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FILED
SAN MATEO COUNTY

APR 30 2020

Clerk of the Superior Court

By 
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN MATEO

RONG JEWETT, SOPHY WANG, and XIAN
MURRAY, on behalf of themselves, and
ELIZABETH SUE PETERSEN, MARILYN
CLARK, and MANJARI KANT, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

ORACLE AMERICA, INC.,

Defendant.

) Case No.: 17CIV02669

) **ORDER DENYING ORACLE'S**
) **MOTIONS TO STRIKE DAVID**
) **NEUMARK PH.D.'s, JANUARY 2019**
) **REPORT AND APRIL 2019**
) **REBUTTAL REPORT IN SUPPORT**
) **OF PLAINTIFFS' MOTION FOR**
) **CLASS CERTIFICATION**

) Assigned for all purposes to the
) Honorable V. Raymond Swope

) Complaint Filed: June 16, 2017

) Trial Date: No date set

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17CIV02669

1 On Friday, February 7, 2020, the Court heard Oral Argument on Defendant Oracle
2 America, Inc.'s Motions to Strike Professor David Neumark's January 2019 Report and April
3 2019 Rebuttal Report in Support of Plaintiffs' Motion for Class Certification.

4 Having fully reviewed and considered the reports, the papers submitted by the Parties in
5 connection with Oracle's Motions to Strike Professor Neumark's January and April Reports, and
6 the Oral Arguments presented at the February 7, 2020 hearing, the Court makes the following
7 findings of fact:

8 1) Dr. Neumark, a Professor at the University of California, Irvine, who has a Ph.D.
9 in Economics from Harvard University, has knowledge about labor economics and statistics that
10 is beyond common experience. He has written peer reviewed articles on those topics, including
11 the topic of discrimination. Oracle does not contest that Professor Neumark is a qualified Labor
12 Economist and Statistician.

13 2) In preparing his January 2019 Report and April Rebuttal, Professor Neumark
14 relied on materials that are the type of materials reasonably relied upon by Labor Economists and
15 statisticians when forming opinions. *See* Neumark January Report at Appendix E (Materials
16 Used); Neumark April Report at ¶7. Those materials included deposition testimony from a
17 witness Oracle designated as most knowledgeable regarding Oracle's compensation policies and
18 practices, Kate Waggoner, who testified about Oracle's job classification system, which is used
19 by Oracle when setting compensation. Finberg Decl., Ex. B (Waggoner) at 225:11-19 ("People
20 in each of these job codes shares certain basic skills, knowledge, and abilities"); 229:7-9
21 (Persons in job codes share "similar" "levels of responsibility and impact"). Professor Neumark
22 also reviewed documents regarding Oracle's job classification system, including Oracle's Global
23 Job Table, *see* Neumark April Report at ¶7; Finberg Reply Decl. Ex. B (Neumark) at 70:7-71:1
24 (Reviewed Global Job Table), which groups Oracle employees by job functions, job specialty,
25 job family, and responsibility level in job codes, each of which has a specific salary range and
26 identified education and experience requirements. Finberg Decl., Ex. Z. Professor Neumark had
27 a reasonable basis for his opinion as a Labor Economist that Oracle employees in the same job
28 code were performing substantially equal or similar work.

1 3) Professor Neumark conducted his statistical analyses using human resource and
2 payroll data provided by Oracle, including information about employees' job histories, such data
3 are the type of materials reasonably relied on by Labor Economists and Statisticians when
4 forming opinions. compensation, tenure at Oracle, education, performance review scores, and
5 prior pay.

6 4) The regression analyses Professor Neumark included in his report were prepared
7 using well accepted and reliable statistical methods.

8 Analysis of pay data through regression analysis, without analysis of narrative
9 explanations for pay decisions, is typical of what labor economists do, and is widely accepted in
10 the field of labor economics and in the courts. See Finberg Reply Decl., Exs. I, J, K, (Plaintiffs'
11 Ex. 82 at Table 4, p. 3157; Ex. 83 at Table 2, p. 238; Ex. 84 at 120). Labor economics
12 authoritative texts and peer-reviewed journals regularly publish articles with regression analyses.
13 *Id.* Those regression analyses study compensation disparities among persons performing similar
14 work. Labor economists regularly infer discrimination from regressions that show a correlation
15 between protected class status and lower pay when that disparity is not explained by reasonably
16 identifiable, bona fide factors such as education experience, job tenure, performance, or company
17 tenure, and the result is statistically significant. Finberg Reply Decl., Exs. H, I, J (Plaintiffs' Ex.
18 82 at Table 4, p. 3157; Ex. 83 at Table 2, p. 238; Ex. 84 at 120).

19 5) Professor Neumark had a reasonable basis for his opinions that women working
20 within the same job codes as men were compensated less than men. Professor Neumark had a
21 reasonable basis for the opinion in his rebuttal report that women working in the same job codes
22 and organizations (a proxy for product) as men were compensated less than those men.

23 6) Professor Neumark had a reasonable basis for his opinions that education, years
24 of prior job experience, tenure at Oracle, and performance review scores do not explain the
25 gender pay gap faced by women in the same job code as men.

26 7) Professor Neumark had a reasonable basis for his opinion that prior pay is highly
27 correlated with starting pay at Oracle, and that correlation is not explained by the new hires'
28 education or years of prior job experience. Professor Neumark had a reasonable basis for his

1 conclusion that the gender gap in prior pay was very close to the gender gap in starting pay, and
2 remained in place over the course of the women’s tenure at Oracle.

3 The court reaches the following conclusions of law:

4 1) “[C]ourts must ‘be cautious in excluding expert testimony’ as the trial court’s
5 gatekeeping goal ‘is simply to exclude ‘clearly invalid and unreliable’ expert opinion.’”
6 *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 293, as modified (Jan. 10,
7 2018) (citing *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55
8 Cal.4th 747, 772. “The court must not weigh an opinion’s probative value or substitute its
9 own opinion for the expert’s opinion. Rather, the court must simply determine whether
10 the matter relied on can provide a reasonable basis for the opinion or whether that
11 opinion is based on a leap of logic or conjecture. The court does not resolve scientific
12 controversies.” *Sargon Enterprises*, 55 Cal.4th at 772. *In Re Cipro Cases I & II* (2004)
13 121 Cal.App.4th 402, 412 (“the class certification stage is not the proper forum in which
14 to resolve such a dispute between experts. At this stage of the proceedings, ‘it is not our
15 role, nor the trial court’s job, to involve ourselves with the merits of the underlying action
16 or which parties’ experts are most qualified.’”). *See also Ellis v. Costco Wholesale Corp.*,
17 285 F.R.D. 492, 521-523 (N.D. Cal. 2012) (admitting plaintiffs’ statistical analyses
18 despite criticisms from Dr. Saad, Oracle’s expert in this case).

19 2) A dispute between two labor economists about proper control variables goes at
20 most to the weight of the opinions, not to its admissibility. “Disputes regarding the proper
21 variables to employ in statistical studies are more properly left for juries to consider and to
22 decide.” *EEOC v. Morgan Stanley & Co.*, 324 F.Supp.2d 451, 458 (S.D.N.Y. 2004); *Wright v.*
23 *Stern*, 450 F.Supp.2d. 335, 359-63 (S.D.N.Y. 2006) (arguments between expert statisticians and
24 labor economists go to weight rather than admissibility of evidence).

25 3) Courts regularly accept regression analyses in Equal Pay Act and Title VII Cases.
26 *See e.g.*, *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476 (2d Cir. 2001); *Paige v. California*, 291
27 F.3d 1141, 1145 (9th Cir. 2002); *Wright*, 450 F.Supp.2d. at 359-63; *Morgan Stanley*, 324
28 F.Supp. at 458; *Taylor v. United Parcel Service, Inc.*, 554 F.3d 510, 523 (5th Cir. 2008); *Beck-*

1 *Wilson v. Principi*, 441 F.3d 353, 363-64 fn.3 (6th Cir. 2006); *Hemmings v. Tidyman's, Inc.*, 285
2 F.3d 1174, 1183-84 (9th Cir. 2002).

3 4) In *Beck-Wilson*, 441 F.3d 363, an Equal Pay Act Case, the Sixth Circuit
4 emphasized that “The text of the EPA may not be brushed with such a demanding gloss as to
5 suggest that plaintiffs' prima facie case fails because each one has not identified one specific
6 individual who constitutes a *perfect* male comparator...Moreover, whether two positions are
7 substantially equal for EPA purposes is a question of fact for the jury.” See *Tomka v. Seiler*
8 *Corp.*, 66 F.3d 1295, 1311 (2d Cir. 1995) (“[I]t is for the trier of fact to decide if [there] is a
9 significant enough difference in responsibility to make the jobs unequal”). In *Beck-Wilson*, the
10 Sixth Circuit expressly found that admission of statistical regressions analyses was appropriate in
11 an Equal Pay Case: “we affirm the district court's conclusion that this statistical evidence of a
12 gender-based disparity in pay supports plaintiffs' prima facie case. We have previously held that
13 an EPA plaintiff can rely upon statistical evidence of a gender-based disparity in pay when
14 establishing a prima facie EPA case.”

15 5) Similarly, in *Lavin-McEleney*, 239 F.3d at 476, the Second Circuit expressly
16 accepted statistical evidence in an Equal Pay case including university professors in different
17 departments, agreeing with the Sixth Circuit and an earlier decision of the Second Circuit, that
18 “[w]hether two positions are “substantially equivalent” for Equal Pay Act purposes is a question
19 for the jury.” *Id.* at 481. The Second Circuit further held “statistical evidence of a gender-based
20 salary disparity among comparable professors properly contributed to plaintiff's case... not only
21 to establish liability, but also in calculating damages.” *Id.*

22 6) The California Supreme Court has expressly approved of expert testimony from
23 statisticians in employment class actions. California courts consider “pattern and practice
24 evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a
25 defendant’s centralized practices in order to evaluate whether common behavior towards
26 similarly situated plaintiffs makes class certification appropriate.” *Sav-On Drug Stores v.*
27 *Superior Court* (2004) 34 Cal.4th 319, 333. As the United States Supreme Court stated in *Int'l*
28 *Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977), “our cases make it unmistakably

1 clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases
2 in which the existence of discrimination is a disputed issue."

3 7) Labor economists and statisticians frequently disagree over the appropriate level
4 of aggregation. The Ninth Circuit noted in *Paige* that "it is a generally accepted principle that
5 aggregated statistical data may be used where it is more probative than subdivided data. Such use
6 is particularly appropriate where small sample size may distort the statistical analysis and may
7 render any findings not statistically probative." 291 F.3d at 1148 (citations omitted). The court
8 emphasized that "[i]ndeed, some commentators suggest that stratification should be upheld only
9 if the employer can demonstrate that 'the stratification is appropriate, and that the stratifying
10 variable is business justified.'" *Id.* (citations omitted). The court went on to state that "[i]n
11 general, 'the plaintiff should not be required to disaggregate the data into subgroups which are
12 smaller than the groups which may be presumed to have been similarly situated and affected by
13 common policies.'" *Id.* (citations omitted). See also *Ellis*, 285 F.R.D. 492 at 523 ("The Court
14 finds there is good reason to rely on nationwide statistics... the larger aggregate numbers allow
15 for a robust analysis and yield more reliable and more meaningful statistical results.")

16 Whereby, the Court hereby orders as follows:

17 1) Oracle's Motion to Strike Professor Neumark's January 2019 Report and April
18 2019 Rebuttal Report In Support of Plaintiffs Motion for Class Certification are DENIED.

19 2) Oracle's criticisms of Professor Neumark's reports go to the weight to be
20 accorded those reports, not to their admissibility.

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