better situating employees for comparison and measuring factors that matter for pay. OFCCP and Dr. Madden take issue with how he did so in the particulars, but they did not attempt their own means of completing the task. I am not sympathetic to a complaint that developing better controls is impossible that is coupled with criticisms of proxies that do so on the grounds that they are imperfect. OFCCP stresses that an employer should not be able to rebut a statistical analysis with hypothetical flaws, but the flip side of this point is that OFCCP should also not be able to excuse inadequacies as impossible to redress due to hypothetical flaws with the proxies used to redress them.

If OFCCP and Dr. Madden are not able to present a model of aggregated job functions that makes the relevant comparisons and accounts for the major factors influence pay, the claim (and/or analysis) should have been refined and narrowed (or disaggregated) so that a probative model could be constructed. The burden of proof and mode of legal analysis remains the same regardless of the claim and does not lessen when a plaintiff chooses to bring larger, more difficult to prove claims. *See Penk v. Or. State Bd. Of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987). OFCCP and Dr. Madden did not create the model they did out of necessity, they did so because they sought to prove systemic discrimination without having to produce more fine-grained and accurate models and measures.

a. OFCCP Has Not Established a Prima Facie Case in its Pattern or Practice Disparate Treatment Compensation Discrimination Claim

In a pattern or practice case, the burden is initially on the plaintiff "to demonstrate that unlawful discrimination has been a regular procedure or policy followed by [the defendant]." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 (1977). This means showing "by a preponderance of the evidence, that [] discrimination was the [defendant's] 'standard operating procedure.'" *Obrey v. Johnson*, 400 F.3d 691, 694 (9th Cir. 2005); *see also Cooper v. Federal Reserve Bank*, 467 U.S. 867, 875-76 (1984). A plaintiff "must prove 'more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts.' They must establish, by a preponderance of the evidence, that discrimination 'was the company's standard operating procedure[--]the regular rather than the unusual practice.'" But "the plaintiffs need not show each individual member of the class 'was a victim of the employer's discriminatory policy,' since 'proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy'" and "[s]tatistical evidence may suffice to establish a prima facie case if the disparities in treatment are significant." *Aliotta v. Bair*, 614 F.3d 556, 562 (D.C. Cir. 2010) (internal citations removed) (quoting *Teamsters*, 431 U.S. at 336, 360, 362) (citing *Wagner v. Taylor*, 836 F.2d 578, 592 (D.C. Cir. 1987); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1303 (D.C. Cir. 1987)).

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 Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978)). But though not onerous, "it is a burden nonetheless." *Gay v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531, 555 (9th Cir. 1982). Statistical proof establishing a prima facie case should eliminate the most common nondiscriminatory explanations, focuses on the proper groups for comparison, and yield statistically significant results. *Segar v. Smith*, 738 F.2d 1249, 1274 (D.C. Cir. 1984) ("In other words, both the methodology and the explanatory power of the statistical analysis must be sufficient to permit an inference of discrimination"); *see also EEOC v. General Tel. Co. of Northwest, Inc.*, 885 F.2d 575, 582-83 (9th Cir. 1989). 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. While statistics can establish a prima facie case, "statistics must be relied on with caution." *American Federation of State, Cty., and Municipal Employees (AFSCME) v. Washington*, 770 F. 2d 1401, 1407 (9th Cir. 1985). Statistics must be evaluated in regards to whether comparisons are being made among similar jobs, the absence of variables that might undermine the inferences drawn, and the surrounding facts and circumstances. *Id.*; *Spaulding v. University of Washington*, 740 F.2d 686, 703 (9th Cir. 1984).

I find that OFCCP has not established a prima facie case. The non-statistical evidence generally supports a finding in Oracle's favor. The anecdotal evidence did not bring the statistics to life and was not suggestive of widespread discrimination by the alleged wrongdoers. There was no good evidence for OFCCP's allegation that Oracle's executives knew about, hid, and ignored widespread disparities. Even had Dr. Madden's analysis been sound, the record is clear that Oracle did not accept her approach and thus would not have acted with discriminatory indifference in not acting on her findings. The breach of affirmative action obligations, if they occurred, would not

indicate an intent to discriminate in this case since the deficiency would be based on a reasonable interpretation of the requirements and potential failure to execute. There is no good evidence that Oracle concealed information regarding disparities. While Oracle's handling of internal complaints does not inspire confidence and appears to be geared more to protecting Oracle from potential legal threats than actually dealing with potential problems, I do not find this to be good support for the proposition that Oracle is discriminating in the manner alleged. And while there is evidence that Oracle is budget conscience and seeks to make money, there is no evidence that this is driven by discriminatory intent or that Oracle intentionally discriminates in order to save money. In this regard, OFCCP has offered attention-grabbing accusations, but not actual evidence. As a whole, the non-statistical evidence is poor support for OFCCP's prima facie case.

The potential mechanism of discrimination also undermines OFCCP's prima facie case. The alleged wrongdoers are Oracle's top executives and HR personnel. The centralized actions of these individuals are the "glue" that is the basis for OFCCP's claim of a pattern or practice of systemic discrimination. The evidence shows, however, that Oracle's compensation "system" is mostly decentralized and that in matters of determining offers, salary increases, bonuses, and equity awards, the primary decision-maker is the line manager. There are centralized aspects that, in theory, could serve as a mechanism—compensation guidelines, budgeting, instructions on global processes, and the approval process. But none of these is a plausible mechanism and there is no evidence that any are actually used in a discriminatory manner. Oracle's guidelines are for the most part high-level near-banal adages or rules of thumb. The budgeting is high-level and done without knowledge of the underlying composition of particular organizations. Instructions are also high-level and generally applicable. In each of these instances, there is no evidence that some discriminatory actions are occurring at the levels alleged—I am left with a very poor means of discriminating, no evidence of discriminatory intent, and no indication that the means were used in any discriminatory manner.

The approval process is potentially a better mechanism in that it involves the alleged wrongdoers in particular compensation decisions. But the weight of the evidence indicates that approvals are done in a very hands-off manner and with little scrutiny into the substance beyond generalized checks for what Oracle called "sanity." Approvals are also an unlikely means of discriminating because the approvers, at the high levels at issue, would not know the individuals in question and would not be able to see demographic data. Moreover, there is no evidence that approvals are processed in a discriminatory manner, e.g. with more returns of recommendations for women than men, or that there is the sort of scrutinizing review that would be present if approvals were being used in a discriminatory manner. OFCCP does not need to establish a particular mechanism in this claim, but it does need to motivate an inference that Oracle, and the alleged wrongdoers at Oracle, are engaged in a pattern or practice of discrimination. The absence of any plausible mechanism though which they *could* be discriminating and the lack of evidence of any discrimination in the mechanisms proposed is good reason not to draw the inference that OFCCP suggests.

Most importantly, the statistical evidence does not support an inference that it is more likely than not that Oracle is engaged in a pattern or practice of discrimination against women in the Product Development, IT, and Support job functions and against African-Americans and Asians in the Product Development job function. OFCCP and Dr. Madden aggregated across organizations, job titles/codes, global career levels, job families, and in the case of women, job functions. This potentially obscures important differences in the relationships that matter for compensation but that differ in different parts of Oracle. OFCCP and Dr. Madden instead attempted to similarly situate employees with respect to the work performed by using controls, and, by the end, a control that

effectively controlled for job/title code. But the weight of the evidence shows that Oracle employees in the same job code/title perform different work on different products involving different sorts of skills depending on the particular line of business/organization that they work in. The evidence also demonstrates that the market for particular jobs within the same job code varies in important ways. Dr. Madden and OFCCP did not attempt to control for these important differences. Dr. Saad did via a proxy, with the result that the explanatory power of the model increased and the disparities substantially decreased.

Further, Dr. Madden's controls related to employee qualification—age, level of degree, tenure at Oracle, and, in some versions, job descriptor as proxy for specialization—were crude measures of the major factors that do impact pay, here experience and education, or were, in the case of job descriptor, circular since it was being used as a control to both similarly situate employees as to the different jobs performed and as a way to compare them with respect to the skills they brought to those jobs. Ultimately, the power of the analysis turned on the Aggregation Assumption—Dr. Madden's hypothesis that any factors that she did not control for, both with respect to qualifications of the employees and the nature of the work at Oracle, could be bracketed and ignored because they were (at least roughly) equally distributed at a group level. But on review, there is no good reason to accept this assumption. There is evidence that it functions as an assumption that Oracle's employees were not subject to any discrimination, inequities, or imbalances with respect to any unmeasured factors before they came to Oracle, and the point of the statistical model is supposed to be to compare the relevant groups of employees and account for the major factors influencing pay without assuming away the potential for group differences.

By the end, then, Dr. Madden's analysis shows that there are inequities that have manifested at Oracle—a point that the raw disparity shows on its own. But it does not provide a good basis to conclude those inequities are the result, in whole or part, of a pattern or practice of discrimination by Oracle. I must evaluate the claim OFCCP decided to bring based on the evidence it decided to present. That evidence does not provide answers or lead me to believe that it is more likely than not that Oracle is discriminating in the manner alleged. Taking all of these points together, I find that OFCCP has not established a prima facie case of a pattern or practice discrimination by Oracle with respect to women in the Product Development, IT, and Support functions and Asians and African-Americans in the Product Development job function.

b. Oracle Would Rebut a Prima Facie Case

Even if OFCCP's evidence did establish a prima facie case, Oracle would rebut the prima facie case with the opinion of Dr. Saad and the other evidence of record. "Once a prima facie case is established, the burden shifts to the employer to rebut the inference of discrimination by showing the employees' proof is either inaccurate or insignificant." *Aliotta*, 614 F.3d at 563 (citing *Teamsters*, 431 U.S. at 360). The rebuttal burden is to produce evidence rebutting the inference, which can be done with "any evidence that is relevant to rebutting the inference of discrimination." *United States v. City of New York*, 717 F.3d 72, -8485 (2d Cir. 2013). 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. *Segar,* 738 F.3d at 1267-69. Rebuttal cannot merely suggest flaws in the statistics, but can be done by evidence showing that the statistics are flawed, showing that the disparities are not significant or actionable, or presenting evidence contradicting the plaintiff's evidence, to include alternative analyses. *EEOC v. General Tel.*

Co. of Northwest, Inc., 885 F.2d 575, 581-83 (9th Cir. 1989); *Penk v. Or. State Bd. of Higher Educ.*, 816 F.2d 458, 464 (9th Cir. 1987).

As discussed more fully above, even though Dr. Saad disagreed with the highly aggregated approach used by OFCCP and Dr. Madden, working within both the SAC model and Dr. Madden's model and making refinements, he presented alternatives that eliminated the basis for an inference to systemic compensation discrimination. This was in larger part due to adding an organization control, a control I found proper since it was an imperfect but approximate proxy for the sort of work that employees perform at Oracle, which matters for compensation. The experts and parties dispute some of the other refinements and controls, but there is no need to further pursue the question. Oracle's rebuttal burden was to produce evidence that would undermine the inference that would be suggested by OFCCP's prima facie case. Dr. Saad's refinements, the deficiencies shown in Dr. Madden's model, the dearth of non-statistical evidence of discrimination of the sort alleged by OFCCP, and the evidence showing that it is highly unlikely that the alleged wrongdoers had and were using a mechanism of discrimination of the sort alleged by OFCCP more than meet this burden.

c. Considering the Record, OFCCP Has Not Established that Oracle has a Policy or Practice of Disparately Treating Women and Minorities in Compensation

"[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." *City of New York*, 717 F.3d at 87. If the rebuttal burden is met, the question is whether the plaintiff has shown, by a preponderance of the evidence, that the defendant engaged in a pattern or practice of discrimination. *E.g. Aliotta*, 614 F.3d at 564. So here, if OFCCP had established a prima facie case of a pattern or practice of discrimination as alleged in the complaint, Oracle would have rebutted it and I would proceed to consider whether OFCCP has sustained its burden of proof by showing by a preponderance of the evidence that Oracle did engage in a widespread, systemic, pattern or practice of discrimination in compensation against women in the Product Development, IT, and Support job functions and against Asians and African-Americans in the Product Development job function.

At this stage in the analysis, OFCCP has not sustained its burden for the reasons discussed more fully above. The non-statistical evidence of discrimination is largely absent and, where present, very weak support. On the whole, the non-statistical evidence is more supportive of the conclusion that Oracle is not discriminating in the manner alleged. OFCCP's claim also alleges that the discrimination is the result of actions by Oracle's top executives and HR personnel. But I find that Oracle's compensation "system" is decentralized in the important parts with the line managers as the primary, most important decision maker. The alleged wrongdoers have no clear, plausible mechanism to engage in the discrimination alleged, and there is no evidence that they are using the mechanisms that are available in a manner that could be discriminatory. Finally, Dr. Madden's statistical model suffers from serious deficiencies in that it does not compare the appropriate groups of employees and uses crude measures of the relevant factors that matter for compensation. Dr. Saad's model presents an alternative approach. While its merits could be further debated, given the importance of properly comparing employees doing similar work and thus in some manner controlling for organization, it is an improvement on Dr. Madden's model. It does not support any inference to a pattern or practice discrimination. Taking all of this evidence together, OFCCP has not established its compensation discrimination claim.

B. Disparate Treatment: Steering Discrimination Theory

The other aspect of OFCCP's disparate treatment theory is the contention that Oracle is discriminatorily steering, or "assigning" women and minorities in the job functions at issue into lower paying positions. "Steering" is a distinct sort of discrimination from compensation discrimination. *See* 41 C.F.R. §§ 60-20.2(b)(6), 60-20.4. If a group is steered into a lower paying job, it will not be receiving lower pay for comparable work—it will be receiving lower pay for different, lower paying work. The result is still discrimination—the allegation is that the employees were similarly situated in terms of qualifications and the jobs that they *could* perform, but that they were not treated similarly because they were steered, funneled, or assigned to different jobs, resulting in less compensation. In this respect, some of the points discussed above are less relevant, or become relevant in different ways.

Nonetheless, as will be seen, much of the discussion above has some bearing on the issues here. In addition, this is a pattern or practice disparate treatment claim, and the applicable legal framework is the same as that discussed above with respect to the straightforward compensation discrimination claim. I will not repeat that legal framework here or reconsider the parties' characterizations of the analysis. Below I first consider the theory and the arguments of the parties. I then examine the non-statistical evidence of steering, the evidence relating to a mechanism of steering, and the statistical evidence related to the steering claim. I conclude that OFCCP has not established its pattern or practice disparate treatment steering discrimination claim.

1. Steering Theory: Argument and Counter Argument

OFCCP contends that its statistical evidence shows that Oracle discriminatorily steers employees into jobs. PPB at 15. It also points to the other non-statistical evidence of discrimination discussed above. *Id.* OFCCP claims that qualifications at hire alone are relevant to this analysis. *Id.* at 23. It observes that Oracle uses internal recruiters to find candidates to apply for position and stresses that Oracle has discretion to up or down level a hire by one global career level. It asserts that Dr. Madden has shown that Oracle uses this mechanism to discriminatorily steer women, Asians, and African-Americans into lower paying career levels at hire. *Id.* at 24; PPF at ¶¶ 29-30. Further, OFCCP contends that Dr. Madden's Column 6, controlling for job descriptor, shows very significant disparities after controlling for the exogenous characteristics, leading to an inference of discriminatory steering.[202] PPB at 24; *see also* PPF at 31-32.

Oracle argues that this claim must fail because there is no steering mechanism at Oracle. It states that OFCCP's theory is confused since at times "assignment" is job at hire while at other times it includes promotions. Oracle represents that OFCCP must establish a standard operating procedure of discrimination based on comparisons of similarly situated employees. But Oracle maintains that there was no evidence of a steering mechanism because employees apply for requisitions that already contain job codes. Up or down leveling by one global career level can occur, but there was no evidence that this occurred in any systematic way or that there was steering of applicants into particular jobs. Further, there was no evidence that high-level executives or HR personnel had a means to steer applicants into higher or lower level jobs. DPB at 28-30. Oracle argues that Dr. Madden's analysis is insufficient since she only studied compensation, not assignments. As Oracle sees it, her theory was based on the assumption that differences in

[202] OFCCP claims that Dr. Madden's analysis shows when this steering occurs—for Asians in setting career level at hire and for women both at hire and over time with lower rates of promotion. PPB at 24-25; *see also* PPF at ¶¶ 33-34.

compensation must be due to discrimination in assignment if her model did not otherwise account for them. But it asserts that the evidence belies these assumptions and indicates that candidates are not assigned jobs at all. *Id.* at 30-31. Oracle points to Dr. Saad's opinion that the proper object of study in this sort of claim is assignment, not compensation. This must also look to the job applied for, not just the job held. But this is not something Dr. Madden attempted to study. Oracle represents that Dr. Saad did study these points and found that there were statistically significant differences among the demographic groups in the jobs applied for, which does not indicate discrimination by Oracle. Dr. Saad further found that there were not statistically significant disparities in up- or down-leveling, and no changes in organization or other aspects of job "assignment." *Id.* at 31-33; *see also* DPF at ¶¶ 51-52.

Oracle argues that Dr. Madden's original analyses do not indicate discriminatory assignments because they fail to study the relevant phenomenon. It contends that Dr. Madden's rebuttal report purported to challenge Dr. Saad's up- and down-levelling analysis, but did so only by cherry-picking the few career levels that supported Dr. Madden's prior conclusion and ignoring the rest, suggesting that there is no pattern. Other studies in the rebuttal report focused on pay, not assignment, and so were insufficient to support a claim of assignment discrimination. DPB at 33-34; *see also* DPF at ¶¶ 37-38. In addition, Oracle accuses Dr. Madden of hiding information in her back-up files indicating that there was no pattern of discrimination in promotions, which undermines any claim that there is discrimination assignment in terms of current position due to the way Oracle promotes employees. DPB at 34; *see also* DPF at ¶¶ 39-40, 53. As to Dr. Madden's Tables 5-7, which she saw as indicating that there was a significant difference in promotion, Oracle avers that the object of study was compensation, not promotions, and the inferences were different from those suggested by the studies of promotions. DPB at 34-35. Oracle adds that OFCCP did not present anecdotal evidence of steering discriminatory. *Id.* at 35. Finally, Oracle argues that the steering discrimination theory must independently fail because OFCCP did not compare similarly situated employees, since the education and experience variables were deficient. *Id.* at 35.

OFCCP argues in reply that Oracle has failed to meet its rebuttal burden, representing that Oracle's critique is that qualifications at hire should not be used to evaluate the claim. OFCCP asserts that Dr. Madden properly looked to qualifications at hire and that if other qualifications mattered; it was Oracle's burden to produce the evidence and show that it eliminated the disparities. PRB at 7-8. As to the point that Oracle does not assign jobs to employees, OFCCP points to evidence that Oracle uses internal recruiters, can up or down level new hires, and engages in a mapping process with acquisitions. It also points to the college hiring program, including MAP, as a means of steering employees. *Id.* at 8-9. OFCCP also relies on Dr. Madden's rebuttal analyses claiming that were systemic racial and gender disparities controlling for job title in requisitions. *Id.* at 9. OFCCP adds that Oracle also engages in unlawful steering of women through lack of advancement/promotion. *Id.*

Oracle argues in reply that OFCCP incorrectly claims that job titles are assigned to employees. Rather, it contends that applicants apply to requisitions with job titles, which can then be up or down leveled by one global career level within the same job family. DRB at 6. Oracle asserts that OFCCP and Dr. Madden merely rely on assumptions, not evidence. It maintains that the overwhelming weight of the evidence shows that employees are hired into jobs, not assigned them. It contends that the steering claim lacks statistical support, lacks any mechanism that would permit steering, and fails factually because there is no good anecdotal or other evidence that steering occurs. *Id.* at 13.

2. Non-Statistical Evidence of Steering

There is a dearth of non-statistical evidence of steering or assignment discrimination. Indeed, there is no evidence that employees at Oracle are "assigned" jobs at all in any normal sense of "assign." Oracle employees *apply* for jobs—they do not arrive at Oracle and *then* receive an assignment. OFCCP and Dr. Madden may perceive some advantage in talking about "assignment" of position, but that is not a reasonable read of the evidence or a fair characterization of the facts about Oracle. 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.

There is evidence that there could be some steering, and that will be considered in the next section. OFCCP, however, has not presented any compelling non-statistical evidence of discrimination in steering. For instance, there were no accounts, testimonial or documentary, of female or minority employees being encouraged by recruiters to apply to lower level positions, of mangers directing female and minority employees into particular lower-paying organizations, of female and minority employees being down-leveled while comparable white male applicants were not (or were up-leveled), and so on.

OFCCP can (and does) rely on its other anecdotal and non-statistical evidence in this regard. If that evidence were compelling, it would provide support for a theory of discriminatory steering in that it would evidence a general discriminatory attitude or approach among the alleged wrongdoers at Oracle that could then be manifested in discriminatory steering. The anecdotal and other non-statistical evidence was discussed in more detail above, both in Section V.I (as to the content of the anecdotal evidence) and in Section VII.A.4 (as to the evaluation of the anecdotal and other non-statistical evidence). Above I found that this evidence does not support an inference that Oracle is engaged in a pattern or practice of discrimination against women and minorities as alleged by OFCCP. That same result follows here—I find that the non-statistical evidence does not provide any support for the inference that Oracle is engaged in a pattern or practice of discriminatorily steering women, African-Americans, and Asians in the job functions at issue into lower paying jobs.

3. Common Mechanism of Steering

Hiring was discussed above in Section V.E. Most Oracle employees end up in their jobs after applying to specific requisitions. Oracle does not hire employees for the Product Development, IT, or Support, function and then assign them to particular job titles (to include particular function, specialty, job family, and Global Career Level) or organizations.[203] So the claim of "assignment" discrimination is really a misnomer and rhetorical device. Oracle does not assign employees in any normal usage of "assign."[204] OFCCP's theory is really one of steering discrimination, an allegation that Oracle is discriminatorily funneling women, Asians, and African-

[203] Let alone hire individuals outside of job function entirely and then "assign" them to Product Development, IT, or Support, as Dr. Madden's aggregation in the model for the analysis of gender discrimination assumes.

[204] There is a sense in which Oracle "assigns" job titles, to include job family and career level, to particular *jobs* within the organization. Mangers determine they will hire an employee to do a particular set of things, and then decide on what job title is appropriate for the requisition. But this is very different from the sort of assignment that OFCCP and Dr. Madden are talking about—the assignment of a particular *employee* to a particular job.

Americans in certain job functions into lower compensated jobs despite equivalent qualifications to white male peers.

Nonetheless, the "steering" theory faces some of the initial problems as the "assignment" theory. In most cases, Oracle hires employees into jobs after they apply for those particular jobs. This creates an initial problem for the theory and the inference OFCCP asks me to draw about discrimination. In a situation where individuals apply for a job and then one is hired, there is no steering, so it is unclear how the alleged discriminatory actors even could be steering employees in a discriminatory manner. This is the same sort of "mechanism" problem discussed above. OFCCP's theory requires drawing an inference to discrimination by the alleged wrongdoers. But that inference cannot be drawn if the wrongdoers have no mechanism to take the discriminatory actions, and the inference becomes less and less plausible the more unlikely it is that they are, in fact, able to and engaged in a mechanism of discriminatory steering in the manner alleged by OFCCP.[205]

OFCCP suggests a number of possible ways in which the steering occurs. First, the use of internal recruiters could be a mechanism. As discussed above, Oracle does use internal recruiters. *See* § V.E.2 *supra*. But there is no evidence that Oracle has a pattern or practice in internal recruitment of not recruiting women and minorities for more lucrative positions. The point was not even explored on the record, and the theory never fully articulated. Nor is there evidence regarding the frequency with which successful candidates are procured by recruiters or evidence about widespread discriminatory practices by those recruiters that would allow one to draw a conclusion that recruitment is the mechanism of discriminatory steering. What is left here is speculation, and speculations that would be poor support for the scope of the claim that OFCCP is bringing since it would only apply to a small-subset of the groups of employees in question.[206]

Next, college recruitment functions differently than the ordinary hiring process. As discussed in Section V.E.5 above, when Oracle hires through its college recruitment program, candidates do not apply for individual requisitions. The process is more centralized and standardized, with candidates being matched with organizations in the interview process, or, in MAP, after joining Oracle. This could provide a potential for discriminatory steering, and it is a possibility that OFCCP suggests but does not prove. And, it is not very plausible. To begin with, this is a pattern or practice claim and most hires are not college hires. *See, e.g.,* HT at 1156. OFCCP is not alleging systemic discrimination in the college hiring program; it is alleging systemic discrimination throughout three job functions. A mechanism of steering that only applies to a minority of the "class" is a poor vehicle to make out such a claim. More importantly perhaps, the process by which an individual ends up with an organization does not involve centralized control or anything that would even fairly be called "steering." The individual interviews with different organizations (or tries them out in MAP) and then a match is made based on mutual preferences. This process involves choices by the candidate, who is the alleged victim of discriminatory steering by Oracle, and choices by the individuals in the organization, who are entirely or almost entirely not

[205] This is another instance in which if the statistical evidence were compelling, the result might be drawing an inference, but not the inference OFCCP prefers because other evidence of record makes the suggested inference improper. Statistics do not exist in a vacuum and are likely to lead to incorrect conclusions if viewed entirely outside of the surrounding facts.

[206] To be clear, this is not the point that the mechanism doesn't apply to *every* member—a pattern or practice claim doesn't need to result in universal application of the discriminatory pattern or practice. But to be a pattern or practice, it needs to be generally applicable to the group alleged to be the victims of discrimination. That leads to an important deficiency with most of OFCCP's alleged mechanisms—they apply only to a minority, sometimes small minority, of the groups it claims are the victims of discrimination.

being accused of any wrongdoing. OFCCP's theory needs some sort of steering by Oracle's top executives or HR department, but the college recruitment program, even with its more centralized features, does not provide a plausible mechanism.

Acquisitions also function differently than normal hires and were suggested as a mechanism of discriminatory steering. The acquisition process was discussed above in Section V.G.6. It involves mapping jobs, and the employees in those jobs, from the acquisition onto Oracle's job "architecture." In some instances it involves creation of new job families where Oracle does not have a counterpart. OFCCP seizes on this as evidence of assignment or steering, since Oracle employees are making decisions about the job code for incoming employees.

For three independent reasons, I find this argument unconvincing. First, OFCCP has not brought a complaint for steering discrimination related to employees who joined Oracle via acquisition. It made a decision to bring a more general claim. Again, a mechanism of discrimination that *only* applies to a minority portion of the "class" is poor support for the claim asserted. If OFCCP believed that Oracle was discriminating against acquisition employees in the mapping process, that is the claim it should have brought for adjudication. Steering via acquisition could still be *part* of the broader claim OFCCP decided to bring, but it could be only a small piece.

Second, the process by its own terms does not involve taking an employee, looking at his or her qualifications, and then assigning/steering into a job code. It is instead based on looking at the existing *job* duties and function in relation to Oracle's job duties and function. This is not the sort of "assignment" or "steering" alleged. It is a process of taking an existing job and finding a categorization in Oracle's system, not taking a new hire and then putting him or her into a particular job or job classification. If there is steering or assignment in this regard, it is of the *job*, not the *employee*.

Third, and most importantly, the process, at least at the times that would matter for this case[207], was anonymized, with those doing the mapping receiving no demographic information and being given only a number, not name, to identify the incoming employee. *See* HT at 1238-39. The agents of the discriminatory steering in this part of the theory would have to be the mappers—they are the ones making decisions about which job title/code will be assigned to the incoming position and derivatively employee. But if the mappers cannot know the race or gender or the incoming employees, they cannot be intentionally discriminating on the basis of race or gender.

A final suggested mechanism of steering is up- and down-levelling at hire. When hiring, managers choose a job code that reflects the position, but are later able to up- or down-level the hire by one global career level within the same job family. *E.g.* HT at 1197; JX 88 at 3; JX 102 at 81-82. This is a potential avenue of steering and the statistical evidence relating to it will be addressed in more detail below. At this point, however, there are some initial difficulties with this alleged mechanism.

First, the record does not contain non-statistical evidence that this up- or down-leveling is being done in a discriminatory manner. Second, OFCCP chose to bring a class-wide claim, but the record reflects that up- and down-levelling applies to a minority of employees. *E.g.* JX 103 ay 116, 120-21. Most employees are hired into the career level that they applied to. So while steering via

[207] I.e. acquisitions that would lead to employees at Oracle in the period of the compliance review and the additional data analyzed.

up- or down-levelling is a potential means of discriminatory steering, it is not an effective means of doing so as a pattern or practice of discrimination as to women and minorities in the job functions at issue as a whole. In addition, the degree of potential steering here is minimal in comparison to the sort of steering found in Dr. Madden's opinion, creating a notable incongruity.

Moreover, the record leads to the conclusion that the up- or down-leveling decisions are made by the hiring manager, not HR or Oracle's top executives. In the discussion of hiring above and the consideration of compensation decisions, I found that the line manager is the primary decision maker. OFCCP is not accusing the line managers of wrongdoing, but they are the actors who would control this mechanism of discrimination. OFCCP can point here to the approval process as a potential means, the idea being that the top executives approve or disapprove/return up-levels and down-levels in a discriminatory way. But this is rather attenuated and as discussed above (§ VIII.A.5), there is not good evidence that the approval process is used in a discriminatory manner or that the level of review would enable that sort of discrimination.

I conclude that the evidence related to the potential mechanisms of discriminatory steering do not favor an inference to any conclusion that Oracle is engaged in a pattern or practice of discriminatorily steering women into lower paying jobs in the Product Development, IT, and Support job functions or Asians and African-Americans into lower paying jobs in the Product Development job function. This does not necessarily dictate a result, but it does provide important context for interpreting the statistical evidence and consideration to taken into account when drawing inferences from the evidence regarding a potential pattern or practice of discriminatory steering.

4. Statistical Evidence of Steering

OFCCP's case for its steering claim is primarily statistical and based on Dr. Madden's compensation model discussed in detail above. Dr. Madden opined that women in the relevant job functions were made 18% to 24% less than men, Asians earns 12% to 18% less than white employees, and African-Americans earn 14% to 40% less than white employees with most of the disparity arising out of what she termed discriminatory assignments. PX 1 at 5-6; HT at 705-10. She based this opinion on controlling for only exogenous factors, reasoning that any endogenous factors within Oracle's control could reflect discriminatory steering/assignment. PX 1 at 9-10; HT at 722-25. If Column 5 is used, as suggested by the reports, with respect to women Dr. Madden found 17.7% to 23.9% differentials and 11.06 to 12.4 standard deviations adverse to women in the three job functions. If Column 6 is used, as suggested at hearing to add a proxy control for specialization, Dr. Madden found 13.2% to 18.7% differentials, with 8.95 to 10.5 standard deviations adverse to women in the three job functions. PX 1 at 15-19, 62. For Asians as compared to white employees in the Product Development function, the Column 5 differentials were 11.7% to 18.1%, with 4.71 to 8.36 standard deviations. In Column 6 they were 10.2% to 17.7%, with standard deviations of 2.67 to 5.29. PX 1 at 28-31, 69. For African-Americans in the Product Development function, Column 5 had differentials of 15.9% to 44% with standard deviations of 1.34 to 3.5; Column 6 had differentials of 9.6% to 32% with standard deviations of .95 to 3.09. *Id.* at 41-43, 76. Dr. Madden further concluded based on analysis of global career level at time of hire that Oracle was engaging in discriminatory assignments. *See, e.g.*, PX 1 at 52-54, 80-82. Dr. Madden did not study whether individuals were hired into the organizations to which they applied. HT at 928-29. Her analyses were based on compensation and did not examine how an individual came to hold a particular job. *Id.* at 914-18.

Dr. Saad criticized OFCCP's failure to consider which job employees applied for in its steering claim. He found that most employees were hired into the job that they applied for and that there were not statistically significant differences in up-leveling or down-leveling. *See* JX 103 at 18, 116-25; HT at 1710-22. In response to Dr. Madden, he explained that he studied steering and found no empirical evidence that it was occurring in a discriminatory manner. JX 104 at 12; HT at 1598-99. He criticized Dr. Madden for ignoring the actual process by which employees end up in jobs, instead assuming that because Oracle is involved, it is an assignment. JX 104 at 55-56. His analysis showed that individuals are generally hired into the jobs they applied for and are hired into the organizations applied to, with no evidence of statistically significant variance by gender or race. *Id.* at 56, 63-66.

Dr. Madden criticized these opinions on the grounds that Dr. Saad included too few employees, included endogenous factors, and aggregated all career levels for the analysis rather than controlling for or disaggregating career level at the time of hire. PX 2 at 32-39. She explained that Dr. Saad found no disparities, but if one looked separately at each global career level, there were statistically significant adverse disparities for Asians at IC4 and IC5 and women at IC4. She also expressed concern that the analysis only included a subset of employees who might have been up- or down-leveled. HT at 831-37, 841-43. Dr. Saad observed that his analysis used 1,661 requisitions, about 90% of the available data. He didn't control for exogenous characteristics because he was simply trying to measure the rate of up-leveling or down-leveling. Dr. Madden disaggregated the study and looked at each career level separately, producing a few statistically significant findings but not any basis for an inference to systemic differences in treatment. HT at 1722-26. The promotion analysis, when viewed as a whole rather than in terms of Dr. Madden's selective reporting of the results that supported her opinion, led to the same conclusion. *Id.* at 1726-30.

I begin with Dr. Madden's original analysis. I find that it provides little support for the discriminatory steering claim. The model itself was discussed in some detail above, and that discussion has some application here. Dr. Madden's general reasoning was simple—look at employees as they come to Oracle, and if there are disparities in compensation outcomes that are not attributable to compensation discrimination, infer that they are the result of discriminatory assignment. Dr. Madden's use of "assignment" is telling. It is a misnomer, but one that naturally results from her approach. It is entirely indifferent to anything about what actually happens at Oracle—instead of considering how Oracle functions and how employees end up in jobs, Dr. Madden either assumed facts or used a statistical analysis to infer facts about Oracle's HR processes. But the usefulness of statistical evidence "depends on all of the surrounding facts and circumstances." *Teamsters*, 431 U.S. at 340. The aim in this case is to analyze Oracle and so facts about how Oracle is structured and function ought to matter. Dr. Madden elected to dismiss all of this on the grounds that it might mask discrimination, but I fail to see how paying attention to how employees actually arrived at Oracle would potentially taint the analysis. Instead, it would inform the analysis and provide a way to test the theory by constructing a model analyzing how individuals arrive in the jobs that they hold.

Dr. Madden's compensation-based analysis is ill-equipped to support the claim. For instance, in the case of women she aggregated three job functions into one analyses and arrived at conclusions about steering generally. But there is no evidence or claim that there is steering between job functions. Similarly, the steering "portion" of Dr. Madden's analysis across the board is aggregated across career levels and jobs, but this is divorced from any of the actual methods by which individuals end up in jobs, or how they might be steered to them. Dr. Madden at times seems to be using her statistical analysis not to test for disparities, but to draw conclusions about how

Oracle functions—hence the repeated use of "assign." But the way to determine how Oracle functions is to look at how Oracle functions, not to draw inferences from a highly aggregated analysis with only a few controls. Dr. Madden did not look at how individuals arrive in job or the frequency with which they arrive in the jobs that they choose to apply for. Her model is thus attenuated in this context, trying to study steering through compensation rather than simply studying steering.

The model itself also suffers from deficiencies that limit its inferential power. The measures of education and experience are very rough proxies for the sorts of education and experience that matter to Oracle. The job descriptor variable can potentially do better work here because it does not need to simultaneously similarly situate employees with respect to the work they perform. But the model still misses measure of the types of skills that would make an employee a fit for a particular organization or line of business, and the products that the job works on. On this point the Aggregation Assumption could provide a reason to not be concerned about factors that matter individually, but I found that assumption unwarranted above. The best proxy offered for the particularized skills needed would be some sort of organization control, but this sort of control produced fading disparities when used by Dr. Saad.

More importantly, the core problem with this model is that is divorced from what it is studying. The foremost mechanism of steering suggested is up- or down-leveling, but this already occurs within job family, so Dr. Madden's Column 6 isn't going to be able to tell us whether that mechanism is being used in a discriminatory manner. To determine whether or not there is discrimination in some employment process, an analysis should consider the major factors that drive outcomes in that process. In a steering discrimination claim, steering should be the object of study and some attention should be paid to how employees end up in jobs. In the employment process being studied, the major factor influencing outcomes is the job an individual applied for, so an inferentially powerful analysis should take some account of that. But instead, Dr. Madden has presented a compensation discrimination model that makes no attempt to similarly situate employees relative to the work they perform and present that as proof of assignment discrimination. This is roundabout, divorced from the facts being studied, and given the inability of the model to adequately control for the sorts of skills needed to work in a particular organization or sub-organization, an inadequate basis to draw any inferences about steering or assignments. To produce a probative model related to assignments or steering, it should account for the major factors influencing how an individual ends up in his or her job. The major factor influencing how an employee ends up in a job is the job he or she applied for, but OFCCP and Dr. Madden do not present statistical evidence that takes this into account.[208]

Dr. Saad studied the potential for steering based on Oracle's actual practices of hiring employees. He found that most employees were hired into the job—including job level, title, and organization—that they applied to and that there were statistically significant differences in the jobs applied to among different demographic groups. He also found that there were not statistically significant differences in up-leveling or down-leveling by race or gender. *See* JX 103 at 116-25. Dr. Madden critiqued this analysis on the grounds that it included too few individuals and that once she disaggregated career levels, she found statistically significant outcomes adverse to Asians at IC4 and IC5 and women at IC4. PX 2 at 32-39; HT 831-37, 841-43. I do not find the criticism that too few

[208] The Aggregation Assumption would be of no assistance here. Not only would it be questionable to just assume that there are no demographic differences in jobs applied for, Dr. Saad provided evidence that there are such differences. *See* JX 103 at 116-19.

instances were included convincing. Over 1,600 requisitions were studied and Dr. Madden used smaller samples when it suited her purposes.[209] The criticism is also misguided since this is the only study of up-leveling or down-leveling in the record, so Dr. Madden hasn't given an alternative that would lead to an inference that this is being done in a discriminatory manner.[210]

The disaggregated findings are interesting and might raise questions that would need to be answered by looking at the applicants in those career levels. But they provide no support for OFCCP's claim in this case. OFCCP asserts that Oracle has a pattern or practice of discriminatory steering against women in the Product Development, IT, and Support job functions and Asians and African Americans in the Product Development job function. Up- and down-leveling applies to a small portion of Oracle employees, and this dis-aggregated analysis would suggest potential discrimination as to women in only one global career level and Asians in only two. That is not a reason to draw an inference to systemic discrimination—to the contrary, it suggests that there is no pattern or practice as alleged by OFCCP because there are no consistent disparities found that would be explained by the alleged pattern or practice.

5. Conclusion

OFCCP has the burden of establishing by a preponderance of the evidence an initial inference that Oracle is engage in the pattern or practice of steering discrimination as alleged. It has not done so. Dr. Madden's model is poorly constructed to draw inferences about potential steering since it does not attempt to study steering and does not account for the major factor influencing the job an employee holds—the job for. The record does not contain good non-statistical evidence of discriminatory steering. Moreover, there is no plausible mechanism that could be used to engage in the sort of systemic, widespread steering OFCCP alleged in this particular claim. Viewing Dr. Madden's evidence in light of the surrounding facts and context, I find that no inference that Oracle is engaged in discriminatory steering is justified. OFCCP has thus not made out a prima facie case.

If OFCCP had done so, Oracle would have rebutted the case with the evidence of Dr. Saad coupled with the evidence already considered. If accepted, it would show that Oracle is not engaged in any systemic discrimination in up- or down-leveling, undercutting any suggested inference that could be drawn to a pattern or practice of steering discrimination. If I were to reach consideration on the entire record, I would find that OFCCP failed to prove its claim. For all of the reasons discussed above, I find that OFCCP has not established its case for a pattern or practice of steering discrimination as to women in the Product Development, IT, and Support job functions and Asians and African-Americans in the Product Development job function.

Raw disparities raise questions, but to motivate an inference to discrimination as a pattern or practice, a statistical model should study the employment practices that might be discriminatory, draw relevant comparisons, and account for the major non-discriminatory outcomes that influence results. OFCCP and Dr. Madden did not do this either in regards to compensation discrimination or steering discrimination. This is a case about Oracle, and attention must be paid to how compensation and job "assignment" actually works at Oracle. This was not done, employees were not similarly situated to draw relevant comparisons, and the major factors affecting outcomes, here

[209] Here she drew conclusions about discriminatory up/down-levelling with respect to subsets of Dr. Saad's analysis and her analysis of reliance on prior pay used 1,387 instances. *See* PX 1 at 51-52.

[210] Again, her model doesn't study up- or down-leveling and provides no basis to conclude that it is occurring in a discriminatory manner.

particularly the jobs employees applied to, were not accounted for. The end result is a statistical model that is divorced from the reality it aims to study and provides no sound basis for drawing inferences about discrimination as a pattern or practice at Oracle.

C. Disparate Impact Theory

The final claim for adjudication is a disparate impact claim. It does not involve an inference to intent, but instead looks to a facially neutral policy or practice that has a disparate impact on the protected groups in question. OFCCP contends that Oracle, prior to October 2017, had a policy or practice of relying on prior pay and setting starting pay, resulting in a disparate impact on women, African-Americans, and Asians in the job functions at issue. Oracle denies any policy or practice of this sort and argues against any inference to causation.

1. Legal Framework

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." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977); *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."). The regulations implementing EO 11246 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 Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989); *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 v. Tidyman's, Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2001); *see also Figueroa v. Pompeo*, 923 F.3d 1078, 1085 (D.C. Cir. 2019); *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 151 (2d Cir. 2012); *Bennett v. Nucor Corp.*, 656 F.3d 802, 817 (8th Cir. 2011); *Stout v. Potter*, 276 F.3d 1118, 1121-22 (9th Cir. 2002).

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 it does 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. Congress has set forth the applicable showings and burdens for 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 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.

A disparate impact claim involves showing a disparity, a policy of practice alleged to cause the disparity, and causation. "[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; *see also American Federation of State, Cty., and Municipal Employees (AFSCME) v. Washington*, 770 F. 2d 1401, 1405 (9th Cir. 1985) ("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").

> 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.

Watson, 487 U.S. 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).

In a disparate impact case, "[t]his '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 Cmtys. 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 Cmtys.*, 135 S. Ct. 2522). Where a plaintiff does not produce evidence identifying the particular employment practice that is responsible for the disparate impact and/or evidence of causation, the disparate impact claim must fail.[211] *Figueroa*, 923 F.3d at 1086; *Bennett*, 656 F.3d at 817-18; *see also Inclusive Cmtys.*, 135 S. Ct. at 2523.

2. Theory and Arguments

OFCCP frames the legal standard as requiring that it show that Oracle has a facially neutral employment practice that adversely affects a protected group. If this is done, Oracle can rebut the claim only by showing that the practice is job-related and consistent with business necessity. PPB at 6. OFCCP maintains that it is undisputed that Oracle had a policy or practice of relying on prior pay in setting pay at hire. It points out that prior to the 2017 change in policy, prior pay was a mandatory field in the approval form used to present hiring recommendations to higher managers and HR. It further points to evidence that in acquisition hires deviation from current pay in offers was "non-standard" and would need "strong justification." *Id.* at 12-13; *see also* PPF at ¶ 36. OFCCP also claims that there is evidence that prior pay was considered at the CEO level, at least on some occasions, and that several witnesses testified that their pay was set based on their prior pay. PPB at 13.

OFCCP contends that its statistical evidence shows that Oracle utilized a practice of setting starting pay based on prior pay, causing disparate impact on women and minorities. PPB at 15. OFCCP argues that Oracle required managers to set pay based on prior pay prior to October 2017, and enforced this requirement through the approval process. It points to anecdotal evidence indicating that pay at hire would lock an individual into lower pay continually, since corrections were not made. *Id.* at 25; *see also* PPF at ¶ 35. As to causation, OFCCP points to Dr. Madden's analysis comparing starting and prior pay, which found a correlation, inferring that Oracle was setting pay and career level based on prior pay, rather than qualifications. PPB at 25-26. It maintains that the correlation found, the disparity that resulted, and the evidence that Oracle set pay based on prior pay makes out its disparate impact claim. *Id.* at 26; *see also* PPF at ¶ 37. OFCCP then argues that Oracle has the burden of showing that its reliance on prior pay is job related and consistent with business necessity, but cannot do so because 1) since 2017 California law has outlawed reliance on prior pay; 2) Oracle does not mention prior pay as a factor to consider in setting job classification and compensation[212]; and 3) Oracle's Equal Pay Act affirmative defenses cannot, as a matter of law,

[211] Disparate treatment and disparate impact claims are interrelated theories. *See, e.g., Sobel v. Yeshiva Univ.*, 839 F.2d 18, 24-25 (2d Cir. 1988). In pattern or practice cases, a disparate treatment can become a disparate impact claim based on the proffered explanation for the statistical disparity. *Segar v. Smith*, 738 F.2d 1249, 1266, 1270-71 (D.C. Cir. 1984). 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 employment practice. *Id.* at 1267. Though this case involves disparate treatment and disparate impact claims, they unfold somewhat differently than what might "ordinarily" be expected. A disparate treatment claim can transform into a disparate impact claim where a plaintiff shows a disparity (or in the individual case a difference in treatment) that the defendant then explains away by reference to a facially neutral policy or practice. That then sets up the disparate impact analysis, with much of the discussion focusing of business necessity and the later stages of the burden-shifting analysis—there is no dispute that there is a policy or practice that caused the disparity (or different treatment) because the defendant posited as much in its defense of the disparate treatment claim. This case differs—Oracle has not defended the disparate treatment claim by pointing to an alternative cause of the disparity in facially neutral employment policies or practices. The result is that although this case involves both disparate treatment and disparate impact theories, initial attention must be paid in the disparate impact claim to the first stages of the analysis.

[212] OFCCP's argument goes in a confusing direction on this point. It avers that Oracle cannot show that reliance on prior pay is justified by business necessity because Oracle does not list it as a factor to consider in setting starting pay.

render prior pay a legitimate consideration since the Ninth Circuit has held that prior pay is not a job-related factor. PPB at 26-27 (citing *Rizo v. Yovino*, 950 F.3d 1217, 1228-31 (9th Cir. 2020)). OFCCP further argues that the Ninth Circuit in *Rizo* rejected the argument that prior pay is a proxy for skill. *Id.* at 27. OFCCP concludes that "the use of prior pay was a deliberate, budget-driven choice that upended Oracle's own system of internal equity."[213] *Id.*

Oracle contends that to prevail, OFCCP must both establish the existence of a policy or practice and show that the policy or practice caused a disparity. Oracle can then defend by showing that the policy or practice is consistent with business necessity, and OFCCP must then show that other practices without the disparate impact would serve the same purpose. DPB at 35-36. But Oracle argues that OFCCP has not shown that Oracle ever had a policy or practice of basing starting pay on prior pay. It points to evidence that some managers did not use prior pay at all, and others considered it only a data point. As Oracle sees matters, OFCCP only established that some employees were asked about prior pay, with the evidence indicating that the offer was not based on that figure. Oracle points in particular to Ms. Waggoner's and Mr. Miranda's testimony that there was no policy of relying on prior pay, and explains that forms prior to October 2017 asking for this information do not indicate that there was a policy of relying on it. It contends there is no anecdotal evidence of managers basing starting pay on prior pay. Oracle concludes that the absence of a policy or practice is fatal to OFCCP's claim on a disparate impact theory. *Id.* at 36-37; DPF at ¶¶ 20, 63.

Moreover, assuming that there was such a practice or policy, Oracle argues that the statistical evidence does not establish a causal relationship between that policy or practice and unlawful disparities. It sees OFCCP's case premised on a correlation between starting and prior pay, but contends that this is the same level or correlation that is found generally and is to be expected since both employers are paying based on the same skillset. Insofar as OFCCP is relying on Dr. Madden's Table 4 to show causation, Oracle argues that it only looks at disparities in prior and starting pay separately and does not even compute the correlation. Oracle adds that there is still a further missing showing in that OFCCP does not "demonstrate that the amount of starting pay each employee at issue received is the cause of the pay disparities during the time frame relevant to this case." DPB at 38-39 (emphasis removed); *see also* DPF at ¶¶ 41, 54. In reference to acquisition employees, Oracle points to evidence that changes in salary can be made and that further positioning is conducted in future focal reviews. DPF at ¶ 23.

In its reply brief, OFCCP asserts that the record proves that Oracle required consideration of prior pay in setting starting pay. It then restates its arguments regarding the import of Dr. Madden's analysis, claiming that it showed virtually identical disparities in prior pay and starting pay, which indicates causation. As to Oracle's point that the actual correlation of starting and prior pay (rather than the comparison of alleged disparities) is only 78%, OFCCP deems this still "strikingly high" and shows that reliance on prior pay is a mechanism driving disparities at Oracle. PRB at 9-10.

Oracle's reply argues that OFCCP's evidence has only shown that in some instances prior to

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But this undermines the previous claim that Oracle does, in fact, have a *requirement* of considering prior pay in setting starting salary, and a requirement that it enforces. OFCCP cannot have it both ways, though since I do not reach the defenses, this point is not important in the disposition below.

[213] The exact purpose attributed to Oracle here is unclear, but this is a disparate impact, not disparate treatment claim and OFCCP has no need to show (or claim to show) an intent to discriminate by use of prior pay.

October 2017 individual managers may have considered prior pay along with other factors. But it avers that there was no evidence of a policy or widespread practice, point to contrary evidence from various witnesses who denied any policy or practice. It deems OFCCP's other evidence as based on out of context selective quotations and mischaracterizations of testimony. DRB at 14. It clarifies that it is not attempting to justify any pay disparity by reference to prior pay, and so OFCCP's arguments that prior pay is not a job-related skill are misguided. Rather, Oracle's position is that there was no practice of basing starting pay on prior pay and thus the disparate impact claim must fail. It adds that it would also fail for lack of causation, since the evidence only showed an expected correlation between prior pay and starting pay even without reliance by Oracle. *Id.* at 15.

3. Was There a Policy or Practice of Relying on Prior Pay to Determine Starting Pay?

To succeed on the disparate impact claim, OFCCP must establish the existence of the alleged policy or practice, a disparate outcome for women and/or minorities in the job functions at issue, and causation—that the policy in question causes the disparity. OFCCP claims that Oracle had a policy or practice of basing starting pay and prior pay and that this resulted in adverse outcomes for women, Asians, and African-Americans. It relies on evidence of Oracle's use of prior pay information before October 2017 to support the existence of the policy or practice and the analysis of Dr. Madden to show the disparities and the causal connection. Oracle contends that there was no policy or practice before October 2017, there is no disparity to explain, and that causation has not been shown, since Dr. Saad's analysis found correlation between starting and prior pay that reflected what is found in the larger economy.

As set forth in Section V.E.6 above, in October 2017, Oracle adopted a policy forbidding asking candidates about their prior pay. Derivative changes to the recruitment tools and other policies followed. This claim focuses on prior policy and practice where, as discussed, the evidence is somewhat mixed. Candidate offer forms from 2008 and 2009 list prior employer and compensation as a mandatory field, and forms dating to 2015 contain the same field, though it is not completed with a salary/rate. *See* PX 95 at 1; PX 96 at 1; PX 97 at 1; PX 98 at 1. A candidate profile summary form includes current and desired compensation as fields. *See* PX 74 at 1-2. Job postings from 2012-14 contain statements that salary verification will be required. *See* JX 71 at 4; JX 72 at 4; PX 295 at 2; PX 296 at 2; PX 73 at 4. Oracle's iRecruitment Administrator application before the Fall of 2017 contained a field for "Candidates Current Salary/ATV." PX 94 at 2; PX 20 at 21-22. Previously, New Hire Justification forms contained a field for current salary information, though this changed with the October 2017 change in policy. Information needed to be entered into that field, though the hiring manager could simply enter a zero instead of any actual current salary. PX 20 at 59-60.

Mr. Kidder, however, wasn't sure whether or how often prior pay information was actually collected. PX 20 at 23-24. He declared that there was no policy requiring linking prior pay and the offer, despite the mandatory field in the justification form. PX 289 at 2-4. Ms. Waggoner testified that before 2017 Oracle did not require or have a policy requiring consideration of prior pay. HT at 1198; *see also* PX 22 at 346-49. Ms. Holman-Harries was unaware of a policy of asking about prior pay. HT at 376. Ms. Cheruvu did not consider prior pay in hiring, except sometimes as one factor among others. PX 12 at 63, 69, 75-76, 84-85. Mr. Miranda thought that Oracle never required collection of prior pay and never had a rule that linked prior pay and compensation offered—it was sometimes, but not always, considered. HT at 1089, 1116. Mr. Webb didn't think there was any policy about asking for prior pay information and didn't base decisions on prior pay. HT at 1411-12. Review of current compensation was not part of Mr. Loaiza's approval process. PX 21 at 38-

39, 82, 84-86.

There are two distinct policies or practices that could be at issue. One is the *collection* of prior pay information; the other is the *consideration* and *reliance* on prior pay in formulating starting pay offers. The evidence is mixed, but I find that the preponderance of the evidence supports the conclusion that Oracle, prior to October 2017, did have a policy of collecting information about prior pay. There was no central articulation, but Oracle's internal systems marked the field as mandatory and there is evidence that candidates were sometimes informed that providing it would be required (as well as anecdotal evidence that it was requested). Oracle's evidence isn't directly contrary to this conclusion—though it resists the identification of any "policies," the affirmative evidence Oracle offers on this particular point speaks more the consideration and reliance issue, not the collection issue.

For OFCCP's claim to succeed, however, it needs to establish more than a policy of collecting prior pay information. The claim is for a compensation disparity that OFCCP alleges is due to Oracle's practice, so for the claim to have merit Oracle must have had a policy of considering and relying on prior pay in a manner that causes the resulting disparity. This is decidedly *not* a clear claim. There is no clear policy and if there was consideration, it could only be consideration as one among other factors. Oracle's evidence, however, leads me to the conclusion that there was no policy or practice of relying on prior pay to set starting pay, even as one among other factors. This is *not* to say that there may not be a subset of cases in which this sort of claim might have traction—i.e. cases where the hiring manager and/or approvers did do so. But here OFCCP is uninterested in individual cases; it wants to establish a *general* policy or practice that applies on a class-wide basis to make out class-wide claims. So it needs more than some instances, it needs a proper policy or practice of consideration and reliance.[214]

Oracle's managers consistently denied there was any such reliance. There was some contrary evidence, but this went more to the *collection* of the information, not consideration of and reliance on it. In harmonizing the discordant evidence, the natural result is to make this important distinction. It may appear odd to collect information that isn't used, but much less so in the context of a compensation "system" that does not seem to have any hard rules or guidelines and in which factors may be considered in one case but not another. Collection could be some ideal of design and so built into the forms, but the actual practice, based on the evidence here, was not systematically relying on the information in determining pay.

Moreover, it is revealing that although Oracle had a policy of some sort making collecting of the information mandatory, in actual practice this was observed in the breach. Ms. Waggoner, who I found credible, denied that there was any general policy requiring consideration of prior pay because Oracle would not have dictated that sort of policy to a hiring manager. HT at 1221-23. She further testified that although there were forms that marked the field as mandatory, the form could be submitted without any numerical value and in actual practice she observed "numerous forms without that cell entered with a value." PX 24 at 55-57. If this is correct, then a policy of collecting the information would not equate to either a general policy or practice of considering the information because one cannot regularly consider information that isn't regularly collected. Dr. Madden's study is informative here. She found 4,868 instances where there was some sort of prior

[214] As above, the point here is not that the practice must be universal—rather, the policy must be general. If Oracle had a policy of generally relying on the information but departed in some cases, OFCCP's claim could proceed. But here the record leads to the conclusion that there was no general practice, even if in some cases prior pay information was used.

salary record. But only 1,387 of these could actually be analyzed because the hires were not regular, a zero was recorded instead of a salary, the field indicated that salary was unknown, there was some other narrative in the field, or information was given in foreign currency or by hourly wage. PX 1 at 51-52.

Based on this evidence, I conclude that as a matter of fact, Oracle was not collecting this information on a systematic basis, even though at some idealized HR-level it was seeking to do so and so had a loose policy. In actual fact, usable information is missing in the field with significant frequency and Oracle allowed hiring managers to proceed without even collecting or providing the information. Oracle's managers could not have been considering and relying on information that they didn't collect and did not have. I see no direct evidence of any policy or practice of consideration or reliance—Oracle's witnesses denied it and OFCCP's case relies on an inference. But that inference falters on a systemic basis if Oracle was missing the information in many cases. OFCCP has brought a class-wide claim for disparate impact, and so cannot rely on individual instances except to support the inference to a general practice applicable to the "classes" it defined. But in the face of the credible testimony that there was no policy or practice of consideration coupled with the empirical and testimonial evidence that the information wasn't even actually collected and recorded in any systematic way, the inference OFCCP asks me to draw is not plausible. I find that there was no policy or practice of reliance in the manner that OFCCP contends. [215]

The offer justifications (discussed in § V.E.4 *supra*) reinforce this conclusion. They create a sense that Oracle's offers are formulated and justified in part based on opinions about what will induce the candidate to accept. Mr. Loaiza made that point in a straightforward, blunt manner. HT at 1474. But in reviewing the series of justifications provided, I did not get any impression that there was a general practice of relying on prior pay to make an offer—insofar as that was relevant, it was relevant to formulating an attractive offer, and offers often departed, sometimes significantly, from information about prior pay. This is not a case about individual circumstances and there may be particular situations in which a claim targeting reliance on prior pay in individual case would have merit. OFCCP is not interested in that sort of case—it is bringing a disparate impact claim on a class wide basis. So while in some instances prior pay was used to gauge what it would take to hire the employee, I find no general policy of doing this of the sort alleged by OFCCP in this claim.

Part of OFCCP's argument on this point focuses on Oracle's acquisition policies/practices, (discussed in § V.G.6 *supra*), where employees from the acquisition at least were brought into Oracle without changes of pay, though changes were/are possible for internal equity reasons and adjustments are made later after Oracle has a better sense of the role and performance of the new employees. This is, in some sense, a reliance on prior pay. But it is still little assistance for OFCCP's theory in *this* case. OFCCP did not bring a case alleging discrimination against the limited group of female and minority employees who joined Oracle via acquisition. Instead it chose to allege a *general* policy or practice as to all employees in the job functions at issue. There are important differences in those sorts of claims, and if OFCCP wished to bring a narrower claim, it should have done so and given Oracle a fair chance to respond. In the claim that is at issue, even accepting OFCCP's point about acquisitions, I am not led to the conclusion that it asserts—that Oracle had a policy or

[215] The anecdotal evidence relating to use of prior pay plays a different role in this claim than in the claims analyzed above. In a pattern or practice disparate treatment case, the anecdotal evidence provides texture or brings the statistical evidence to life, providing instances of discriminatory treatment that support an inference to a pattern or practice of disparate treatment based on the statistics. In a disparate impact claim, there is no need to show or infer intent, but there is a need to establish the existence of the policy or practice in question. Here, anecdotal evidence taken on its own is weak evidence of a general policy or practice (unless it is anecdotal evidence of a policy or practice).

practice of determining starting salary on the basis of prior salary as to the employees OFCCP defined as part of the "classes" in this case.

4. Could OFCCP Show Causation Via Statistical Evidence?

Even if OFCCP established the existence of a policy or practice of relying on prior pay in setting starting pay, it would also be necessary to show that this policy or practice caused a disparate impact. OFCCP attempted to do so via statistical evidence. And if that evidence were convincing, it might also bolster the case for the existence of a policy or practice—a high degree of otherwise unexpected correlation between starting pay and prior pay would be a basis to infer a general policy or practice. I find, however, that the statistical evidence is not convincing.

Dr. Madden concluded that the disparities reflected in Oracle's workforce reflected disparities existing in prior pay. PX 1 at 5-6. There were no disparities in the correlation and she agreed that some correlation between prior pay and starting pay is expected. HT at 912-13. Dr. Saad originally opined that OFCCP's allegations of reliance on prior pay failed to adequately control for standard job title or the particular skills of the employee. More directly, he argued that that the analysis only showed a correlation that is expected given that both companies are paying for the same skills and that was consistent with what was found in the economy in general. *See* JX 103 at 17, 107-15. In his rebuttal, Dr. Saad observed that there is an expected correlation between starting pay and prior pay given that the employers are employing and compensating the same employee. He tested that correlation at Oracle and found that it was consistent with the correlation observed in the economy as a whole. JX 104 at 72-73. In addition, he opined that Dr. Madden's analysis on the issue had internal flaws involving including improper individuals, with the statistically significant findings disappearing with correction. *Id.* at 73-74. He opined that Dr. Madden had not shown a causal relationship between prior pay and starting pay, instead only finding evidence of the sort of correlation one would expect without any causal relationship. HT at 1598-99, 1733-41.

OFCCP's argument for causation turns on Dr. Madden's analysis. Correlation is not causation, but causation can be inferred from correlation, and it is that inference that OFCCP urges. The substance of Dr. Madden's analysis, however, did not involve studying the relationship of prior pay and starting pay. Instead, it involved studying racial and gender disparities, as measured using her methodology in the other parts of the report, on, *separately*, starting pay and prior pay. Dr. Madden then compared the disparities measured in the separate analyses and found a strong correlation between those disparities. *See* PX 1 at 51-52, 79.

This is a confusing approach to the issue because it overcomplicates the question. The aim is to establish the degree to which prior pay and starting pay are correlated. From those findings causation might be inferred. There is no need to look at racial and gender disparities in this analysis. The disparities, if they exist, would be established by the prior analyses. What we want to know now is the degree to which prior pay for an individual predicts starting pay for that individual. The bulk of Dr. Madden's analysis and argument does not do this. Instead it conducts distinct analyses on prior pay and starting pay, and then compares those results. This is problematic for at least three reasons. First, it is unnecessarily complicated to study the question. Second, it introduces all of the infirmities discussed above with respect to Dr. Madden's modeling and control metrics into this analysis—something that wasn't necessary. And third, what the comparison Dr. Madden elaborated upon is really telling us about is other relationships at the group level, not relationship between starting pay and prior pay at the group level. The comparisons between starting pay and prior pay in this chain of reasoning are actually being made at the group level after the analyses have been

completed, not at an individual level across a group in a manner that would provide average distance between starting pay and prior pay. This attenuates the analysis and makes the reasoning quite indirect.

The natural approach would be to study correlation or starting pay and prior pay, not gender and race differentials within the figures separately and reported at a group level, followed by a comparison. Dr. Madden did this sort of analysis as well, though it plays only a preliminary role in her opinion. She found in a regression of prior salary and starting salary[216] that prior salary explains 61% of the variation in starting pay at Oracle. PX 1 at 51. While this can initially seem significant, there is an additional difficulty of inferring causation here because it is expected—as Dr. Madden agreed, HT at 912-13—that there is a correlation between starting pay and prior pay even when there is no causal relationship between the two.

So a correlation alone is not enough. To be convincing the correlation should be more than what would otherwise be expected. In this light, Dr. Madden's finding that prior pay could explain 61% of starting pay variance is somewhat unremarkable. Absent a causal relationship, one would expect correlation and thus a degree of predictability. But at Oracle 39% of the variation in starting pay cannot be accounted for by assuming a causal relationship. Dr. Saad used Dr. Madden's analysis and calculated a .78 correlation coefficient, showing a .78 correlation between starting pay and prior pay, which is similar to the correlation found in the economy as a whole, which Dr. Saad measured at .75. JX 103 at 114-15; JX 104 at 71-72; HT at 1735-37, 1739-41.

Considering the competing opinions and evidence of record, I find that OFCCP has not shown causation on a "class"-wide basis. The part of Dr. Madden's analysis on the point that was potentially convincing measured correlation/R-squared between prior pay and starting pay. It indicated significant correlation, but everyone agrees that significant correlation is to be expected without a causal relationship. Here Dr. Madden's analysis shows correlation, but it also shows that a significant degree of the variation cannot be explained by assuming a causal relationship. Based on Dr. Saad's analysis and opinion, the correlation at Oracle is relatively similar to what is expected generally. Hence, the correlation here does not support an inference to causation.

5. Conclusion

Though I have analyzed the existence of a policy or practice and the question of whether that policy or practice causes a disparity separately, the two are interrelated. Strong independent evidence of a policy would support a finding a causation (along with other evidence). For instance, if there were good evidence that hiring managers were required to consider and in part based their offers on prior compensation, that would support a finding that starting pay is in part the result of prior pay. Conversely, strong statistical evidence of causation could support a finding that there was a policy or practice, especially in a messy case like this, where there are no clear policies of practices. For instance, an unexpectedly high degree of correlation between starting pay and prior pay would support an inference to the best explanation that hiring managers were, as a general matter, relying on prior salary in making starting salary offers.

Here, however, OFCCP has not provided solid evidence of either a policy or practice of considering and relying on prior pay *or* causation. I thus find that OFCCP has not established its disparate impact claim. While I conclude that Oracle had a policy of collecting prior/current

[216] There is some confusion in the record of what was regressed on what, but that isn't important for the final result.

compensation information, I find that the record does not support the conclusion that Oracle had a policy or practice of relying on prior/current compensation information in setting starting pay in any systemic or general manner. Further, I find that the statistical evidence does not show causation. Rather, it shows the sort of correlation that is to be expected even without a policy or practice.

Finally, this theory is unsuccessful for an independent reason. It relies on the existence of statistically significant disparities in the job functions at issue affecting women, Asians, and African-Americans—these are the disparities that are allegedly caused by the policy or practice at issue. But since above I found Dr. Madden's model deficient in making the appropriate comparisons and adequately accounting for the major factors influencing pay, OFCCP has not shown the existence of disparities by gender and race in need of explanation with reference to actions by Oracle. Each of these points is independent reason to deny the claim. I thus conclude that OFCCP has not established a disparate impact claim and do not proceed further in the analysis.

D. Conclusion: OFCCP Has Not Established Its Complaints

The raw disparities underlying this case are concerning and indicate that unacceptable racial and gender economic inequities persist. But this is a case about discrimination, not simply a disparity. OFCCP alleges that the disparities are due to discriminatory acts of Oracle, and acts of its top executives and HR personnel on a systemic basis. That is, OFCCP contends that the raw disparities seen at the beginning of the analyses are Oracle's doing, at least in part, and Oracle's responsibility rather than the product of other factors. It contends that Oracle 1) has a pattern or practice of disparate treatment in compensation women in the Product Development, IT, and Support functions and Asians and African-Americans in the Product Development function; 2) has a pattern or practice of disparate treatment in steering women in the Product Development, IT, and Support functions and Asians and African-Americans in the Product Development function; and/or 3) had a policy or practice of reliance on prior pay in setting starting pay that causes a disparate impact on women in the Product Development, IT, and Support functions and Asians and African-Americans in the Product Development function.

After careful review of the record in light of governing law, the evidence does not establish the allegations. The suggested mechanisms of discrimination do not exist, could not cause the sort of widespread discrimination alleged, and/or are implausible. The non-statistical evidence does not support an inference that Oracle in engaging in the sort of discrimination alleged, or that it operated under the policy alleged to cause a disparate impact. Most importantly, the statistical evidence offered does not support an inference that Oracle is discriminating, or that there are disparities to be explained by either a pattern or practice of discrimination or a policy or practice of relying on prior pay. The statistical evidence is unconvincing because based on the facts about Oracle, the sort of work its employees perform and the differences in jobs matter for compensation, and the analysis is not making comparisons between the relevant groups of employees. Further, the analysis does not adequately account for the major non-discriminatory factors that influence pay, or in the steering discrimination case, which position an employee occupies. For an analysis to be convincing in a discrimination claim, it should provide a good reason to infer that the underlying disparity in question is the result of discrimination by the employer rather than other factors—such as pre-existing inequities and imbalances. The analysis here does not do that, instead reaching its results by making powerful, but unwarranted assumptions. Considering the claims that OFCCP chose to bring and the entirety of the evidence presented in light of the governing law, OFCCP did not establish its case, and the record does not substantiate its allegations. I accordingly recommend that

OFCCP's complaint be dismissed. In light of this recommendation, no further proceedings are necessary and the bifurcated hearing on damages is moot.

E. Oracle's Request for Costs

In the event that it prevails, Oracle requests that it be awarded its costs of suit. *E.g.* DPB at 40. Oracle does not, however, elucidate any basis for an award of costs. The Federal Rules of Civil Procedure provide for an award of costs to a prevailing party, unless otherwise provided by applicable law. *See* Fed. R. Civ. P. 54(d)(1). "But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law." *See id.* In the absence of guidance by the governing regulations, the Federal Rules of Civil Procedure apply here. *See* 41 C.F.R. § 60-30.1. The governing regulations do not provide for any award of costs. Though the Federal Rules of Civil Procedure apply to procedural matters, this does not mean that the *powers* accorded to Article III judges in applying those rules automatically vest in an ALJ hearing an administrative complaint. So, for instance, though matters of discovery in this case were largely governed by the Federal Rules of Civil Procedure, at no one point did I apply the quasi-automatic fee-shifting provisions found in Fed. R. Civ. P. 37(a)(5).[217] Indeed, no party ever attempted to invoke this provision. For good reason—I am aware of no grant of authority that would allow me to award fees in those circumstances.

Similarly, I am aware of no grant of authority that would allow me to award costs to the prevailing party.[218] Insofar as an award of costs (or fees) might be awarded in a case such as this, it would be a result of the Equal Access to Justice Act. *See* 5 U.S.C. § 504; *see also Sims v. Apfel*, 238 F.3d 597, 599-600 (5th Cir. 2001) (explaining application); 29 C.F.R. § 16.104(a)(3) (applicable to OFCCP proceedings). But Oracle has not asked me to make the prerequisite findings for such an award. Further, under the implementing regulations, Oracle could not be eligible for any award. *See* 29 C.F.R. § 16.105(b)(5). Since Oracle does not articulate a sound basis for the award of costs that it seeks and I perceive none, Oracle's request for an award of costs is denied.

ORDER

For the reasons stated above, it is recommended that:

1. OFCCP's Second Amended Complaint be dismissed with prejudice.

2. An Administrative Order be entered in favor of Oracle.

[217] Though perhaps the application of this provision might have served the wholesome purpose of cajoling the parties to behave more reasonably and cooperatively in matters of discovery.

[218] Arguments might be made otherwise (*cf.* 41 C.F.R. § 60-30-15(n)) but they are not facially persuasive and no party has pursued such an argument.

3. Oracle's request for costs be denied.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

To appeal, you must file exceptions ("Exception") with the Administrative Review Board ("Board") within fourteen (14) days of the date of receipt of the administrative law judge's recommended decision.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the Exception with the Board, together with one copy of this decision. If you e-File your Exception, only one copy need be uploaded.

Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an

extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See* 41 C.F.R. § 60-30.28.

Even if no Exception is timely filed, the administrative law judge's recommended decision, along with the record, is automatically forwarded to the Board for an administrative order. *See* 41 C.F.R. § 60-30.27.