**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| FRANCES YVONNE SCHULMAN,<br>*Plaintiff*,<br>*v.*<br>ZOETIS, INC. and ZOETIS REFERENCE LABS, LLC,<br>*Defendants*. | Civ. Action No.:<br>2:22-cv-1351 (JXN)(LDW)<br><br>**ORAL ARGUMENT REQUESTED**<br><br>**Return Date**: June 17, 2024 |

# PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVE MOTION TO STRIKE PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES

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## PRELIMINARY STATEMENT

Zoetis argues it was reasonable and necessary to pay Drs. EJ Ehrhart and Samuel Jennings salaries of $230,720 and $195,000 because those were their prior salaries and it had decided not to reduce salaries because it needed to retain pathologists to grow its business.[1] Defs.' Br., ECF No. 106-1, at 14, 32-33; Plaintiff's Statement of Undisputed Facts, ECF No. 111 ("Pl.'s SUMF"), ¶¶ 16-17. At the same time, it brought Dr. Schulman on at just $125,000. Pl.'s SUMF ¶¶ 25-28. The hiring manager freely acknowledged she was paid so little to save the company money. *Id.* ¶ 26. He also acknowledged that she was the "most experienced pathologist on the team," well-known, respected, and a "key opinion leader." *Id.* ¶ 23. When Dr. Schulman discovered the disparity and asked for it to be fixed, Zoetis's Chief Medical Officer told her they were trying to get approval to go beyond a normal salary correction for her, which was possible to try to retain people. *Id.* ¶ 75, Pl.'s Response to Defendants' Rule 56.1 Statement ("Pl.'s Resp.") ¶ 149. But a Zoetis executive decided to keep her salary exactly where it was. Pl.'s SUMF ¶ 79.

Paying a man whatever is needed to retain him, while saving money on a woman doing the same job—and telling her to pound sand when she asks for equal pay—may have been legal before the federal Equal Pay Act, Title VII, and their New Jersey analogues were passed. It is not now.

[1] For the same reasons as in Plaintiff's brief for partial summary judgment, Zoetis, Inc. and Zoetis Reference Labs, LLC are collectively referred to herein as "Zoetis."

Zoetis's motion for summary judgment must be denied in its entirety. As laid out in Dr. Schulman's moving brief, ECF No. 110, summary judgment must instead be granted for her on her claims under the federal Equal Pay Act ("EPA"), the New Jersey Equal Pay Act ("NJEPA"), and Section 12(a) of the New Jersey Law Against Discrimination ("NJLAD") because she has a prima facie case under each based on facts as to which there is no genuine material dispute, *and* Zoetis cannot prove an affirmative defense. New Jersey law applies because, *inter alia*, Zoetis has not established a conflict; and because Zoetis, Inc. and Zoetis Reference Labs are both New Jersey-based companies and all the discriminatory decisions and actions at issue in this case were made or centered in New Jersey, including a Zoetis, Inc. executive deciding in New Jersey not to raise Dr. Schulman's pay.

Zoetis's motion for summary judgment on Dr. Schulman's Title VII claim must be denied because a reasonable jury could find its rationale for the pay disparity was pretext where it inexplicably failed to apply its retention rationale to her.

Finally, Zoetis, Inc. is, like Zoetis Reference Labs, LLC, a proper party. And Zoetis's motion to strike Dr. Schulman's prayer for punitive damages must be denied because the key question, its knowledge or intent for its actions, presents a jury issue.

## LEGAL STANDARD

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as

a matter of law." FED R. CIV. P. 56(a). A fact is material if it might "affect the outcome of the suit under the governing law," and a dispute as to a material fact is genuine if the evidence is such that "a reasonable [factfinder] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "On a motion for summary judgment, a district court must view the facts in the light most favorable to the non-moving party and must make all reasonable inferences in that party's favor." *Hugh v. Butler Cty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005). It does "not weigh the evidence or make credibility determinations." *Boyle v. Cnty. of Allegheny*, 139 F.3d 386, 393 (3d Cir. 1998).

## ARGUMENT

### I. Zoetis's Motion for Summary Judgment on the EPA Claim Fails.

Under the EPA's two-step test, a plaintiff makes out a prima facie case by showing an opposite-sex employee was paid more for substantially equal work, which means "work of substantially equal skill, effort and responsibility, under similar working conditions." *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000). If she does, the burden of proof shifts to the employer to prove an "affirmative defense so clearly that no rational jury could find to the contrary." *Id.* (quotation omitted). Because Dr. Schulman has a prima facie case based on facts as to which there is no genuine material dispute, and Zoetis cannot prove an affirmative defense, its motion fails.

### A. Dr. Schulman has a prima facie case because Zoetis paid her less than men to do equal work.

The EPA requires that a plaintiff's work be "substantially equal" to her comparator's. *Shultz v. Wheaton Glass Co*., 421 F.2d 259, 265 (3d Cir. 1970) (men and women did equal work where their core duties were the same but men also did handyman tasks); *see also Usery v. Allegheny Cnty. Inst. Dist*., 544 F.2d 148, 152-53 (3d Cir. 1976) (barbers and beauticians did substantially equal work under EPA despite some differences). The critical question is whether the jobs have a "common core" of similar tasks. *Brobst v. Columbus Servs. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985). "[J]obs need not have the same balance of content in order to be substantially similar under the EPA." *Dubowsky v. Stern, Lavinthal, Norgaard & Daly*, 922 F. Supp. 985, 993 (D.N.J. 1996) (quotation omitted). As Zoetis previously conceded and the record shows, that standard is more than met here.

#### 1. Zoetis has already conceded that Drs. Schulman, Jennings, and Ehrhart did the same work.

Despite the new theory Zoetis has developed for litigation that Drs. Schulman, Jennings, and Ehrhart did different work because the anatomic pathology cases they reviewed sometimes differed, the record shows they did substantially equal work. Zoetis conceded in its administrative Position Statement as to both Drs. Ehrhart and Jennings that their "position[s] with Zoetis as a full-time veterinary pathologist required substantially equal skill, effort, and responsibility, and [were] performed

under substantially equal conditions as the position of full-time veterinary pathologist held by Dr. Schulman following her employment by Zoetis on or about September 16, 2020." Pl.'s SUMF ¶ 32; *see also Id.* ¶¶ 30-46. Ivelisse Williams, an HR representative who originally verified those statements as a corporate representative, and was involved in deciding not to raise Dr. Schulman's salary, re-confirmed in her deposition that those statements were true. Baran Decl., Ex. 13, Williams 6/30/23 Dep. 252:13-260:3; Pl.'s Resp. ¶ 219.[2]

**2. Dr. Schulman's job was substantially equal to Drs. Erhart and Jennings's, and Zoetis cannot show otherwise.**

Beyond Ms. Williams' testimony, the rest of the record also shows that Drs. Schulman, Ehrhart, and Jennings did substantially equal work. Pl.'s SUMF ¶¶ 30-46. As their manager Dr. Gardiner testified, Drs. Schulman, Jennings, and Ehrhart's core job duties were to "[r]eview the cases that are assigned each day, interact with fellow pathologists on difficult cases as needed," and "return phone calls to clients who have questions about reports that [they] issued." *Id.* ¶ 31; Pl.'s Resp. ¶¶ 111, 204 (describing Drs. Schulman's, Jennings's, and Ehrhart's duties the same way;

[2] Although the record conclusively shows Drs. Schulman, Ehrhart, and Jennings did the same work, supporting summary judgment in Dr. Schulman's favor, Zoetis's newly formulated-for-litigation argument that they did dissimilar work would be grounds to deny *it* summary judgment on Dr. Schulman's EPA, Title VII, and state-law claims. *Cox v. Off. of Att'y Ethics*, No. CIV. 05-1608(AET), 2007 WL 1234977, at *2 (D.N.J. Apr. 26, 2007) (denying defendant summary judgment where jury could find its rationale for pay gap was "after-the-fact rationalization").

agreeing Dr. Jennings' job duties were "the same as Dr. Schulman" and Dr. Ehrhart's job duties were "the same" except that in 2020 "he may" have done "some" "histology lab oversight"). They did about "the same number of cases each day. [They] were all on the same team, and . . . if one of [them] was not working that day, for whatever reason, cases would be re-distributed amongst [them], so [they] were all doing the same job." Pl.'s SUMF ¶ 34.

Although Zoetis makes much of the fact that Drs. Ehrhart and Jennings continued to read cases from Ethos specialty hospitals, which tended to be complex, that did not make their jobs dissimilar to Dr. Schulman's. Indeed, the document Zoetis relies on shows the opposite—that the pathologists' caseloads were comparable. In that document, Dr. Gardiner was explaining to a half-time pathologist who felt she was being asked to review too many cases that "[b]ecause not all cases are 1:1 in terms of effort I don't think it is as easy as halving one pathologist's caseload to get to a half time equivalent caseload." Pl.'s Resp. ¶ 168. He went on: "For instance, [Drs. Jennings and Ehrhart] read on average about 25 cases a day but a lot of them come from the ETHOS specialty hospitals which are almost always multisite [bizarre] cases whereas Dr D[] reads a considerable amount of routine stuff so she reads on average 35-40 cases. Dr Schulman reads about 30 cases and is somewhere between Dr D[] and Sam and EJ in terms of case make up. Ethan reads about 30 cases a day but a lot of that is exotics necropsy in a jar cases.

Our contractors regularly get more than 40 cases a day. I have no idea if any of those numbers are perfect. I do think they are all fair. . . .” *Id.* As Dr. Gardiner explained, the pathologists’ workloads were comparable when case numbers and case complexity were considered. And as his explanation shows, Dr. Schulman’s caseload was particularly comparable to Drs. Jennings and Ehrhart’s.

Moreover, although Zoetis now argues that Drs. Ehrhart, Jennings, and Schulman did not do substantially equal work if their cases were not identical, that is exactly what the law does not require. *Brobst*, 761 F.2d at 155 (“Congress did not intend to limit the applicability of the [EPA] to cases involving identical work”). In fact, a case Zoetis cites held that while some employees “handle[d] more complex cases,” their job responsibilities were “identical except for this difference in complexity,” and so because the jobs “share a ‘common core’ of tasks,” the employees did “substantially equal jobs” under the EPA.[3] *Wachter-Young v. Ohio Cas. Grp.*, 236 F. Supp. 2d 1157, 1162 (D. Or. 2002) (citation omitted).

Finally, Zoetis also vaguely suggests that Drs. Ehrhart and Jennings “had additional responsibilities beyond reading cases while employed by Ethos and

[3] Defendants’ citation of 29 C.F.R. § 1620.17(b)(2) is similarly misplaced. It describes two sets of sales clerks, one with and one without power to decide whether to accept personal checks, as an example of a “considerable, additional degree of responsibility which may materially affect the business operations of the employer” that could show unequal responsibility. Here, reviewing cases from different clients is not a different responsibility; it is a minor variation in the *same* responsibility.

continued those responsibilities at ZRL," and hints that "while at Ethos Drs. Ehrhart and Jennings were involved in creating the Pathology department, supervised and trained Pathologists, and prepared Standard Operating Procedures." Defs.' Br. at 11. If Zoetis is suggesting that, *at Zoetis*, Drs. Ehrhart and Jennings were "involved in creating the Pathology department, supervis[ing] and train[ing] Pathologists, and prepar[ing] Standard Operating Procedures," and so had meaningfully different duties from Dr. Schulman *at Zoetis*, that is simply wrong. There is no evidence that, in 2020 or 2021, either created Zoetis's pathology department, supervised or trained pathologists, or that Dr. Ehrhart created standard operating procedures. Nor does Zoetis cite any. In the transcript passage Zoetis cites, *Id.*, Zoetis Reference Labs testified that Drs. Ehrhart and Jennings were paid what they were at Ethos because they had "bigger roles in their legacy compan[y]" than at Zoetis, which had included "creating the pathology department in some cases, writing SOP documents, [and] training." Defs.' Rule 56.1 Stmt. ¶ 164; Cino Cert, Exh. X, DaCosta Dep. Tr. 160:3-11. It was, in short, plainly not a description of their duties at Zoetis. Dr. Jennings was one of several pathologists, *including* Dr. Schulman, who worked on standard operating procedures for Zoetis. Pl.'s Resp. ¶¶ 60, 166, 220.[4] Zoetis was thus correct

[4] Where the plaintiff and comparator share a common core of tasks but the employer alleges the comparator performs particularly valuable extra duties that merit higher pay, this is analyzed as an extra-duties defense. *See* 29 C.F.R. § 1620.20 (describing extra-duties defense); *Shultz*, 421 F.2d at 267 (holding company did not establish

to concede, in its statement to the local civil rights commission, which Ivelisse Williams re-affirmed the accuracy of, that Drs. Schulman, Ehrhart, and Jennings did substantially equal work. *Id.* ¶ 219.

**B. Zoetis cannot state an affirmative defense.**

Zoetis cannot meet its burden of proving an affirmative defense. It asserts only the EPA's fourth affirmative defense, that the disparity was based on "any other factor other than sex." 29 U.S.C. § 206(d)(1). It cannot show that its asserted rationale of prior pay is a factor other than sex because reliance on prior pay generally incorporates sex discrimination in pay; is not job-related; and in any event, does not explain the entire disparity here.

**1. Zoetis cannot show that prior salary is not based on sex.**

Zoetis's categorical argument that salary based on prior pay is not based on sex cannot be squared with the EPA's text and purpose, the Supreme Court's interpretation of the EPA, or the Third Circuit's endorsement of the Ninth Circuit's decision in *Rizo v. Yovino*, 950 F.3d 1217, 1220–21 (9th Cir. 2020)—which held

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extra-duties defense where it did not show "economic value" of men's extra duties exceeded those of men and women's shared core duties or that women would not have done extra duties if given the chance). Zoetis does not, and cannot, claim that it paid Drs. Jennings and Ehrhart more for extra duties; it avowedly paid them their salaries solely because it was their prior pay. *See, e.g.*, Defs.' Br. at 33 ("any wage differential was based on the decision to not reduce the salaries of any Ethos colleagues"); Defs.' Rule 56.1 Stmt. ¶¶ 98, 126, 164. Zoetis's witnesses also made clear they had not paid Drs. Ehrhart and Jennings more because of extra duties. *See* Defs.' Rule 56.1 Stmt. ¶¶ 97, 126; Pl.'s Resp. ¶¶ 126, 140, 170, 205-218.

that prior salary is *not* a factor "other than sex." Instead of any of these, Zoetis directs the Court to out-of-circuit district court cases that predominantly relied on the Ninth Circuit's now-overruled decision in *Kouba v. Allstate Insurance Co*., 691 F.2d 873 (9th Cir. 1982). The few cases it cites that do not rely on this now-overruled precedent largely rely on Seventh Circuit precedent that—as other circuits have recognized—is contrary to Supreme Court precedent, and which the Third Circuit has treated as contrary precedent. These overruled, undermined, and outlier precedents do not counsel against departing from the EPA's text or Supreme Court or Third Circuit precedent.

As explained fully in Plaintiff's moving brief and incorporated here by reference, *see* ECF No. 110 at 11-25, prior pay cannot satisfy the fourth affirmative defense for three reasons. First, Zoetis cannot show prior pay is a factor other than sex because, as the Third Circuit has observed and the record evidence shows, prior pay is pervasively based on sex. *Greater Phila. Chamber of Com. v. City of Phila*., 949 F.3d 116, 143 (3d Cir. 2020) (citing *Rizo v. Yovino*, 887 F.3d 453, 460–61 (9th Cir. 2018) (*en banc*) for proposition that prior salary is not factor other than sex under EPA); Pl.'s SUMF ¶¶ 48-51. Second, Zoetis cannot show prior pay is job-related, as the EPA makes clear it would have to, because it has conceded as to both Dr. Ehrhart and Dr. Jennings that each was "not paid more than [Dr. Schulman] because of a factor related to his job as a Veterinary Pathologist." Pl.'s SUMF ¶ 46.

Finally, Zoetis cannot show that Drs. Ehrhart and Jennings's prior pay explains the entire disparity, as it concededly hired Dr. Schulman at such a comparatively low salary to save money; and after hiring her, it repeatedly hired less-experienced male pathologists at higher salaries. *Id.* ¶¶ 82-94.

Zoetis instead focuses primarily on out-of-circuit district court decisions that relied on *Kouba*, which *Rizo* overruled. *See* Defs.' Br. at 11-15. *Kouba* had held that the EPA "does not impose a strict prohibition against the use of prior salary," as long as employers considered prior pay "reasonably" for "an acceptable business reason." 691 F.2d at 876–78. Relying on *Kouba*, the district court in *Arthur v. College of St. Benedict*, 174 F. Supp. 2d 968, 977 (D. Minn. 2001) held that, where a men's and women's college merged and the men's college's (predominantly male) faculty's more-generous tuition benefit was "grandfathered" in, the "grandfathered" benefit was essentially based on prior salary. *Id.* It held that "previous employer salary" was the correct analytical framework for analyzing "grandfathered" pay, and, citing *Kouba*, that employers could use prior salary to set pay. *Id.*

Likewise, *Russell v. Placeware, Inc.*, No. CIV. 03-836-MO, 2004 WL 2359971 (D. Or. Oct. 15, 2004) and *Wachter-Young v. Ohio Cas. Grp.*, 236 F. Supp. 2d 1157, 1162 (D. Or. 2002) also relied on *Kouba*. *Rizo*, a 2020 Ninth Circuit decision, overruled these District of Oregon decisions to the extent they conflict. *See Rizo*, 950 F.3d at 1229 (overruling *Kouba*).

This case law Zoetis cites relying on *Kouba* is not just undermined or overruled; it is also incorrect under the EPA's text and purpose and Supreme Court precedent interpreting it. As the Ninth Circuit held in overruling *Kouba*, "allowing prior pay to serve as an affirmative defense would frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities." *Rizo*, 950 F.3d at 1228. And because using prior pay to set salary perpetuates pay discrimination, *Kouba*'s decision to permit use of prior pay in combination with other factors allowed, "[a]t best," some "water[ed] down" discrimination—also at odds with the EPA's text and spirit. *Id.* at 1230. Moreover, *Kouba*'s consideration of whether employers used prior pay "reasonably" for a business purpose is "in tension with the EPA's strict liability framework, in which intent to discriminate plays no role," and can incorrectly "blur the line between the *McDonnell Douglas* three-step test for Title VII claims and the two-step test applicable to the EPA." *Id.* (quotation omitted). Finally, *Kouba*'s blessing of "business reasons" for pay disparities could not "be squared with the Supreme Court's rejection of the market force theory" in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), because it immunized decisions that "'may be understandable as a matter of economics,'" but "'became illegal once Congress enacted into law the principle of equal pay for equal

work.'" *Id.* (quoting *Corning Glass*, 417 U.S. at 205).[5] *Arthur*, *Russell*, and *Wachter-Young*'s reliance on *Kouba* was, therefore, misplaced.

Next, although most circuits to have addressed the question have held that prior pay cannot alone justify pay disparities, the Seventh Circuit stands at odds with them. *Greater Philadelphia*, 949 F.3d at 148 n.240 (collecting cases; citing Seventh Circuit as contrary authority). The Seventh Circuit has held that prior salary is a factor other than sex where the plaintiff did not offer "expert evidence (or even a citation to the literature of labor economics) to support a contention" that prior employers "use wage scales that violate the [EPA] and thus discriminate against women." *Wernsing v. Dep't of Hum. Servs.*, 427 F.3d 466, 470 (7th Cir. 2005). Zoetis relies heavily on this outlier circuit. Defs.' Br. at 12-13.

The Seventh Circuit's approach is wrong for two reasons. First, it ignores that it is the employer who must prove that "sex provided no basis for the wage differential." *Dubowsky*, 922 F. Supp. at 993; *see also Boyer v. United States*, 97 F.4th 834, 845 (Fed. Cir. 2024) ("As the party with the burden of proof, the employer

[5] Zoetis also cites *Taylor v. White*, which decided to employ, instead of a rule defining factors other than sex, a "case-by-case analysis" to "preserve[ ] the business freedoms Congress intended to protect" while "ensur[ing] that employers do not rely on the prohibited 'market force theory' to justify lower wages for female employees simply because the market might bear such wages." 321 F.3d 710, 718-20 (8th Cir. 2003) (quotation omitted). As *Rizo* observed, this cannot be squared with *Corning* because "'business freedoms' is broad enough to accommodate circumstances that run afoul of" *Corning*'s holding "that market forces cannot justify unequal pay for comparable work." 950 F.3d at 1227.

is not entitled to simply assume that prior pay is unrelated to (or 'other than') sex."). Second, "the Seventh Circuit implicitly used the market force theory to justify the pay disparity and . . . ignored congressional intent as to what is a 'factor other than sex.'" *Glenn v. Gen. Motors Corp*., 841 F.2d 1567, 1571 (11th Cir. 1988).

Accordingly, *Hubers v. Gannett Co*., No. 16 C 10041, 2019 WL 1112259, at *4 (N.D. Ill. Mar. 11, 2019), which Zoetis cites, did not attempt to explain how its holding that "prior wages are a valid 'factor other than sex'" flowed from the EPA's text. It simply held that "unless and until the U.S. Supreme Court adopts the Ninth Circuit's view, this Court must follow the Seventh Circuit's holdings . . . which are to the contrary." *Id.* at *5. Because the Third Circuit has indicated that it finds the Seventh Circuit's view unpersuasive, *Greater Philadelphia*, 949 F.3d at 148 n.240, and because the Seventh Circuit's position ignores Congressional intent and Supreme Court case law, this Court should not follow it. *Glenn*, 841 F.2d at 1571.[6]

Next, although Zoetis suggests that 5 U.S.C. § 5362—which allows federal employees placed into a lower-grade position due to a reduction in force to keep their higher pay grade for two years—supports its position, it does not. As the

[6] Zoetis also cites to *Pettiford v. N.C. HHS*, 228 F. Supp. 2d 677, 689 (M.D.N.C. 2002), which held a pro se plaintiff's claims failed because she did not "create[] a reasonable inference of gender discrimination under Title VII and the [EPA]." But *Pettiford* is unpersuasive as it used the wrong standard for EPA claims, failing to recognize that the EPA requires no showing of discriminatory intent. *See EEOC v. Del. Dep't of Health & Soc. Servs.,* 865 F.2d 1408, 1414 n.8 (3d Cir. 1989).

Federal Circuit recently held, the EPA "and the government pay-setting statutes are capable of co-existence" because the "EPA allows consideration of prior pay if prior pay is not sex-based" – in other words, if the employer can "prove that the prior pay was not itself based on sex." *Boyer*, 97 F.4th at 847. Therefore, 5 U.S.C. § 5362 cannot be read as blessing reliance on prior pay unless the employer shows the prior pay was unaffected by discrimination (which, of course, Zoetis has not done).

Finally, Zoetis suggests that Equal Employment Opportunity Commission regulations allowing "red circling" express a "[s]imilar position" to its argument that prior pay is a factor other than sex.[7] Defs.' Br. at 15 (citing 29 C.F.R. § 1620.26). Just the opposite. Red circling is permissible to maintain an existing employee's salary in a temporary situation, such as where an ill employee temporarily does reduced work. *See* 29 C.F.R. § 1620.26; *Miller v. Aluminum Co. of Am.*, 679 F. Supp. 495, 505 (W.D. Pa. 1988), *aff'd*, 856 F.2d 184 (3d Cir. 1988) ("temporary reassignment" is "an example of tolerable red circling"). It is not a get-out-of-jail-free card immunizing indefinite unequal pay. *See* 29 C.F.R. § 1620.26(a) ("[W]here wage rate differentials have been or are being paid on the basis of sex to employees performing equal work, rates of the higher paid employees may not be 'red circled'

[7] Zoetis correctly does not argue that *this* is an instance of red circling. As its prominently cited case *Arthur* made clear where two institutions merged their staff and "grandfathered" in one staff's higher benefits, "red-circling does not provide the proper analytic"; "previous employer salary" does. 174 F. Supp. 2d at 977.

in order to comply with the EPA. To allow this would only continue the inequities which the EPA was intended to cure."); *Corning*, 417 U.S. at 209–10 (company could not perpetuate pay inequity by "red circl[ing]" higher paid men); *Youngblood v. George C. Wallace State Cmty. Coll.*, No. 1:13CV33-MHT, 2014 WL 2961085, at *9 (M.D. Ala. July 1, 2014) ("Refusing to allow across-the-board red circling furthers the purposes of the Equal Pay Act. Otherwise, employers could quite easily escape the Act's requirements by simply shuffling employees around. A blanket policy might well immunize an employer from liability under the Act altogether so long as the employer transferred employees with enough frequency."). Finally, red circling "does not justify higher payment to a new employee," which Drs. Ehrhart and Jennings were. EEOC Compliance Manual, Section 10 Compensation Discrimination, at n.73, https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination. Red circling offers Zoetis no support.

**2. Zoetis cannot account for the entire disparity.**

Next, Zoetis cannot establish an affirmative defense because, while it emptily claims that the "purchase of Ethos, followed by the Integration account for the entire wage differential at ZRL," Defs.' Br. at 16, it has no legitimate justification for why Dr. Schulman's salary was so low—and thus has no legitimate explanation for the entire disparity. *See Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009) (holding it "is insufficient as a matter of law" to justify only male

comparator's salary; "[j]ustifying [his] salary does not justify [the plaintiff's] salary. It is the differential that must be explained."). In fact, Dr. Gardiner explained that he offered Dr. Schulman only $125,000 to save the company money. *See* Pl.'s SUMF ¶ 26. And Zoetis hired multiple less-experienced male pathologists at higher salaries than Dr. Schulman, both before and after telling her that her salary was market rate and so would not be increased. *Id.* ¶¶ 82-94. Zoetis thus has no legitimate explanation for why her salary was so low. It therefore fails to "submit evidence from which a reasonable factfinder could conclude not merely that [its] proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity" and so cannot establish an affirmative defense. *Stanziale*, 200 F.3d at 107–108.

### C. Even if the Court believes there is a genuine dispute, Zoetis's motion for summary judgment must still be denied.

Even if the Court were to find Zoetis could point to some evidence negating Dr. Schulman's prima facie case or disagreed with her analysis on the affirmative defense, it must nonetheless deny Zoetis's motion. Dr. Schulman has plainly put forward sufficient evidence to create, at a minimum, a genuine dispute of material fact—particularly when that evidence is viewed, as it must be on Defendants' motion for summary judgment, in the light most favorable to her. *See Hugh*, 418 F.3d at 267. Moreover, even if Zoetis could state an affirmative defense under the EPA, the fact that Zoetis failed to apply its retention rationale to Dr. Schulman, and that it paid

later-hired, less-experienced men higher salaries, Section I.C *supra*, shows pretext that would also preclude summary judgment on the EPA claim. *See Day v. Bethlehem Ctr. Sch. Dist.*, No. CIV.A. 07-159, 2008 WL 2036903, at *10 (W.D. Pa. May 9, 2008) (denying defendant summary judgment on EPA claim where jury could view its proffered "factor other than sex," negotiation, as pretext—"a refusal to negotiate with women, while simply accepting the first overture of the men").

## II. Zoetis Is Not Entitled to Summary Judgment on Dr. Schulman's Title VII Claim Because Its Rationale for the Pay Gap Appears to Be Pretext.

Under Title VII, a plaintiff establishes a prima facie case by showing (1) she was a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) members of the opposite sex were treated more favorably. *Burton v. Teleflex Inc.*, 707 F.3d 417, 426 (3d Cir. 2013). The EPA's "equal work" standard does not apply; to state a claim for wage discrimination, a plaintiff can simply show she was underpaid compared to a similarly situated man. *Cnty. of Wash. v. Gunther*, 452 U.S. 161, 168 (1981); Defs.' Br. at 36 (under "less-exacting standards of a prima facie case under Title VII," complainant need "show only that the work is 'similar'"). If the plaintiff meets this comparatively relaxed prima facie test, the burden shifts to the defendant to offer a legitimate, non-discriminatory explanation for its actions. *Burton*, 707 F.3d at 426. If it does, the plaintiff must point to evidence from which a reasonable jury could find that the explanation is pretext for discrimination—evidence showing "such

weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence." *Id.* at 427 (quotation omitted).

Because the EPA's prima facie burden is higher, a "prima facie showing of an EPA claim is also a prima facie showing of a Title VII violation." *Miller v. Beneficial Mgmt. Corp*., 977 F.2d 834, 846 (3d Cir. 1992). Therefore, because Dr. Schulman has established that she did substantially equal work to Drs. Ehrhart and Jennings under the EPA, as explained *supra*, she states a prima facie case under Title VII. *See Id.* Of course, she also states a prima facie case under Title VII's relaxed standard. *See Gokay v. Pennridge Sch. Dist*., No. CIV.A. 02-8482, 2004 WL 257085, at *8 (E.D. Pa. Feb. 5, 2004) (where school district refused to give plaintiff, its HR Director and Legal Counsel, whose "qualifications and performance were more than satisfactory," same raises it gave its similarly situated male Business Administrator, this satisfied Title VII prima facie burden); Pl.'s SUMF ¶¶ 2, 16-17, 25-28, 43; Pl.'s Resp. ¶ 222 (Dr. Schulman is a woman; her performance met expectations; she was "every bit as . . . qualified as Dr Ehrhart, if not more so"; yet Zoetis paid her less than less-experienced men doing the same job).

Next, there is more than enough evidence to find Zoetis's rationale for the salary gap pretextual. A desire to retain employees could be a legitimate reason for higher salaries. But where an employer pays men a higher salary to retain them, but

refuses to do so for a woman, it suggests pretext. In *Gokay*, when the male comparator received a job offer elsewhere, the employer substantially increased his pay. When the plaintiff said she would have to leave if she did not get a raise, it gave her a much smaller one. The court held that "the motivation for Defendant's actions in giving [the man] a higher salary, i.e., the desire to keep a valuable employee, remains the same for Plaintiff, especially considering Plaintiff's stellar reputation as a competent employee," so a jury "could conclude that [its] reasons for the significant disparity in the raises . . . were pretext." 2004 WL 257085, at *9.

Here, Zoetis broadly professed to wanting to retain employees as they "were crucial to building up the new Reference Labs business," resulting in the "decision to grandfather [the pathologists] in where Ethos had been paying them" in order to "retain talent." Defs.' Rule 56.1 Stmt. ¶¶ 93, 97. As in *Gokay*, the motivation for paying Drs. Ehrhart and Jennings their salaries—retaining them—should remain the same for Dr. Schulman. When Dr. Schulman asked Dr. Goldstein to fix the pay disparity, he responded that they were trying to get approval to go beyond a normal salary correction, which he testified could happen "[i]f there's attempt at retention, or if there's a risk of losing someone." Pl.'s Resp. ¶ 149. That Zoetis ultimately did not apply its retention rationale to Dr. Schulman could, as in *Gokay*, lead a rational jury to see pretext.

Likewise, Zoetis's decision to pay Dr. Schulman so much less than less-experienced pathologists that her manager called the discrepancy "absurd" and "unethical" suggests pretext, Pl.'s SUMF ¶¶ 57, 72, as does its decision to pay her $128k when her subsequent manager said that he "cannot in good conscience hire a board certified pathologist" at $128k, *Id.* ¶ 89. So too does its decision to hire less-experienced male pathologists at higher salaries *after* telling her that her salary was market rate and so wouldn't be raised. *Id.* ¶¶ 82-94; *see supra* Part I.C.

## III. Zoetis's Motion Must Also Be Denied Because It Violated the NJLAD Section 12(a) and NJEPA.

### A. Zoetis violated the NJLAD Section 12(a).

Zoetis is liable under the NJLAD Section 12(a) because a violation of the federal EPA is a violation of Section 12(a) and, as explained *supra*, Zoetis violated the EPA. *Dubowsky*, 922 F. Supp. at 996 (citing *Grigoletti v. Ortho Pharm. Corp.*, 570 A.2d 903, 913 (N.J. 1990)). Moreover, even if Dr. Schulman's work were only "similar" to Drs. Ehrhart and Jennings's and so only the Title VII prima facie burden were satisfied—and so under Section 12(a) Dr. Schulman's claims would be evaluated under the Title VII standards—summary judgment would still have to be denied because there is ample evidence that Zoetis's rationale for the disparity was pretext for discrimination, as explained *supra*. *See Grigoletti*, 570 A.2d at 913.

### B. Zoetis violated the NJEPA.

Zoetis violated the NJEPA for all the reasons laid out in Dr. Schulman's moving brief, incorporated by reference here. Pl.'s Br. at 21-24. Unlike the federal EPA, the NJEPA requires only that work be "substantially similar," not substantially equal. N.J.S.A. § 10:5-12(t); N.J. Div. Civ. Rights Guidance on the Diane B. Allen Equal Pay Act 6 (Mar. 2020), https://www.nj.gov/lps/dcr/downloads/DCR-Equal-Pay-Guidance-3.2.20.pdf (explaining "two employees perform 'substantially similar work' when their job duties require a similar degree of skill, effort, and responsibility . . . . Work is substantially similar where, on balance, the jobs are substantially similar, but they need not be identical."). As explained *supra*, because Drs. Shulman, Ehrhart, and Jennings did far more than "substantially similar work," and actually did "substantially equal" work, and Zoetis paid her less than the men, she has a prima facie case under the NJEPA. N.J.S.A. § 10:5-12(t).

Zoetis would therefore have to prove all five of the enumerated factors under § 10:5-12(t) to avoid liability. It can prove none. First, it cannot show that the pay disparity was based on "bona fide factors other than the characteristics of members of the protected class." *Id.* Zoetis cannot show that its stated factor, retention, is "bona fide" where it refused to apply it to Dr. Schulman—including after Dr. Goldstein tried to secure an above-normal salary correction to retain her. Pl.'s Resp. ¶ 149. Retention may explain Drs. Jennings and Ehrhart's salaries, but it does not explain the disparity. Moreover, Zoetis cannot show that salaries based on prior pay

are not based on "characteristics of members of the protected class," § 10:5-12(t)(1), when salary histories typically reflect discrimination in the general labor market towards women, so the resulting disparity in salaries is likely based on women's characteristic as a pervasively underpaid group. Pl.'s SUMF ¶¶ 48-51.

Second, Zoetis's decision to pay the pathologists their previous salaries perpetuated a differential based on sex. The legacy labs all paid male pathologists, on average, more than female pathologists: 26% more at Phoenix; 16.5% more at Ethos; and 3.8% more at ZNLabs. *Id.* ¶ 56. This meant that when Zoetis was integrating the labs, average base pay for the female pathologists ($128,713) was 19% less than for the male pathologists ($158,536). *Id.* ¶ 53. Adopting these salaries wholesale adopted and perpetuated these disparities wholesale. That Zoetis did a "pay equity analysis" that failed to look at the pay disparities between men and women within and across the legacy labs changes nothing. *See Id.* ¶¶ 77-78.

Third, Zoetis argues that it was "reasonable and necessary" to pay the Ethos pathologists their previous salaries because it needed to retain pathologists. Defs.' Br. at 32. This proves too much. If it was reasonable and necessary to pay Drs. Ehrhart and Jennings their previous salaries to retain them, it was reasonable and necessary to pay Dr. Schulman that amount to retain her, too.8 What was

[8] To bolster its argument that it had to pay Drs. Ehrhart and Jennings their prior salaries, Zoetis argues it was contractually obligated to do so from February 2020 to

unreasonable was paying her, an even more experienced pathologist, about half of what Zoetis strenuously argues it was worth paying Dr. Ehrhart.

Fourth, Zoetis cannot show "[t]hat one or more of the factors account for the entire wage differential." § 10:5-12(t)(4). It has energetically justified Drs. Ehrhart and Jennings's salaries, and those of all the Ethos pathologists, on the grounds that it needed to retain pathologists to grow. But this does not explain why it refused to pay Dr. Schulman, its most experienced pathologist, the same salary to also retain her. In fact, Dr. Gardiner explained that the reason why Dr. Schulman's salary was set at just $125,000 was to save the company money. Pl.'s SUMF ¶ 26. Wanting to retain employees hardly explains selectively scrimping on Dr. Schulman's salary.

Finally, Zoetis does not argue—and so concedes—that the reason for the disparity is not job-related. For good reason: it already conceded that the disparity is not due to job-related factors. *Id.* ¶ 46. That is fatal to its defense, as it would have to show both that "the factors are job-related with respect to the position in question and based on a legitimate business necessity." § 10:5-12(t)(5) (emphasis added).

On the business-necessity prong, Zoetis tries to suggest that paying whatever Drs. Ehrhart and Jennings required to retain them is "consistent with the express terms of the" NJEPA. Defs.' Br. at 33. While Zoetis is correct that the NJEPA is not

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February 2021. *See* Defs.' Br. at 32; Defs.' Rule 56.1 Stmt. ¶ 19. It is normal for salaries to be the subject of contracts. That Zoetis entered into this contract shows only that it viewed the Ethos pathologists' salaries as reasonable and necessary.

a pay-lowering statute, so it was permissible to pay Drs. Ehrhart and Jennings their prior salaries, what it misses is that the NJEPA is a pay-increasing statute—so it was required to pay Dr. Schulman the same as it paid Dr. Ehrhart.9 It is not a defense to the NJEPA that paying women more would cost more. Paying women more is the point. *Cf. Corning Glass*, 417 U.S. at 205 (while paying women less "may be understandable as a matter of economics," it "became illegal once . . . the principle of equal pay for equal work" was "enacted into law").

Moreover, as explained in Dr. Schulman's moving brief, even if the retention rationale was a legitimate business necessity, there were alternative business practices available, including simply paying her the salary it paid Dr. Ehrhart—a salary it had determined was worth paying an experienced pathologist. Pl.'s Br. at 23-24. That practice would have served the same business purpose—allowing them to retain Drs. Ehrhart and Jennings—without producing the wage differential. Accordingly, under the NJEPA, this factor does not provide Zoetis a valid defense.[10]

**C. New Jersey law applies to Dr. Schulman's claims.**

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[9] As Zoetis notes, Dr. Schulman has consistently maintained that her pay should have been equal to Dr. Ehrhart's and contends in her summary judgment motion that damages should be awarded accordingly, consistent with the EPA and NJEPA's remedial purposes. *See* Pl.'s Br. at Section IV.

[10] In the alternative, as explained above in Section I.C regarding Dr. Schulman's EPA claim, there is at minimum sufficient evidence to raise jury questions on her NJLAD and NJEPA claims, which precludes summary judgment for Defendants.

As this Court held, the "New Jersey LAD can reach a remote worker who worked for a New Jersey-based company, but physically outside of New Jersey." *Schulman v. Zoetis, Inc*., 684 F. Supp. 3d 275, 278 (D.N.J. 2023). The New Jersey Division on Civil Rights agrees. It recently explained in enforcement guidance that "the LAD's protections extend broadly to workers who are employed by a New Jersey company, even if they work remotely in another state." N.J. DIV. ON CIVIL RIGHTS, GUIDANCE ON DISCRIMINATION AND OUT-OF-STATE REMOTE WORKERS 3 (May 2024), https://www.njoag.gov/wp-content/uploads/2024/05/2024-05-07-DCR-Guidance-on-Remote-Work.pdf.

As this Court explained, New Jersey law applies unless there is a conflict. *Id.* at 286. "If an actual conflict exists," the Court applies "the choice-of-law principles described in the Second Restatement," particularly sections 145, 146, and 6, to determine the state with the most significant relationship to the claims. *Calabotta v. Phibro Animal Health Corp*., 213 A.3d 210, 218–19 (App. Div. 2019). Even if a conflict exists here, under the Second Restatement factors, New Jersey has the most significant relationship to Dr. Schulman's claims, so its law applies.

**1. New Jersey law applies because Zoetis has demonstrated no actual conflict.**

Zoetis reiterates nearly verbatim the "on-paper differences between New Jersey and New Hampshire law" that the Court made clear are insufficient to establish a conflict, as Zoetis would need to show that "'application of one or another

state's law may alter the outcome of the case.'"[11] *Schulman*, 684 F. Supp. 3d at 286 (quoting *In re Accutane Litig.*, 194 A.3d 503, 518 (2018)); *compare* ECF No. 106-1, Defs.' Br. at 20-25 *with* ECF No. 62-1 at 17-23. Exactly as before, "Defendants do not explain how, if at all, each of the New Jersey/New Hampshire legal differences they list will make a practical difference in this case. Accordingly, they have not triggered a choice of law analysis, let alone shown that that analysis should land on New Hampshire law." *Schulman*, 684 F. Supp. 3d at 286-87. The analysis therefore stops there, and New Jersey law applies.

**2. Even if there is a conflict, New Jersey has the most significant relationship to the claims, so its law applies.**

New Jersey has the most significant relationship to the claims because the undisputed facts show that the conduct at issue here—Zoetis's decision to pay Dr. Schulman about half of a less-experienced man doing the same job—overwhelmingly centered in New Jersey and did not take place in New Hampshire. *See* Pl.'s SUMF ¶¶ 101–115.[12] The employees involved in putting together Dr.

[11] Zoetis is also wrong on some counts; for instance, it is mistaken that attorney's fees are unavailable in civil actions brought under the New Hampshire Law Against Discrimination. *See* N.H. RSA § 354-A:21-a(I) ("A court in cases so removed may award all damages and relief which could have been awarded by the commission . . . ."); *E.D. Sweet, Inc. v. N.H. Comm'n for Human Rights*, 124 N.H. 404 (1983) (finding New Hampshire Commission for Human Rights has authority to award reasonable attorney's fees).

[12] This argument is set forth in greater detail in Dr. Schulman's moving brief, ECF No. 110 at 33-39, and incorporated by reference here.

Schulman's salary offer, Kelly Winder and David Gardiner, worked in New Jersey and Utah—not New Hampshire. *Id.* ¶ 102. Zoetis employees in New Jersey made the decision about the pay model Zoetis would use for pathologists. *Id.* ¶ 104. The majority of the team that worked on integrating the labs was in New Jersey. *Id.* ¶ 65. The head of Zoetis HR—who made the ultimate decision not to correct the pay disparity—worked at Zoetis's New Jersey headquarters. *Id.* ¶¶ 19, 79, 106. She made that decision based on the recommendation of a majority-New Jersey (and no-part New Hampshire) HR team. *Id.* ¶ 107. She also decided in New Jersey to pay Drs. Ehrhart and Jennings's prior salaries. *Id.* ¶ 105. Because New Jersey has the most significant relationship to the claims, its law must be applied. 2d Rstmt. § 146.

The Section 145 factors overwhelmingly favor applying New Jersey law. Zoetis, Inc. and Zoetis Reference Labs, LLC's headquarters are at 10 Sylvan Way, Parsippany, New Jersey. Pl.'s SUMF ¶¶ 6, 101, 108; 2d Rstmt. § 145(2)(c). The relationship between the parties was centered in New Jersey. Nearly all the relevant decisionmakers—Roxanne Lagano, Tracey DaCosta, Kelly Winder, Catherine Matus, Alisa Zelmanovich, Richard Goldstein, and Lisa Lee—worked there. 2d Rstmt. § 145(2)(d); Pl.'s SUMF ¶¶ 79, 104, 107; Defs.' 56.1 Stmt. ¶¶ 15, 36, 68-69, 149. The other decisionmakers, Dr. Gardiner, Ivelisse Williams, and Phil Hoertz, were in Utah, Virginia, and Pennsylvania, and Dr. Schulman's later manager, Dr. Ackermann, was in Iowa; but of course, no party contends those states had the most

significant relationship because of those one-off contacts. Pl.'s SUMF ¶¶ 102, 107; Defs.' 56.1 Stmt. ¶¶ 8, 113, 150. Zoetis does not, and cannot, argue that any conduct causing the injury occurred in New Hampshire, *see* Defs.' Br.; 2d Rstmt. § 145(2)(b); Pl.'s SUMF ¶¶ 101-15. That leaves only § 145(2)(a), which is neutral because the place of injury is "not easily identified" when the injury-causing conduct occurred mainly in New Jersey, but the injury is arguably felt in the employee's home state. *See Calabotta*, 213 A.3d at 228. Moreover, even if the place of injury is determined by looking at the employee's home state, it receives little weight because it is happenstance that bears little relation to the parties' relationship. *See* § 145(2) cmt. (e); *cf. Grainer v. Smallboard, Inc*., No. CV 16-4866, 2017 WL 736718, at *2 (E.D. Pa. Feb. 24, 2017) (dismissing Pennsylvania remote worker's claims against California-based employer for lack of personal jurisdiction, holding his Pennsylvania "residence seems to be nothing more than a fortuitous circumstance").

The Section 6 factors also all support applying New Jersey law. The needs of the interstate system, Section 6(2)(a), support applying New Jersey law to a New Jersey company whose New Jersey staff primarily made the discriminatory decisions at issue in New Jersey. As Zoetis points out on this factor, "New Jersey law does not regulate conduct outside the state." *D'Agostino v. Johnson & Johnson, Inc*., 133 N.J. 516, 539 (1993); Defs.' Br. at 28. Because the conduct at issue centered in New Jersey (and did not happen in New Hampshire), New Jersey law should apply.

To argue otherwise, Zoetis relies on case law where the employer had a location outside New Jersey where it required employees to work and subjected them to discrimination. That bears no resemblance to this case, where Zoetis has no New Hampshire location, did not ask Dr. Schulman to work there, and no discriminatory conduct happened there. *See Weinberg v. Interep Corp.*, No. CIV. 05-5458 (JBS), 2006 WL 1096908, at *6 (D.N.J. Apr. 26, 2006) (holding NJLAD did not apply where defendant "never maintained an office in New Jersey" and plaintiff worked in its Pennsylvania office). When Zoetis hired Dr. Schulman, it did not fill a New Hampshire "job opening." *Calabotta*, 460 N.J. Super. at 70. It filled a remote opening for its New Jersey company. *See* Pl.'s SUMF ¶ 115 (Zoetis listed "Primary Location" in posting for position to replace Dr. Schulman as "US NJ Remote.").

Next, Zoetis argues that under Sections 6(2)(b)-(e), policy supports applying New Hampshire law because that is where Dr. Schulman lived, worked remotely, and received pay and tax documents.[13] To the contrary, New Jersey policy favors applying the NJLAD, furthering its remedial goals of eradicating discrimination in New Jersey. *See Nini v. Mercer Cnty. Cmty. Coll.*, 202 N.J. 98, 115 (2010) ("The more broadly the LAD is applied the greater its antidiscriminatory impact.")

[13] Zoetis cites to *Diana v. AEX Grp.*, No. CIV.A. 11-1838 PGS, 2011 WL 4005333 (D.N.J. Sept. 7, 2011), but it is irrelevant because in that case there was no allegation as to where the plaintiff worked, *id*. at *2, so the complaint was dismissed with leave to refile; and because its assertion that the NJLAD only applies "if the plaintiff was employed in New Jersey" did not survive *Calabotta*.

(cleaned up). New Hampshire's complementary policy of ensuring equal pay for equal work, *see* N.H. Rev. Stat. § 275:37, does not counsel otherwise. Zoetis, a New Jersey company, can have no "justified expectations" in being exempt from New Jersey law. *See D'Agostino*, 133 N.J. at 545.[14] And Dr. Schulman could not assuredly expect to be able to sue Zoetis in New Hampshire, as it appears to have no contacts there beyond her remote employment. *See Carlson v. Colo. Firearms, Ammunition & Accessories, LLC*, No. CV 22-1686, 2022 WL 11398472, at *3 (E.D. Pa. Oct. 19, 2022) (where employer had no activities in Pennsylvania other than plaintiff working remotely, getting paid, and having taxes deducted there, "[n]umerous other courts have held" that is "insufficient to establish personal jurisdiction" and court agreed); *cf*. N.J. DIV. ON CIVIL RIGHTS, GUIDANCE ON DISCRIMINATION AND OUT-OF-STATE REMOTE WORKERS 3 n.20 (noting "LAD's protections may not extend . . . to employees who work remotely in New Jersey for an employer in another state").

Finally, predictability and ease in determining the law, 2d Rstmt. § 6(2)(f)-(g), support applying New Jersey law, as "New Jersey law regulates conduct in New Jersey," and the illegal conduct in this case centered in New Jersey. *D'Agostino*, 133

[14] That Dr. Schulman cross-filed her administrative charge with the EEOC and the New Hampshire Commission for Civil Rights at most "arguably may affect section 6(2)(d) ('the protection of justified expectations')." *Calabotta*, 213 A.3d at 229. But of course, that Dr. Schulman filed her charge there did not relieve Zoetis of any reasonable expectation that it, a New Jersey-headquartered company with New Jersey HR staff and executives, remained subject to New Jersey civil rights laws.

N.J. at 539. Cases Zoetis cites holding that New Jersey law would not apply to New Jersey residents who worked in other states just underscore that the happenstance of the employee's residence does not control. *See, e.g.*, *Norris v. Harte-Hanks, Inc.*, 122 Fed. App'x 566, 569 (3d Cir. 2004) (Pennsylvania law applied to New Jersey resident's work at and termination from facility in Pennsylvania, where decision to terminate her was made in Pennsylvania). Courts so holding have reasoned that "mak[ing] the rights of each of several co-workers dependent on his or her state of residence would be an entirely unreasonable result." *Buccilli v. Timby, Brown & Timby*, 660 A.2d 1261, 1264 (N.J. Super. 1995). Certainty and ease thus weigh against making the outcome dependent on Dr. Schulman's state of residence.

## IV. Zoetis, Inc. Is a Proper Party Because It and Zoetis Reference Labs, LLC Are Both Liable as a Single Employer or, in the Alternative, as Joint Employers for All the Violations in This Case.

As laid out in Dr. Schulman's moving brief and incorporated here by reference, ECF No. 110 at Section III, the evidence shows that Zoetis, Inc. and Zoetis Reference Labs[15] are both liable as a single employer or, in the alternative, as joint employers for all the violations here. This evidence includes, but is not limited to, Zoetis, Inc.'s admissions that it was Dr. Schulman's employer and that it was correctly named in her charge of discrimination filed with her local civil rights

[15] There is no dispute that Zoetis Reference Labs, a New Jersey company, was Dr. Schulman's employer, *see* Pl.'s SUMF ¶¶ 101, 116, and so is liable for all violations in this matter.

agency. Pl.'s SUMF ¶¶ 116-18. Zoetis, Inc. also entered into a contract with Dr. Schulman agreeing she was an employee at will of "Zoetis, Inc." Pl.'s SUMF ¶ 118.

Dr. Schulman has presented extensive record evidence that the two entities were highly integrated such that they can be considered a single employer, Pl.'s Br. at 32-36. Zoetis does not show otherwise. To begin, its moving brief relies on an outdated and incorrect standard, citing a 2000 district court decision. Defs.' Br. at 7 (citing *Johnson v. Cook Composites & Polymers, Inc.*, 2000 U.S. Dist. LEXIS 2330, at *10, 2000 WL 249251, at *4 (D.N.J. Mar. 3, 2000)). But as the *Johnson* court noted, as of 2000 "the Third Circuit ha[d] not specifically adopted the integrated enterprise test as the test to be used in employment discrimination suits[.]" *Johnson*, 2000 WL 249251, at *3 (quotation omitted). The framework used in *Johnson* was derived from NLRB caselaw, but the Third Circuit specifically adopted a "different framework, tailored to Title VII's policy goals," in *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 85 (3d Cir. 2003), the chief case in point cited in Dr. Schulman's brief (but not Zoetis's, which cites only pre-*Nesbit* cases on this issue).[16]

[16] Zoetis also complains about what it claims is improper pleading of Zoetis, Inc. and Zoetis Reference Labs, LLC together as "Zoetis" in the First Amended Complaint. *See* Defs.' Br. at 7-8. But Zoetis did not move to dismiss on that basis, and Dr. Schulman gathered significant evidence through discovery that the entities are either a single employer or, in the alternative, joint employers. That evidence is set out in detail in her brief and in her statement of undisputed material facts. Zoetis's griping about pleadings cannot undo what the evidence shows: that Zoetis, Inc. employed her and is liable for the violations in this case.

When viewed in light of the correct standard articulated in *Nesbit* and cited in Dr. Schulman's brief—i.e., that two entities may be considered a single employer under Title VII if *either*: (1) a parent company directs a subsidiary to perform the alleged discrimination; or (2) the two companies' "affairs are so interconnected that they collectively caused the alleged discriminatory employment practice," *Nesbit*, 347 F.3d at 86 —the undisputed facts in the record demonstrate that Zoetis, Inc. and Zoetis Reference Labs, LLC are a "single employer," and thus that Zoetis, Inc. is a proper party liable for all violations in this case, for the reasons stated in Dr. Schulman's moving brief. Pl.'s Br. at 32-36. Alternatively, the undisputed record allows the Court to determine Zoetis, Inc. and Zoetis Reference Labs, LLC are joint employers, an issue that is not addressed in Zoetis's moving brief, for the reasons stated in Dr. Schulman's moving brief. *See* Pl.'s Br. at 36-40.

Finally, even if the Court finds there is a material factual dispute between the parties on this issue, it would be a jury question, so Zoetis's motion for summary judgment on this issue must in any event be denied.

## V. Dr. Schulman's Prayer for Punitive Damages Presents a Jury Question.

Zoetis prematurely asks the Court to strike Dr. Schulman's prayer for punitive damages. But it would be improper to do so because "'[d]etermining an employer's intent or knowledge for its employment actions is a task best relegated to the factfinder.'" *Hricenak v. Mickey Truck Bodies*, No. 4:21-CV-00694, 2024 WL

1604650, at *10 (M.D. Pa. Apr. 12, 2024) (quoting *Johnson v. Fed. Express Corp.*, 996 F. Supp. 2d 302, 322 (M.D. Pa. 2014)).

Under Title VII, a plaintiff may "seek punitive damages if they demonstrate that the employer acted: with malice or reckless indifference to the plaintiff's federally protected rights." *Donnelly v. Cap. Vision Servs., LLC*, 644 F. Supp. 3d 97, 112 (E.D. Pa. 2022) (citing 42 U.S.C. §§ 1981a(a)(1) & (b)(1)). "The terms 'malice' or 'reckless indifference' pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999). And despite Zoetis's suggestion that conduct must be "particularly egregious," Defs.' Br. at 38, Title VII "does not require a showing of egregious or outrageous discrimination independent of the employer's state of mind." *Kolstad*, 527 U.S. at 535. Thus, "if an employer discriminates 'in the face of a perceived risk that its actions will violate federal law,' it may be liable for punitive damages." *Donnelly*, 644 F. Supp. 3d at 112 (quoting Kolstad, 527 U.S. at 536).

Under the NJLAD, punitive damages may be awarded if (1) "there was 'actual participation by upper management or willful indifference,'" and (2) "the conduct was 'especially egregious.'" *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 274 (2010) (quoting *Rendine v. Pantzer*, 141 N.J. 292, 313-14 (1995)). Egregiousness can be shown through: (1) "an intentional wrongdoing in the sense of an 'evil-

minded act'"; (2) "an act accompanied by a wanton and willful disregard for the rights of" the plaintiff; or (3) "if the evidence demonstrated defendant acted with 'actual malice.'" *Id.* (citations omitted). But "egregiousness does not lend itself to neat or precise definitions." *Id.* The type of evidence a jury may consider "includes the likelihood that the conduct would cause serious harm" and "the actor's awareness or reckless disregard of the likelihood of such harm." *Id.* (quoting N.J. Model Civil Instruction § 8.61 (Punitive Damages-LAD Claims)). Such determinations, the New Jersey Supreme Court held, are "difficult and fact-sensitive," and "the exceptional nature of a given case and the wanton or malicious nature of the defendant's conduct are questions for the finder of fact." *Id.* at 275 (quotation omitted).

Zoetis's upper management had notice it might be violating the law. Pl.'s SUMF ¶¶ 18-19, 57-61, 72-94. As early as November 2020, Dr. Gardiner wrote to Zoetis's Senior Vice President of Global Diagnostics Lisa Lee and Zoetis HR representative Kelly Winder that the fact that Dr. Schulman was "a female pathologist making 1/2 of a male contemporary . . . . creates a very uncomfortable and ethically questionable situation." *Id.* ¶¶ 57-59. He wrote to David Gersholowitz, the head of Zoetis Reference Labs operations, that the salary gap was "unethical." *Id.* ¶ 72. In fall of 2020, Zoetis Head of Compensation Catherine Matus wrote to Zoetis executive Roxanne Lagano that "Richard Goldstein and [David Gardiner] have raised concerns as to the inequity across the pathologists in the three

companies." Pl.'s Resp. ¶ 87; Cino Cert., Exh. CC, D-1716 to D-1717. Dr. Ackermann told Zoetis HR he "cannot in good conscience hire a board certified pathologist" at Dr. Schulman's salary. Pl.'s SUMF ¶ 89. He told a Zoetis HR representative that it "doesn't seem right" to hire a male pathologist after Dr. Schulman at a higher salary "because of Dr. Schulman[']s experience and time with Zoetis"—but Zoetis did it anyway. *Id.* ¶ 92. Instead of heeding those alarms, Zoetis doubled down and defended the pay disparity. Pl.'s SUMF ¶¶ 80, 140. The decision not to raise Dr. Schulman's salary was made by Roxanne Lagano, a member of Zoetis's executive team, advised by Tracey DaCosta—and while neither is a practicing attorney, both attended law school and Ms. DaCosta previously did employment litigation. *Id.* ¶¶ 77, 79; Pl.'s Resp. ¶ 223. A jury could easily find Zoetis's upper management knowingly decided not to raise Dr. Schulman's salary in face of the risk it was violating the law. *See Kolstad*, 527 U.S. at 536.

Next, Zoetis claims it is entitled to a good-faith defense. Defs.' Br. at 39. A good-faith defense is available under Title VII to effectuate "limits on vicarious liability for punitive damages" and provides that "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents" that are "contrary to the employer's good-faith efforts to comply with Title VII." *Kolstad*, 527 U.S. at 545 (quotation omitted). It is "inapplicable as a defense to punitive damages when the corporate officers who engage in illegal

conduct are sufficiently senior to be considered proxies for the company." *O'Brien v. Middle E. Forum*, 57 F.4th 110, 120 n.45 (3d Cir. 2023) (quoting *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000)). If it applied, Zoetis would bear the burden of proving it. *Lloyd v. Children's Hosp. of Phila.*, No. 2:19-CV-02775-JDW, 2023 WL 2940229, at *9 n.2 (E.D. Pa. Apr. 13, 2023) (holding good faith is affirmative defense, reasoning "Third Circuit hasn't determined whether [it] is an affirmative defense, but its model instruction treats it as one"). Zoetis cannot establish the defense because a Zoetis executive made the decision not to raise Dr. Schulman's pay. Pl.'s SUMF ¶¶ 79.

Even if that were not the case, Zoetis cannot show its "pay equity reviews" establish the defense. First, the good-faith defense is inapplicable because the pay equity reviews were part of Zoetis HR, including an executive, determining the pay scheme for all Zoetis Reference Labs employees; they were not a managerial employee's actions that ran contrary to the company's efforts as a whole. *See Kolstad*, 527 U.S. at 545; Pl.'s SUMF ¶¶ 18-19; 77-79; Defs.' 56.1 Stmt. ¶¶ 84-99, 153-62. Second, the "training" Zoetis HR appears to have received on pay equity was being told to follow the company's "compensation structure." Pl.'s Resp. ¶ 203. This hardly shows good-faith efforts to comply with pay equity laws. Finally, Zoetis cannot show good faith through "pay equity reviews" that ignored the fact that each legacy lab paid men more than women on average, *see* Pl.'s SUMF ¶¶ 53, 56; Pl.'s

Resp. ¶ 90 ("pay equity review" did not evaluate whether there were any gender pay disparities within any of the acquired labs); and ignored that around the time it hired Dr. Schulman, Zoetis hired a male pathologist with just 1.5 years of experience at a higher salary than Dr. Schulman, who had 29 years of experience—a disparity that a member of the pay equity review team could not explain. *Id.* ¶¶ 77-82.

Finally, with respect to the NJLAD's 'egregiousness' requirement, it is the jury's province to decide whether paying a woman about half of a less-experienced man—then telling her that her salary was "market rate" while hiring less-experienced men at higher salaries—was "especially egregious" conduct warranting punitive damages. *See Quinlan*, 204 N.J. at 275-77.

There is more than sufficient evidence to preclude summary judgment. *See, e.g.*, *Donnelly*, 644 F. Supp. 3d at 113 (denying summary judgment on punitive damages where defendant chose to terminate pregnant employee over non-pregnant employee); *E.E.O.C. v. Bob Evans Farms, LLC*, 275 F. Supp. 3d 635, 668–69 (W.D. Pa. 2017) (same, where jury could find manager knew pregnancy discrimination was unlawful but still dissuaded plaintiff from working full-time); *Hightower v. Roman, Inc.*, 190 F. Supp. 2d 740, 754 (D.N.J. 2002) (same, where there were genuine issues of material fact regarding whether perpetrator was "sufficiently senior" to be corporate proxy, and on reasonableness of company's policies).

## CONCLUSION

Zoetis's motion must be denied. The undisputed facts shows that Zoetis violated the EPA, NJEPA, and NJLAD Section 12(a) when it paid Drs. Ehrhart and Jennings their prior salaries of $230,720 and $195,000 to ensure that they, and the rest of the Ethos pathologists, would work for Zoetis, but decided to save money on Dr. Schulman and pay her—its most experienced pathologist—no more than $128,812.50. Zoetis's motion must also be denied on Dr. Schulman's Title VII claim because a reasonable jury could find that Zoetis's rationale for the pay disparity was pretext where it inexplicably failed to apply its retention rationale to her, and insisted that her salary was market rate even as it was hiring less-experienced male pathologists at higher salaries. Zoetis, Inc. is, like Zoetis Reference Labs, LLC, a proper party that is liable for all violations in this case. And Zoetis's motion to strike the prayer for punitive damages must be denied because Zoetis's intent or knowledge presents a jury issue. Finally, even if her motion were not granted, Dr. Schulman has put forward more than sufficient evidence to create, at minimum, genuine disputes of material fact as to the prima facie case and affirmative defenses under these statutes, and as to whether Zoetis's explanation was pretext. For all these reasons, Zoetis's motion for summary judgment must be denied in its entirety.

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/s/ Hugh Baran
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