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August 30, 2017

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VIA HAND DELIVERY

Administrative Law Judge Christopher Larsen
United States Department of Labor
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AUG 30 2017

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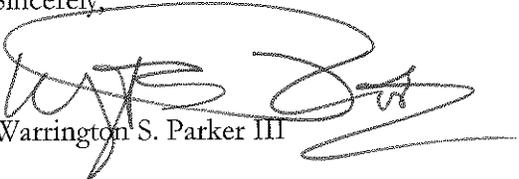
Re: *OFCCP v Oracle America, Inc.*
OALJ Case No. 2017-OFC-00006

At pages 6 and 7 of its Opposition to Oracle's Motion to Compel, OFCCP cites *OFCCP v. Analogic Corp.* OFCCP attaches as Exhibit 3 to the Declaration of Norm Garcia an opinion in the *Analogic* case.

However, the opinion attached as Exhibit 3 is not the *Analogic* opinion that OFCCP quotes and relies on.

Attached to this letter is the *OFCCP v. Analogic Corp.*, opinion on which OFCCP relies and that it quotes. Oracle brings this to the Court's attention to avoid confusion and because the decision on which OFCCP actually relies support Oracle's arguments.

Sincerely,


Warrington S. Parker III

- cc: Laura C. Bremer, Esq. (via email)
- Marc A. Pilotin, Esq. (via email)
- Ian Eliasoph, Esq. (via email)
- Norm E. Garcia, Esq. (via email)
- Erin Connell, Esq. (via email)

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 16 August 2017

ALJ NO.: 2017-OFC-00001

In the Matter of:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,

v.

ANALOGIC CORPORATION,
Defendant.

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AUG 30 2017

Office of Administrative Law Judges
San Francisco, CA

**ORDER GRANTING IN PART DEFENDANT'S MOTION
TO COMPEL RULE 30(B)(6) DEPOSITION AND
GRANTING IN PART PLAINTIFF'S MOTION FOR PROTECTIVE ORDER**

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, and the regulations pursuant to 41 C.F.R. Chapter 60. The Court has jurisdiction in this matter under Sections 208 and 209 of the Executive Order and 41 C.F.R. § 60-1.26 and 41 C.F.R. Part 60-30. The formal hearing is scheduled to commence on October 25, 2017, in Boston, Massachusetts.

On May 3, 2017, the Defendant, Analogic Corporation ("Analogic") filed a Motion to Compel Rule 30(b)(6) Deposition ("Analogic Mot. Compel"), attaching exhibits (EX) A through H.

On May 17, 2017, the Plaintiff, Office of Federal Contract Compliance Programs, United States Department of Labor ("OFCCP") filed a Motion for Protective Order Limiting Analogic's Deposition of OFCCP Personnel ("OFCCP Mot. Prot. Ord."), and included with its motion exhibits (EX) A through D.

On May 25, 2017, Analogic filed an Opposition to OFCCP's Cross-Motion for Protective Order Limiting Analogic's Deposition of OFCCP Personnel ("Analogic Opp. to Mot. Prot. Ord."), attaching one exhibit, EX A.

A hearing was held on this motion and two other pending motions¹ on June 27, 2017, during which the parties were allowed an opportunity to present oral arguments.

¹ Specifically, OFCCP's Motion for Partial Summary Decision and Analogic's Motion to Compel Production and for In Camera Review of Redacted and Withheld Documents.

Based on a review of the parties' filings and considering their oral arguments, I have concluded that Analogic's Motion to Compel Rule 30(b)(6) Deposition and OFCCP's Motion for Protective Order shall be granted, each in part, based on the reasoning discussed below.

Applicable Rules

For cases arising under Executive Order 11246, in the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure ("FRCP"). 41 C.F.R. § 60-30.1.

The scope of discovery is defined by FRCP 26(b) as follows:

Parties may obtain discovery regarding *any matter, non privileged, that is relevant to any party's claim or defense* For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(emphasis added); *see also* 29 C.F.R. § 18.51.

One discovery tool available to parties in litigation is a Rule 30(b)(6) deposition. Pursuant to FRCP 30(b)(6):

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify The persons designated must testify about information known or reasonably available to the organization.

See also 29 C.F.R. § 18.64(b)(6).

A party objecting to discovery has the burden of establishing such discovery should not be allowed. *EEOC v. California Psychiatric Transitions*, 258 F.R.D. 391 (E.D. Ca. 2009). When a party withholds information based on an assertion of privilege, the party must "(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." FRCP 26(b)(5).

One potentially applicable privilege is the deliberative process privilege, which protects "the decision making processes of government agencies." *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150, 95 S. Ct. 1504, 44 L. Ed. 2d 29 (1975). The ultimate purpose of this privilege to encourage "frank discussion of legal or policy matters." *Id.* at 151, quoting *United States v. Nixon*, 418 U.S. 683 (1974). In order to be protected by the deliberative process privilege, the document must be both "predecisional" and "deliberative." *Assembly of the State of California*

v. United States Department of Commerce, 968 F.2d 916, 920 (9th Cir. 1992). Factual material generally is not considered deliberative, but the fact/opinion distinction should not be applied mechanically. *Id.* at 921-922. Rather, the relevant inquiry is whether “revealing the information exposes the deliberative process.” *Id.* The privilege is a qualified privilege. Once the privilege is properly invoked, a court weighs competing interests and balances the public interest and the party’s need for the information. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, (D.D.C. 1966); *Committee for Nuclear Responsibility v. Seaberg*, 463 F.2d 788, 791 (D.C. Cir. 1971).

A party from whom discovery is sought may move for a protective order under FRCP 26(c), and the court may, “for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” which may, among other things, “forbid[] inquiry into certain matters, or limit[] the scope of disclosure or discovery to certain matters.” *See also* 29 C.F.R. § 18.52. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery. FRCP 26(c)(2).

Analogic’s Notice of Rule 30(b)(6) Deposition

Analogic’s Notice of Rule 30(b)(6) Deposition, served on OFCCP on April 20, 2017, identified the following eighteen topics for the OFCCP’s designated representative to address at the deposition:

1. OFCCP’s policies and procedures, as set forth in the Federal Contract Compliance Manual and OFCCP Public Directives;
2. OFCCP’s policies and procedures pertaining to the creation, maintenance and use of a Case Chronology Log;
3. OFCCP’s policies and procedures pertaining to the creation, maintenance and use of a Case File including, but not limited to, the contents thereof;
4. OFCCP’s policies and procedures pertaining to the creation, maintenance and use of a Standard Compliance Evaluation Report (“SCER”);
5. OFCCP’s policies and procedures pertaining to the creation, maintenance and use of a Supply and Service Standard Compliance Report (“SCRR”);
6. OFCCP’s policies and procedures pertaining to audits of compensation data, as may be delineated in the Federal Contract Compliance Manual and elsewhere;
7. OFCCP’s policies and procedures pertaining to determinations that data provided by a contractor indicates potential compensation discrimination;
8. OFCCP’s determination that the data provided by Analogic indicated potential compensation discrimination;

9. OFCCP's policies and procedures pertaining to the development of an Onsite Investigative Plan, and the development, maintenance and use of an Onsite Investigative Plan pertaining to the Analogic onsite review;
10. OFCCP's policies and procedures pertaining to determinations that there are measurable differences in compensation on the basis of sex, and OFCCP's determination that there are measurable differences in compensation on the basis of sex between male Assembler 2 and female Assembler 2 employees, and between male Assembler 3 and female Assembler 3 employees;
11. OFCCP's policies and procedures pertaining to the determination of factors considered by contractors in making compensation decisions, and pertaining to OFCCP's independent determination of factors considered or that should be considered in making compensation decisions;
12. OFCCP's determination of the factors that actually explain Analogic's compensation structure relative to Assembler 2 and 3 employees;
13. OFCCP's policies and procedures pertaining to the development of questionnaires, interview forms or templates, and interview plans, and the training provided to OFCCP employees and/or agents who conduct employee, manager or witness interviews;
14. OFCCP's development of an interview plan relative to Analogic, its development and use of questionnaire(s) and/or interview forms or templates to assist or guide interviews with Analogic employees and/or managers, and the identification of each person who conducted one or more interview with Analogic employees or managers, whether in person or by telephone;
15. OFCCP's policies and procedures pertaining to the calculation of damages, including the determination of "victims" of discrimination, and OFCCP's calculation of damages relative to Analogic's female Assembler 2 and Assembler 3 employees, including but not limited to the identification of "victims" of discrimination, and whether such damages were calculated using victim-specific or formula relief;
16. OFCCP's policies and procedures pertaining to the conciliation process;
17. OFCCP's policies and procedures pertaining to the creation, maintenance and use of reports or memoranda pertaining to compliance audits and/or enforcement recommendations or actions, (other than those reports or memoranda specifically referenced above); and
18. The contents of an enforcement package (as referenced in OFCCP-ANA-000540) including identification of the categories of files and sub-files included in an enforcement package.

Analogic Mot. Compel, EX B.

Summary of the Parties' Arguments

OFCCP asserts that the topics identified by Analogic for the Rule 30(b)(6) deposition are irrelevant as they go to sufficiency of its investigation and conciliation process, which is improper under analogous EEOC case law. OFCCP Mot. Prot. Ord. at 14-16. OFCCP instead asserts that the Rule 30(b)(6) deposition should be limited to the likely trial testimony by OFCCP witnesses, specifically "anecdotal evidence discovered during the compliance evaluation" identified in its Amended Initial Disclosures.² *Id.* at 8-9. OFCCP further asserts that 16 of the 18 categories identified by Analogic concern OFCCP's policies and procedures or determinations, which intrudes on its deliberative process privilege, that Topic No. 14 also intrudes on the investigative privilege, and Topic No. 18 is protected by deliberative process, investigatory, attorney-client, and work-product privileges. *Id.* at 10, 12-14. OFCCP seeks a protective order limiting the Rule 30(b)(6) deposition to the limited topic upon which OFCCP officials may testify at trial – anecdotal evidence discovered during the compliance evaluation. *Id.* at 11.

Analogic argues that OFCCP cannot unilaterally limit the scope of the deposition of its witnesses to only those matters it chooses to have those witnesses testify to at trial and that it is entitled to discovery concerning facts and matters relevant to the claims or defenses in this action, regardless of whether OFCCP intends to use that information at trial. Analogic Opp. Mot. Prot. Ord. at 1, 3. Otherwise, Analogic argues, the implications would be that OFCCP could prevent its witnesses from disclosing exculpatory evidence because it does not intend to have its witnesses testify concerning such evidence at trial. *Id.* at 3. Analogic further contends there have been EEOC cases, contrary to the OFCCP's position, that have permitted defendants to inquire into a number of topics relating to EEOC's investigation and conciliation efforts at a Rule 30(b)(6) deposition. *Id.* at 9-10.³

Discussion

OFCCP's Objection Based on Relevancy

A majority of the topics identified in Analogic's Notice of Rule 30(b)(6) Deposition seek information on the "policies and procedures" of OFCCP at the investigative and conciliatory stages. OFCCP objects to these topics on the basis that the purpose of the information sought is to attack the sufficiency of OFCCP's pre-suit investigation, which is irrelevant under applicable law. OFCCP Mot. Prot. Ord. at 1, 14, 15.

² While Analogic argued in its filings that OFCCP put its investigation directly at issue based on its Initial Disclosures (Analogic Mot. to Compel at 8-9), OFCCP has since provided Amended Initial Disclosures. Therefore, any arguments based on the Initial Disclosures will not be entertained.

³ Analogic also argued that a blanket privilege assertion and refusal to produce a witness for a Rule 30(b)(6) deposition is inappropriate and the proper procedure is to lodge objections to particular questions based on privilege at the time of the deposition rather than refusing to produce a witness. Analogic Mot. Compel at 5-6, 10-11. This argument appears to be moot, as counsel for Analogic represented in the hearing held on June 27, 2017, that the Rule 30(b)(6) deposition did occur with Rhonda Aubin-Smith, the District Director for the Boston Regional Office, and specific objections were made based on privilege at the time of the deposition.

The argument presented is interrelated with those presented in OFCCP's Motion for Partial Summary Decision, in which OFCCP argued that it is entitled to partial summary decision on Analogic's Fifth Affirmative Defense asserting that OFCCP failed to engage in good faith conciliation efforts. In its Motion for Partial Summary Judgment, OFCCP asserted it met its obligation to engage in "reasonable efforts" to conciliate under 41 C.F.R. § 60-1.20(b) and the Supreme Court's decision in *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015).

By Order dated August 16, 2017, I granted OFCCP's Motion for Partial Summary Decision, finding that based on the undisputed facts, OFCCP met the requirement to conciliate in this claim. Accordingly, OFCCP's Motion for Partial Summary Decision was granted and Analogic's Fifth Affirmative Defense was dismissed.

Given my ruling that OFCCP engaged in good faith conciliation, the topics identified in the Notice of Rule 30(b)(6) Deposition which seek general information regarding OFCCP's investigative and conciliatory processes are not relevant to this case and such discovery is not necessary for the remaining issues to be presented at trial.

Furthermore, case law in analogous EEOC decisions has established that Rule 30(b)(6) testimony regarding the EEOC's investigation and conciliation is inappropriate as it intrudes upon the government's deliberative process privilege. *See EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 5836, at *15-19 (D. Neb. Jan. 19, 2012) (disallowing Rule 30(b)(6) testimony regarding "internal policies, directives, guidelines or mandates of the EEOC pertaining to the investigation or prosecution of alleged systemic discrimination and/or pattern or practice discrimination" and indicating that "this area would inevitably invade information protected by the deliberative process privilege" and "several courts have determined that inquiries touching on the nature and extent of EEOC investigations are impermissible"); *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 17003 (E.D. Wash. May 7, 2012) ("The details of the EEOC's investigation and conciliation efforts are not essential to Defendant's understanding and defense of the Title VII claims . . . the focus of the trial will be on the merits of the Title VII claim . . . not the meaning of EEOC's reasonable cause determination).⁴

Accordingly, I find that Analogic is not entitled to Rule 30(b)(6) testimony on the general "policies and procedures" of OFCCP as it improperly seeks information regarding OFCCP's investigation and conciliation processes. Specifically, Analogic is not entitled to elicit testimony on Topic Nos. 1-7, 9, 11, 13, and 16-17 listed in the Notice of Rule 30(b)(6) Deposition. However, Analogic is allowed to pursue the following topics, at least in part, in a Rule 30(b)(6) deposition.

⁴ Analogic cites to several cases to support its position that some inquiry into EEOC investigations and conciliation efforts during a Rule 30(b)(6) deposition is allowed. *See Analogic Mot. Compel* at 9-10. However, I find the cases cited are not analogous to Analogic's requests for general information on OFCCP's "policies and procedures," but rather addressed requests for factual information and clarification and interpretation of documents produced by EEOC. Analogic also cites to *Lifecare Mgmt. Servs., LLC*, 2009 WL 772834, at *5 (D. Penn. Mar. 17, 2009), for the assertion that it may seek information pertaining to the efforts and actions of EEOC to conciliate in order to develop evidence which may establish its affirmative defense that the EEOC failed to engage in good faith conciliation. This decision is not entitled to any credence as it was decided prior to the controlling Supreme Court decision, *Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645 (2015), which greatly limited the scope of review of EEOC's conciliation efforts. Furthermore, I have already found in my Order Granting OFCCP Motion for Partial Summary Decision and Denying Analogic Motion for Summary Decision that the undisputed facts establish that EEOC did in fact conciliate in good faith.

Topic Nos. 8 & 12

In Analogic's Notice of 30(b)(6) Deposition, Topic No. 8 seeks testimony regarding "OFCCP's determination that the data provided by Analogic indicated potential compensation discrimination," and Topic No. 12 seeks testimony on "OFCCP's determination of the factors that actually explain Analogic's compensation structure relative to Assembler 2 and 3 employees." Analogic Mot. Compel, EX B.

OFCCP asserts that these two categories "directly seek OFCCP's evaluation and analysis of facts gathered during its investigation that led to its determinations to refer this matter for enforcement" and that "[s]uch information falls squarely within the deliberative process privilege." OFCCP Mot. Prot. Ord. at 12. OFCCP also asserts that the information sought has no relevance to the issues remaining in the case or to the likely testimony of the OFCCP officials identified in the Amended Initial Disclosures. *Id.* at 8-9.

Analogic stated in its Motion that it agreed to revise Topics 8 & 12 to only "seek[] testimony about the *facts* that OFCCP relied on or considered in making the determination that Analogic engaged in compensation discrimination with respect to the Assembler 2 and 3 positions." Mot. Compel at 5, 7 (emphasis in original) & EX E. Purely factual information is not protected by the deliberative process privilege. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 254 F.R.D. 35 (D. Mass 2008); *OFCCP v. USAir, Inc.*, Case No. 1991-OFC-00002 (ALJ Feb. 23, 1993). Thus, to the extent that Analogic is only seeking the facts, and not OFCCP's "evaluation and analysis of facts," this testimony is not protected by the deliberative process privilege.

Furthermore, factual information that supports or rebuts OFCCP's claims or the relief sought by OFCCP is clearly relevant and Analogic should be allowed to elicit testimony on such factual information in a Rule 30(b)(6) deposition. *E.E.O.C. v. Albertson's LLC*, No. 06-cv-01273-WYF-BNB, 2007 WL 1299194, at *1 (D. Col. May 1, 2007); *EEOC v. JBS, USA, LLC*, No. 8:10CV318, 2012 WL 169981 (D. Neb. Jan. 19, 2012). I agree with Analogic's position that the facts underlying the OFCCP's determination of discrimination are highly relevant. Analogic Mot. Compel at 7.

OFCCP stated "even assuming, *arguendo*, that Analogic is asserting it needs to inquire into factual information related to the government witnesses' testimony, the argument fails because the Rule 30(b)(6) Motion seeks permission to inquire into facts about which government witnesses will not be testifying."⁵ OFCCP Mot. Prot. Ord. at 9. To the extent OFCCP is attempting to argue Analogic is only entitled at the discovery stage to information that its witnesses will likely testify to at trial, this argument is specious. Parties are entitled to obtain discovery regarding any matters relevant to its claims or defenses, even if such information is ultimately inadmissible at trial. FRCP 26. There is no qualification to FRCP 26 limiting the scope of discovery to evidence likely to be presented at hearing. The OFCCP, like all parties to a litigation, is required to comply with the discovery rules under the Federal Rules of Civil

⁵ OFCCP stated its government witnesses will only testify concerning anecdotal evidence discovered during the compliance evaluation. OFCCP Mot. Prot. Ord. at 10.

Procedure. See *EEOC v. California Psychiatric Transitions*, 258 F.R.D. 391, 396-97 (E.D. Cal. 2009); *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009).

Accordingly, I find Analogic entitled to testimony under Topics No. 8 and No. 12, so long as such testimony is limited to the underlying facts that OFCCP relied on or considered in making the determination that Analogic engaged in compensation discrimination with respect to the Assembler 2 and 3 positions.

Topic No. 10

Topic No. 10 seeks “OFCCP’s policies and procedures pertaining to determinations that there are measurable differences in compensation on the basis of sex, and OFCCP’s determination that there are measurable differences in compensation on the basis of sex between male Assembler 2 and female Assembler 2 employees, and between male Assembler 3 and female Assembler 3 employees.” Analogic Mot. Compel, EX B.

OFCCP asserts that Topic No. 10 “directly seeks OFCCP’s evaluation and analysis of facts gathered during its investigation that led to its determination to refer this matter for enforcement [and] [s]uch information falls squarely within the deliberative process privilege. OFCCP Mot. Prot. Ord. at 12. Analogic did not provide any specific arguments as it pertains to Topic No. 10.

As discussed above for Topics 8 and 12, Analogic is entitled to purely factual information supporting or rebutting OFCCP’s claims, as such information is not protected by the deliberative process privilege and is relevant to the case. See *Albertson’s LLC*, 2007 WL 1299194 at *1; *JBS, USA, LLC*, 2012 WL 169981; *Pharm. Indus. Average Wholesale Price Litig.*, 254 F.R.D. 35; *USAir, Inc.*, Case No. 1991-OFC-00002. Thus, to the extent that Analogic is seeking the underlying facts relied on by OFCCP in finding measurable differences in compensation between males and females in the Assembler 2 and Assembler 3 positions, this testimony is allowed. However, Analogic is not entitled to testimony on general “policies and procedures” used by OFCCP in determining “measurable differences” nor is it entitled to testimony regarding OFCCP’s evaluation and analysis of facts in determining there were measurable differences in compensation in Analogic’s case.

Topic No. 14

Topic No. 14 in the Notice of Rule 30(b)(6) Deposition seeks “OFCCP’s development of an interview plan relative to Analogic, its development and use of questionnaire(s) and/or interview forms or templates to assist or guide interviews with Analogic employees and/or managers, and the identification of each person who conducted one or more interview with Analogic employees or managers, whether in person or by telephone.” Analogic Mot. Compel, EX B.

Analogic has asserted that there were multiple forms of questionnaires and interview forms used by OFCCP during its compliance investigation and that a review of interview summaries reflect inconsistent notes by different OFCCP individuals conducting the same interview. Analogic Mot. to Compel at 7-8; Analogic Opp. to Mot. Prot. Ord. at 3-4. Analogic asserts these differing responses may be material to any effort by OFCCP to present anecdotal

evidence of discrimination and it is entitled to pursue discovery of facts that could relate to such anecdotal evidence. *Id.* Analogic is allowed to obtain clarification and interpretation of factual information in documentation produced by the government. See *E.E.O.C. v. California Psychiatric Transitions*, 258 F.R.D. 391, 397-98 (E.D. Ca. 2009). Thus, I find Analogic shall be entitled to elicit testimony limited to the clarification of any discrepancies or inconsistent statements in the witness interview summaries and the use of multiple forms for employee questionnaires and interviews.⁶

Topic No. 15

Topic No. 15 seeks “OFCCP’s policies and procedures pertaining to the calculation of damages including the determination of ‘victims’ of discrimination, and OFCCP’s calculation of damages relative to Analogic’s female Assembler 2 and Assembler 3 employees, including but not limited to the identification of ‘victims’ of discrimination, and whether such damages were calculated using victim-specific or formula relief.” Analogic Mot. Compel, EX B.

Analogic argues that it is entitled to discovery regarding the bases for OFCCP’s damages calculations, noting that OFCCP has produced a document purporting to show the damages it calculated for each alleged victim. Analogic Mot. Compel at 7; EX G. While Analogic acknowledges that OFCCP has indicated that it will not be relying on these damages calculations, it states:

It is not clear, however, to what extent the trial expert will be relying on the information provided or calculations that were previously done by OFCCP. Furthermore, if OFCCP’s trial expert renders a view that differs from OFCCP’s calculations, Analogic will be entitled to use information concerning OFCCP’s calculation in connection with its assessment and potential impeachment of its trial expert.

Id. at 7.

OFCCP argues that Topic No. 15 “directly seeks OFCCP’s evaluation and analysis of facts gathered during its investigation that led to its determination to refer this matter for enforcement [and] [s]uch information falls squarely within the deliberative process privilege.” OFCCP Mot. Prot. Ord. at 12. At oral argument, OFCCP also argued that testimony on its internal method of calculation of damages is irrelevant, as it is not relying on those internal calculations, but rather intends to rely on calculations of damages by its trial expert; OFCCP stated it has provided the methodology its trial expert used in calculating damages. TR 23-24, 51-52.

I find that Analogic is entitled under Topic No. 15 to factual information, specifically what wage data OFCCP used in calculating damages, but is not entitled to the methodologies behind the internal calculation of damages, either in general or in

⁶ While OFCCP asserts that Topic No. 14 intrudes on its investigative privilege, it did not provide any explanation of why the privilege applies. OFCCP Mot. Prot. Ord. at 10. I find given the narrow inquiry allowed, limited to an explanation of the differing forms used and the inconsistent interview summary notes does not intrude on such a privilege.

Analogic's case as such information intrudes on OFCCP's deliberative process, and is irrelevant in light of the fact that OFCCP is no longer relying on such calculations. *See EEOC v. Albertson's LLC*, 2017 U.S. Dist. LEXIS 32003 (D. Col. May 1, 2007) (allowing inquiry at Rule 30(b)(6) deposition of "factual information which supports the relief sought by the EEOC" (emphasis added)).

Topic No. 18

Lastly, Topic No. 18 seeks: "The contents of an enforcement package (as referenced in OFCCP-ANA-000540) including identification of the categories of files and sub-files included in an enforcement package." Analogic Mot. Compel, EX B.

Analogic asserts it is entitled to ask clarifying questions about an email produced by OFCCP referring to an "enforcement package," and is also entitled to ask questions in an effort to confirm that relevant documents contained in the "enforcement package" have been disclosed by OFCCP. Analogic Mot. Compel at 8.

OFCCP argues that Topic No. 18 seeks information which is protected by the deliberative and investigative privileges, as well as attorney work product and attorney-client privileges. Mot. Prot. Ord. at 10, 14.

The email referenced in Topic No. 18 was provided in EX H to Analogic's Motion. The email is between two OFCCP personnel; it mentions documents being put together for an "enforcement package," and indicated there should be an "Enforcement Recommendation" document containing an index to tabs and exhibits. Analogic Mot. Compel at EX H.

Analogic is allowed to obtain clarification and interpretation of factual information in documentation produced by the government. *See E.E.O.C. v. California Psychiatric Transitions*, 258 F.R.D. 391, 397-98 (E.D. Ca. 2009). Thus, I find Analogic shall be entitled to elicit testimony clarifying what is an enforcement package and what are the various tabs and exhibits referenced. OFCCP has not established how basic clarifying questions about what the enforcement package is, and the title of the documents that go into the enforcement package, would infringe on any privileges. However, Analogic is not entitled to information as to the contents of documents included in the Enforcement Package as such information intrudes on OFCCP's deliberative process privilege and any written recommendations or communications between OFCCP and the Solicitor's office intrudes on the attorney-client privilege.

ORDER

Based on the foregoing, Analogic's Motion to Compel Rule 30(b)(6) Deposition is **GRANTED IN PART AND DENIED IN PART**, and OFCCP's Motion for Protective Order is also **GRANTED IN PART AND DENIED IN PART**. The following **ORDER** shall be entered, incorporating the findings outlined above:

- 1) Analogic is entitled to conduct a Rule 30(b)(6) Deposition of a designated official from OFCCP, with the following limitations:
 - a) Analogic is not entitled to elicit testimony on Topic Nos. 1-7, 9, 11, 13, and 16-17 identified in its Notice of Rule 30(b)(6) Deposition pertaining to OFCCP's investigation and conciliation processes, and OFCCP is entitled to a protective order barring Analogic from asking questions related to these Topics;
 - b) Analogic is entitled to elicit testimony regarding Topic Nos. 8 & 12, only to the extent that it is seeking the underlying facts that OFCCP relied on or considered in making the determination that Analogic engaged in compensation discrimination with respect to the Assembler 2 and 3 positions. OFCCP is entitled to a protective order based on its deliberative process privilege to the extent that Analogic seeks testimony regarding OFCCP's evaluation and analysis of such facts, or seeks general "policies and procedures" of OFCCP;
 - c) Analogic is entitled to elicit testimony regarding Topic No. 10, only to the extent that it is seeking the underlying facts relied on by OFCCP in finding measurable differences in compensation between males and females in the Assembler 2 and Assembler 3 positions. OFCCP is entitled to a protective order based on its deliberative process privilege to the extent that Analogic seeks testimony regarding OFCCP's evaluation and analysis of such facts;
 - d) Analogic is entitled to elicit testimony under Topic No. 14, for ~~the limited purpose of clarifying any discrepancies or inconsistent statements in the witness interview summaries and the use of multiple forms for employee questionnaires and interviews;~~
 - e) Analogic is entitled to elicit testimony under Topic No. 15, only to the extent that it is seeking the underlying facts that OFCCP relied on in its internal calculation of damages. OFCCP is entitled to a protective order to the extent that Analogic seeks testimony regarding OFCCP's methodology or

formulas for calculation of damages, in general and as it pertains to Analogic; and

- f) Analogic is entitled to elicit testimony under Topic No. 18, for the limited purpose of clarifying factual information contained in the email produced by OFCCP (OFCCP-ANA-000540). OFCCP is entitled to a protective order to the extent that Analogic seeks testimony as to the contents of documents included in the Enforcement Package as such information intrudes on OFCCP's deliberative process privilege and the attorney-client privilege.

SO ORDERED.

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts