

**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE
AMERICA INC.'S SECOND
MOTION TO COMPEL
PLAINTIFF OFCCP TO
PRODUCE DOCUMENTS AND
FURTHER RESPOND TO
INTERROGATORIES**

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Administrative Law Judges
San Francisco, Ca

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INTRODUCTION

In 2017, Oracle brought a motion to compel that reads not too differently from this one. Oracle won that motion to compel. In the broadest strokes, the September 11, 2017 Order granting Oracle's motion required OFCCP to provide the facts underlying its lawsuit against Oracle and documents reflecting those facts in its possession, custody and control. Now, two years and an amended complaint later, OFCCP still has not provided all of those facts or documents. Instead, OFCCP has, with minor exception, taken advantage of the reassignment of this case and resorted back to the stance it took prior to the Order on Oracle's motion to compel.

Here is why Oracle brings a motion to compel, again:

OFCCP relies on the government informant's privilege to withhold entire communications, rather than just the identity of an informant. It asserts a common interest privilege to conceal communications with third parties despite meeting none of the requirements. OFCCP will not even provide the identity of persons with knowledge of the facts relating to OFCCP's allegations, which courts have required even in light of the assertion of the government informant's privilege.

Oracle is now sitting seven months out from trial and two months out from a discovery cutoff. And, except for a limited number of OFCCP personnel whom OFCCP identified as having knowledge of the facts, Oracle has no ability to know the persons who possess what information so that it may depose them or even mount a defense against what those persons may say or use them as a defense, including for summary judgment. If OFCCP has its way—as it acknowledged in the meet and confer process—Oracle will not learn this information until November 8, 2019, when OFCCP provides its witness list, thereby depriving Oracle of its rights to discovery, its rights to bring and oppose summary judgment. Also, this may impact the

December trial date so that Oracle will be able to engage in the discovery this discovery practice deprived it of.

In response to interrogatories, rather than state facts that support its claims, OFCCP says that the facts can be found in the Second Amended Complaint (“SAC”) and in the Supplemental Responses to the First Set of Interrogatories, as amended. That does not work. The First Set of Interrogatories related to the First Amended Complaint (“FAC”) and some of the allegations in the SAC are new, as this Court found. The Supplemental Responses to the First Set of Interrogatories also note that the answers can be found somewhere in the thousands of pages of documents cited by OFCCP. OFCCP thus wrongly directs Oracle to a mountain of documents with the unstated “you find it.” In fact, some of those documents do not even relate to this case. One document is about an EEOC action taken against a hog farmer in South Georgia. Another is Oracle’s 10K from 2014. Some of the documents referenced are interview memos that are so enthusiastically redacted that there are no real facts to glean from them.

In short, this motion to compel, like the last one, is merely seeking the documents and facts related to the allegations that OFCCP brought after *eighteen months* of investigation during which Oracle produced documents and OFCCP interviewed witnesses. And since the bringing of the First and Second Amended Complaints, OFCCP has received thousands and thousands of additional pages of documents and conducted additional witness interviews. Oracle is entitled to bring a meaningful summary judgment motion. It is entitled to offer a meaningful opposition to a summary judgment motion. Oracle is entitled to prepare for trial in this matter. OFCCP is seeking millions and millions of dollars in damages and Oracle is entitled to defend itself against such a request and maintain its reputation—this is to say nothing of due process standing alone.

Lastly, Oracle requests that this Court issue an order stating that no documents, witnesses or information requested but not disclosed may be introduced as evidence at the hearing.

For all the reasons set forth below, the Court should grant Oracle's request to compel OFCCP to produce documents supporting its claims and to respond in full, without incorporation by reference, to Oracle's Interrogatories.

STATEMENT OF FACTS

OFCCP filed its complaint on January 17, 2017 and the FAC on January 25, 2017. In the FAC, OFCCP alleged that Oracle discriminated against non-Asians in recruiting and hiring in its "PT1" job group, and discriminated against women, African Americans, Asians and Hispanics in its Product Development, Support and IT lines of business.

Prior Discovery Responses. On February 8, 2017, Oracle served its Request for Production, Set One. See Parker Declaration in Support of Oracle's Motion to Compel ("Parker Decl."), Ex. 1 ("Oracle's 1st RFPs"). On May 16, 2017, Oracle served its Interrogatories, Set One, as amended. Parker Decl. Ex. 2 ("Oracle's 1st Am. Rogs"). Oracle's requests were directly tied to the allegations in the FAC.

On March 6, 2017 and June 12, 2017, OFCCP served its responses and objections to Oracle's Requests for Production and to Oracle's Interrogatories, respectively. Parker Decl. Ex. 3 ("Responses to Oracle's 1st RFPs"); Ex. 4 ("Responses to Oracle's 1st Rogs"). OFCCP's 2017 responses and objections are similar to its current responses and objections that are the subject of this motion. *Compare, e.g.,* Responses to Oracle's 1st RFPs at RFP Response No. 22 *with* Ex. 12 ("Responses to Oracle's Am. 2d RFPs") at RFP No. 101; *compare, e.g.,* Responses to Oracle's 1st Rogs at Interrogatory No. 12 *with* Ex. 13 ("Responses to Oracle's 2d Rogs") at Interrogatory No. 30.

Judge Larsen's Order and OFCCP's Supplemental Responses. Throughout 2017, the parties engaged in extensive telephonic and written meet and confers.¹ When the discussions hit

¹ For these meet and confer letters, Oracle refers this Court to the Declaration of Gary Siniscalco ("Siniscalco Decl."), filed on August 18, 2017. Similarly, Oracle refers the Court to this Court's file for the August 18, 2017 Motion to Compel ("Oracle's 1st MTC") and the Order of September 11, 2017. Oracle will re-file both documents should this Court so request.

an impasse, Oracle moved to compel OFCCP to produce documents and respond to Oracle's Interrogatories in August 2017. On September 11, 2017 Judge Larsen issued a lengthy and detailed order (the "Order"), largely granting Oracle's motion and ordering OFCCP to supplement its responses and document production.

OFCCP served supplemental answers to Oracle's Requests of Production and Interrogatories on October 11, 2017. Parker Decl. Ex. 5 ("Supp. Responses to Oracle's 1st RFPs"); Ex. 6 ("Supp. Responses to Oracle's 1st Rogs").

The Discovery That Is The Subject Of This Motion to Compel. On January 22, 2019, OFCCP filed its motion for leave to file a SAC to add new allegations of discriminatory job channeling and use of prior pay.

On February 26, 2019, Oracle served its Second Set of Requests of Production, based on OFCCP's proposed Second Amended Complaint, i.e., the proposed complaint attached to the Motion for Leave to Amend. Parker Decl. Ex. 7 ("Oracle's 2d RFPs"). Following this Court's Order requiring modifications to the proposed SAC, and after OFCCP's March 8 filing of the SAC with those modification, Oracle served an amended Second Set of Requests for Production on March 12, 2019, to relate to the as-filed SAC. Parker Decl. Ex. 8 ("Oracle's Am. 2d RFPs").² Oracle also served its Second Set of Interrogatories, containing Interrogatory Nos. 26-50, on March 15, 2019. Parker Decl. Ex. 9 ("Oracle's 2d Rogs").

OFCCP served its Responses and Objections to Oracle's Second Set of Requests for Production, as amended, on April 5, 2019. Responses to Oracle's Am. 2d RFPs. OFCCP served its Responses and Objections to Oracle's Second Set of Interrogatories on April 9, 2019. Responses to Oracle's 2d Rogs. The parties exchanged meet and confer letters and met telephonically on April 18, 2019 and May 2, 2019. Parker Decl. at ¶ 2 and Ex. 12 ("M&C

² On March 29, 2019, Oracle served a Third Set of Requests for Production, correcting typographical errors in its Second Set. OFCCP did not object to Oracle's typographical corrections. The corrections are incorporated into OFCCP's responses.

Letters”).³

ARGUMENT

I. OFCCP SHOULD BE COMPELLED TO PROVIDE DOCUMENTS IN CONFORMITY WITH FED. R. CIV. P. 26 AND 34

Under Rule 26(b)(1), a party may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case. Under the Federal Rules, an interrogatory may relate to any matter that may be inquired into under Rule 26(b). Fed. R. Civ. P. 33(a)(2). It is well established that “[f]or discovery purposes ‘relevancy’ is a broad term.” *Liew v. Breen*, 640 F.2d 1046, 1049 (9th Cir. 1981). “The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections.” *Cable & Comput. Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997) (noting that Rule 26(b) is liberally interpreted to permit wide-ranging discovery of all information reasonably calculated to lead to discovery of admissible evidence). “Information within this scope of discovery need not be admissible in evidence to be discoverable.” Fed. R. Civ. Proc. 26(b)(1).

A. OFCCP Should Be Compelled to Produce Additional Documents

There are two principal deficiencies in OFCCP’s document production. First, OFCCP refuses to produce its communications with third parties—including current and former Oracle employees—and unredacted interview memos that relate to its claims in the SAC. Second, OFCCP refuses to produce communications with the plaintiffs and their counsel in *Jewett v. Oracle America, Inc.* regarding their purported oral and written common interest agreement.

1. OFCCP should be compelled to produce its communications with current and former Oracle employees

OFCCP objects to every Request that seeks interview memos and documents relating to

³ On April 25, 2019, the parties filed with the Court Consent Findings with respect to OFCCP’s claims based on Oracle’s hiring practices and related recordkeeping allegations. Oracle therefore does not move on the following requests that relate to those allegations: RFP Nos. 203-227, 230 and Interrogatory Nos. 46-48.

communications OFCCP has had with third parties—including current and former Oracle employees—that relate to the facts asserted in the SAC. *See* Responses to Oracle’s Am. 2d RFPs at RFP Nos. 104, 106, 111, 116, 121, 123, 131, 134, 137, 140, 151, 154, 157, 170, 175, 180, 185, 197, and 202.⁴

In any enforcement action, Oracle would be entitled to OFCCP’s communications with current and former Oracle employees. In this case, however, these Requests are even more crucial because OFCCP is actively directing misleading and coercive communications to current and former Oracle employees. *See* Parker Decl. Ex. 14 (“DOL Letter”). OFCCP’s communications are misleading because, among other reasons, they present OFCCP’s allegations as foregone conclusions. For example, in the April 4, 2019 communication attached as Exhibit 14 to the Parker Declaration, OFCCP states that it has “determined” that certain employees were paid less than their peers and that “this discrimination cost these employees at least \$600,000,000 in lost wages.” By failing to accurately describe its allegations as just that—mere unproven allegations—OFCCP misleads these employees into thinking that a Court has found discrimination and that the recipient of this letter may be entitled to a recovery. Compounding its misdeeds, OFCCP then suggests employees should contact the Department of Labor in order to reap the benefits of a purported \$600,000,000 in so-called lost wages. Given the highly improper contents of this communication, Oracle’s need for OFCCP’s communications with third parties is paramount.⁵

Oracle requested interview memos and communications with third parties in its first round of document requests. Oracle’s 1st RFPs, RFP Nos. 18, 32, 46, and 63. The parties met and conferred extensively on these Requests. Siniscalco Decl. at 3, Ex. E. OFCCP objected to what it claimed were overbroad definitions and proposed that Oracle narrow the Requests to

⁴ These Requests seek communications with all third parties, which also includes the plaintiffs in *Jewett v. Oracle America, Inc.* and their counsel. As explained below, contrary to OFCCP’s assertion, the common interest privilege does not apply to these communications.

⁵ Oracle is still meeting and conferring with OFCCP regarding this letter, the outcome of which may be additional motion practice.

apply only to communications between OFCCP and “class members and applicants.” Siniscalco Decl. Ex. E at 66. When the parties were unable to resolve their dispute, Oracle moved to compel Oracle’s 1st MTC. Judge Larsen agreed with Oracle and held that OFCCP must produce in response to these Requests “any writings in its possession, custody, or control **comprising or memorializing communications with third parties** which support the material factual allegations.” *See, e.g.*, Order at 61.

Despite Judge Larsen’s Order, OFCCP refuses to produce unredacted interview memos or its communications with former or present Oracle employees or third parties, claiming that these memos and communications are shielded by the common interest privilege and the government informant privilege.⁶ M&C Letters at 24-25, 27. OFCCP is mistaken on both counts.

The Common Interest Privilege Does Not Apply. OFCCP’s communications with Oracle employees (former or present) and any third party cannot be protected by the common interest privilege as it simply does not apply.

The common interest doctrine is not its own privilege; instead, it is merely a carefully-limited exception to the waiver of the attorney-client privilege. *See Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir.1965) (“common interest” rule designed to allow attorneys for

⁶ OFCCP affirmed to Oracle that it does not represent any Oracle employee, current or former, and that OFCCP is not providing them legal advice. M&C Letters at 31. It is not clear whether OFCCP asserts work product privilege over these interviews. However, even if OFCCP were to make this argument, work product privilege does not protect the underlying facts revealed in the interviews. It would also not protect a communication, particularly a communication drafted by the third party. *Ocean Mammal Inst. v. Gates*, 2008 WL 2185180, at *46 (D. Haw., May 27, 2008) (work product doctrine was not applicable where document contained facts, rather than attorney’s mental impressions or strategies). OFCCP has an obligation to disclose those facts and documents. Instead, many of OFCCP’s responses to Oracle’s Interrogatories incorporate by reference memoranda of interviews that are so heavily redacted as to be essentially meaningless. For example, in response to Interrogatory No. 49, OFCCP cites as part of the anecdotal evidence of discrimination the interviews of Oracle personnel, including those found at DOL000000507-904. Attached as Exhibit 13 to the Parker Decl. is a subset of these interviews, consisting of DOL000000805-839. As is evident from even a quick glance through these documents, with vanishing rare exception, they are stripped of meaning and fall far short of meeting OFCCP’s obligation to provide the facts that support its allegations. Oracle will provide to this Court copies of all the interview memos cited in OFCCP’s interrogatory responses, if requested by this Court.

different clients pursuing a common legal strategy to communicate with each other).

Thus, a threshold requirement for the common interest privilege is that the purpose of the communication be to seek legal advice. *Fox v. Shinseki*, 2013 WL 11319070, at *3–4 (N.D. Cal. June 11, 2013) (granting motion to compel and ordering documents produced that merely “convey[ed] facts” and “describ[ed] questions [] asked” and where there was “no indication that Plaintiff was seeking legal advice”). OFCCP has affirmed that it is not representing the “class members” or providing legal advice. M&C Letters at 31. Rather, OFCCP is using Oracle’s employees to gather facts to build its case against Oracle.

Moreover, because the purpose of the communication must be to seek legal advice, it follows that all parties must be represented by counsel. *Finisar Corp. v. U.S. Bank Tr. Nat. Ass’n*, 2008 WL 2622864, at *4 (N.D. Cal. June 30, 2008) (“Under the strict confines of the common interest doctrine, the lack of representation for the remaining parties vitiates any claim to a privilege.”) (quoting *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass. 2001)); *Regents of Univ. of Cal. V. Affymetrix, Inc.*, 2018 WL 4896066, at *3 (S.D. Cal. Oct. 9, 2018) (where party claiming privilege has not shown that parties had legal representation at the time the communications were disclosed, “[t]hat alone forecloses protection under the common interest doctrine.”). At least for the interview memos, it does not appear that Oracle employees were represented by counsel. Oracle suspects that is true for most, if not all, former and current Oracle employees that OFCCP has interviewed as well as third parties. But on this, Oracle does not carry the burden.⁷ *Finisar Corp.*, 2008 WL 2622864, at *4 (“The party asserting the privilege has the burden of establishing that the privilege is applicable to the discovery in question.”).

⁷ Even the cases OFCCP cites concerning the common interest privilege support Oracle’s position because each demonstrates that the privilege only applies, if at all, where both parties are represented by counsel. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (common interest privilege is an extension of attorney-client privilege that establishes an implied attorney-client relationship between codefendants and their counsel); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (because common interest privilege is an anti-waiver exception, it applies only if the communication at issue is privileged in the first instance).

Further, OFCCP cannot show the necessary “common interest” with Oracle’s employees. A desire that OFCCP prevail is insufficient. Even victims of a crime do not have a common interest with the government. *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (“[A] shared desire to see the same outcome in a legal matter is insufficient... Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement[.] ...He has no more of a common interest with the government than does any individual who wishes to see the law upheld.”); *Nidec*, 249 F.R.D. at 579 (to be protected, communications must be made in the course of formulating a common legal strategy). Oracle’s employees are not working with OFCCP to pursue a common legal strategy against Oracle. They are merely fact witnesses for OFCCP’s claims.

The Government Informant’s Privilege, Even If It Were to Apply, Cannot Continue to Shield Discovery. Nor are these communications and memos shielded by the government informant’s privilege. The informant’s privilege only protects the *identification* of a person *as an informant*. It does not prevent the disclosure of the facts provided to the government by that informant. *Westinghouse Elec. Corp. v. City of Burlington, Vt.*, 351 F.2d 762, 768 (D.C. Cir. 1965) (“Only the identity of the informer is privileged. The content of the communication is not privileged unless it would tend to reveal the identity of the informer.”); *see also, Roviario v. United States*, 353 U.S. 53, 60 (1957) (“[W]here the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged.”).

Moreover, even if the privilege applied, Oracle is at least entitled to these communications in a redacted format that only removes identifying information. *See Solis v. Seafood Peddler of San Rafael, Inc.*, 2012 WL 12547592 at *4 (N.D. Cal. Oct. 16, 2012) (“Finding that no identifying information exists within the text of the letters, the Court orders the Secretary to produce the documents, redacting only the names and addresses of confidential informants.”); *OFCCP v. Owens-Illinois*, Case No. 1977-OFCCP-11 (ALJ, Nov. 21, 1980) (under the “informant’s privilege,” the identity of the informant is protected, but the contents of

the communication are not privileged).

Lastly, the informant's privilege is qualified and can be overcome by a showing of need. *OFCCP v. Crown Zellerbach Corp.*, Case No. 1987-OFC-23 (ALJ, June 6, 1989) (public interest in protecting the flow of information to aid law enforcement must be balanced against defendant's need for disclosure). Seven months out from trial, Oracle has a need for this information. Two months prior to the discovery cutoff, Oracle has a need for this information. Such need is supported by the fact that OFCCP insists that the highly redacted interview memos support the claims of the SAC. *See, e.g.*, Responses to Oracle's 2d Rogs at Interrogatory Nos. 28-45, incorporating by reference Supp. Responses to Oracle's 1st Rogs, Interrogatory Nos. 2, 11, and/or 12.

OFCCP claims that it will produce information protected by the government informant's privilege at the time it discloses its witnesses as required by Court Order—November 8, 2019. M&C Letters at 31. That is not tenable.⁸ It deprives Oracle of its right to discovery, of the right to defend against or bring summary judgment motions. It means that trial cannot commence in December 2019 so that Oracle can take discovery.

The Court should order OFCCP to produce its communications with third parties relating to the allegations in the SAC.

2. OFCCP should be compelled to produce documents related to its alleged common interest agreement with the *Jewett* Plaintiffs (Oracle's RFP Nos. 232-235)

OFCCP objects to Oracle's requests for communications with the *Jewett* plaintiffs' counsel on the basis of the common interest privilege. *See* Responses to Oracle's Am. 2d RFPs, Responses and Objections to RFPs 232-35; M&C Letters at 28. OFCCP and the *Jewett* plaintiffs do not share a common interest. While OFCCP and plaintiffs in *Jewett* both have suits pending against Oracle (unlike the Oracle employees whom OFCCP also tries to shoehorn into this privilege), the two cases involve different legal theories, different parties, and are being litigated

⁸ In addition, as explained above, given OFCCP's misleading communications, that need is met here.

pursuant to different mandates. OFCCP operates under Executive Order 11246. Unlike the *Jewett* plaintiffs, who are private litigants seeking to extract the maximum amount of monetary damages for their own benefit, OFCCP's task is to determine, one way or the other, if there is discrimination. As this Court recently stated, "Counsel for the government has an interest only in the law being observed, not in victory or defeat in any particular litigation." See 3/9/2019 Order on OFCCP's Motion to File a Second Amended Complaint at 14. Conversely, the sole interest the *Jewett* plaintiffs have is to find Oracle liable, on any theory and by any legal means necessary. This difference alone eliminates any "common interest" between OFCCP and the *Jewett* plaintiffs. "The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 2002 WL 1334821, at *3 (S.D.N.Y. June 19, 2002) (omitting citations).

Thus, OFCCP must show that its communications with the *Jewett* plaintiffs were "made to advance the[] [parties'] *shared interest* in securing legal advice on that common matter" and "necessary . . . to secure the legal representation." *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 163 F.R.D. 574, 581 (N.D. Cal. 1995). OFCCP cannot meet these standards.

In addition to the lack of common interest between an agency of United States Department of Labor and attorney in private practice, the *Jewett* plaintiffs' disclosures to the government are discoverable because they are not confidential. To the contrary, they are subject to disclosure under the Freedom of Information Act (FOIA). *Lucaj v. Federal Bureau of Investigation*, 852 F.3d 541, 547-49 (6th Cir. 2017) (finding that common interest privilege does not protect from disclosure materials provided to government agency by third party). This is a separate and independent basis on which to overrule this meritless privilege assertion.

OFCCP should be compelled to withdraw its baseless common interest privilege objection and to produce documents responsive to Request Nos. 232-235.

II. OFCCP SHOULD BE COMPELLED TO RESPOND IN FULL TO ORACLE'S INTERROGATORIES

Oracle has propounded 25 Interrogatories in its Second Set that track the allegations in the SAC and seek the facts underlying those allegations. Oracle's 2d Rogs. OFCCP's responses are deficient because: (1) they improperly incorporate other documents by reference and are therefore not complete within themselves; (2) OFCCP refuses to disclose the identity of persons with knowledge of the facts relating to OFCCP's allegations; (3) OFCCP refuses to provide a complete answer to Oracle's request for all anecdotal evidence; and (4) OFCCP refuses to give a complete answer to Oracle's request that OFCCP identify all policies, practices, procedures, and tests that OFCCP contends operate to have a disparate impact. The Court should compel OFCCP to respond fully to Oracle's interrogatories.

A. OFCCP Cannot Rely on Incorporation by Reference to Respond to Oracle's Interrogatories

In response to every Interrogatory, including Interrogatories asking OFCCP to state facts in support of a specific allegations of the SAC, OFCCP incorporates by reference answers to interrogatories that related to the FAC or the SAC itself. *See, e.g.*, Responses to Oracle's 2d Rogs, Interrogatory Nos. 28-45. This is improper, procedurally. But perhaps more importantly—and perhaps the reason for the procedural rules against incorporation—in this case it fails to provide the facts relating to the SAC.

The Violation of the Procedural Rules. The relevant rules of procedure require that parties respond to interrogatories “separately and fully in writing.” 41 C.F.R. 60-30.9(a). Under the identical language of the Federal Rule of Civil Procedure 33(b)(1), it is improper to refer to a response to another interrogatory unless it seeks information identical to the original interrogatory. Fed. R. Civ. Pro. 33(b)(1) (Interrogatories must be “answered separately and fully

in writing under oath”); *see also*, *U.S. ex rel O’Connell v. Chapman Univ.*, 245 F.R.D. 646 (C.D. Cal. 2007). Further, it is well established that an answer to an interrogatory “must be complete in itself.” *Former S’holders of Cardiospectra, Inc. v. Volcano Corp.*, 2013 WL 5513275, at *12 (N.D. Cal. Oct. 4, 2013). In other words, a response “should not refer to the pleadings, or to depositions or other documents, or to other interrogatories, at least where such references make it impossible to determine whether an adequate answer has been given without an elaborate comparison of answers.” *Id.* “It is important that parties include all of the relevant information in their responses because [the responses] are sworn statements while the other documents are not.” *Small v. Welldyne, Inc.*, 2017 WL 2484181, at *5 (E.D.N.C. June 8, 2017); *see also*, Fed. R. Civ. P. Rule 33 (“Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.”).

The Failure to Provide Complete Responses. OFCCP’s incorporation by reference is particularly inappropriate because it allows OFCCP to avoid providing facts. The interrogatories at issue relate specifically to the allegations of the SAC. Oracle’s 2d Rogs at Interrogatory Nos. 26-45. In response, OFCCP cites to the SAC as support for its claims—rendering the response a tautology. OFCCP also incorporates by reference OFCCP’s supplemental responses to Oracle’s First Set of interrogatories, dated October 11, 2017, all of which were based on the allegations in the FAC. Responses to Oracle’s 2d Rogs at Interrogatory Nos. 26-45; Supp. Responses to Oracle’s 1st Rogs at Interrogatory No. 1-25.

The problem is that OFCCP has asserted new allegations in the SAC. By incorporating earlier answers, OFCCP ignores these new allegations. For example, Interrogatory No. 32 in Oracle’s current Interrogatories asks OFCCP to “state the facts that support the allegation in Paragraph 18 of the Second Amended Complaint that ‘Oracle pays women and Asians less on

hire, either by suppressing their pay relative to other employees in the same or comparable job, or by hiring them for lower-paid jobs.” Oracle’s 2d Rogs at Interrogatory No. 32.

OFCCP responded by incorporating the responses to Interrogatory Nos. 2-6 and 12-16 of the First Set of Interrogatories. Responses to Oracle’s 2d Rogs, at Interrogatory No. 32. None of these prior responses actually pertain to Paragraph 18 of the SAC and its allegations. For example, Rog No. 12 of the First Set of Interrogatories relates to Paragraph 12 of the FAC, which alleged that Oracle discriminated against Asians in Product Development roles by paying them less than comparable Whites. This is not the only instance of a mismatch. *See also, e.g.*, Responses to Oracle’s 2d Rogs at Interrogatory Nos. 33-38.

B. OFCCP Wrongly References Thousands Of Pages Of Documents—Some Of Which Have Nothing To Do With This Case

OFCCP’s response to Interrogatory No. 49—which seeks facts relating to anecdotal evidence of discrimination—to the Second Set of Interrogatories is one example of many where OFCCP references thousands of pages of documents that apparently somewhere sets forth the facts of the anecdotal evidence of discrimination. Some of the documents referenced are the redacted interview memos, some of which are attached as exhibits and referenced in footnote 6, above. Some of the documents are just literally thousands of pages of documents, one of which is the AAP that Oracle allegedly did not provide. And some could not conceivably apply to this case.⁹

⁹ As examples, one document relates to an EEOC action taken against a farm in South Georgia. Parker Decl. Ex 15. One is about former employee Thomas Kurian and his personal history and heritage. Parker Decl. Ex 16. Another is an Oracle 10K from 2017. Parker Decl. Ex 17.

However, this reference to thousands of pages of documents is not limited to the response to Interrogatory No. 49. For example, the response to Interrogatory No. 32 from the second set of Interrogatories incorporates the response to Interrogatory No. 2 from the first set. Interrogatory No. 2 from the first set *references the same exact documents as the response to Interrogatory No. 49*. This would mean that the same exact documents—including those about the farm in South Georgia—reflect the anecdotal evidence (Interrogatory No. 49), the facts supporting the claims that Asians and women are channeled into lower paying jobs or suffer from pay suppression (Interrogatory No. 32 of the second set) *and* the allegation in the FAC (Interrogatory No. 2 of the first set).

Basically, these are non-responses. Reference to redacted documents, thousands of pages of other materials, including those that are irrelevant on their face, is just no answer at all. Instead of providing “facts,” as the Interrogatory requested, OFCCP asks Oracle to go on a scavenger hunt in hopes of finding something relevant buried in hundreds of pages of documents. This is not an appropriate response to an interrogatory and it is far from “complete in itself.” Fed R. Civ. P. 33(d)(1); *Palmdale 3D, LLC v. Calamos*, 2015 WL 12832140, at * 1 (C.D. Cal. June 24, 2015); *Reinsdorf v. Sketchers U.S.A, Inc.*, 2012 WL 12882125, at * 3 (C.D. Cal. May 11, 2012); *Volcano Corp.*, 2013 WL 5513275, at *2.

Finally, Judge Larsen already put OFCCP on warning that it cannot rely on incorporation by reference, stating that “If an interrogatory asks for facts supporting an allegation, the answering party does not satisfy its obligation to answer the question merely by citing the questioner to the Amended Complaint or the Notice of Violation.” Order at 84.

OFCCP should be compelled to produce complete answers to Oracle’s Interrogatories.

C. OFCCP Should Be Compelled To Disclose The Identity Of Persons With Knowledge Of The Allegations (Interrogatory No. 27)

Interrogatory No. 27 asks OFCCP to “identify by name and last known contact information each PERSON with knowledge of the facts regarding the alleged discrimination, including the nature of the facts of which the PERSON identified has knowledge.” See Oracle’s 2d Rogs at Interrogatory No 27. OFCCP responds by incorporating Interrogatory No. 2 of the first set, which names only OFCCP personnel by name. Supp. Responses to Oracle’s 1st Rogs at Interrogatory No. 2. Otherwise, the response states that persons with knowledge of the facts of the SAC are “Oracle management and supervisory employees, people in Oracle’s human resources and/or personnel departments, Oracle employees or agents involved with compliance with the Executive Order . . . people involved in securing and processing information provided to OFCCP, etc. . . .” Responses to Oracle’s 2d Rogs at Interrogatory No. 27.

As made evident by the “etc.,” this is not an actual identification of any particular persons with knowledge of the facts of the allegations. It is just everyone at Oracle and “etc.” The identification of persons with knowledge of the facts of a case is one of the core purposes of an interrogatory. *Welldyne, Inc.*, 2017 WL 2484181 at *6 (Although the phrase that parties must produce “the identity and location of persons who know of any discoverable matter” was removed from Rule 26, the advisory committee notes make clear that it was removed because “[d]iscovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples”). Consistent with that, courts have consistently held that a party is entitled to know the identity of persons who have knowledge of facts. See *Escamilla v. Nuyen*, 2015 WL 4245868, at *5 (D.D.C. July 14, 2015); *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, 2008 WL 5336700, at *7 (S.D.N.Y. Dec. 22, 2008). Referencing broad groups by vague terms does not suffice. *Escamilla*, 2015 WL 4245868,

at *5 (compelling party to identify individuals by name in response to interrogatory requesting “identify individuals with discoverable information supporting his positions in this case and to state in detail the information possessed by each person identified.”).¹⁰

Finally, OFCCP cannot rely on the informant’s privilege for its refusal to respond fully. The informant’s privilege only protects the identification of a person as an *informant*, not as a witness. *Sec’y of Labor, United States Dep’t of Labor v. Kazu Constr., LLC*, 2017 WL 628455, at *5 (D. Haw. Feb. 15, 2017) (Secretary of Labor disclosed list of witnesses with knowledge about a case without waiving informant’s privilege where list did not identify which witnesses, if any, were informants).

D. OFCCP Should Be Compelled To Provide All Anecdotal Evidence That Supports Its Claims (Interrogatory No. 49)

Oracle’s Interrogatory No. 49 requests OFCCP to describe in detail any anecdotal evidence of discrimination it contends supports any allegation in the SAC. See Oracle’s 2d Rogs at Interrogatory No. 49. OFCCP’s response is lacking because it is arbitrarily limited and incomplete on its face.

First, OFCCP arbitrarily limits its response to this Interrogatory to materials contained within the Investigative File. Responses to Oracle’s 2d Rogs at Interrogatory No 49.¹¹ OFCCP is specifically soliciting anecdotal evidence, stating to potential witnesses “We want to hear what

¹⁰ Oracle acknowledges that Judge Larsen’s order allowed OFCCP to broadly list as persons with knowledge all Oracle personnel. That was at a different stage. OFCCP has now had since 2016, to further investigate this matter. It has had contact information for Oracle employees since 2017 and it is currently soliciting information from Oracle’s former and current employees. OFCCP cannot delay its responsibility to disclose witnesses any longer.

¹¹ Judge Larsen ruled on a nearly identical Interrogatory in Oracle’s first set of Interrogatories and held that OFCCP must answer the Interrogatory, without limiting the answer to the Investigative File. *See Order* at 133.

happened to you.” See DOL Letter. Presumably, OFCCP is seeking this evidence to present at trial in support of its claims. There is no justification for withholding this evidence.¹²

Second, OFCCP’s response to Interrogatory No. 49 is not complete because it relies on references to external documents that it contends contain anecdotal evidence. This is not a sufficient response. As explained above, an interrogatory “must be complete in itself.” *Volcano Corp.*, 2013 WL 5513275, at *2.

The Court should compel OFCCP to produce a complete answer to Oracle’s Interrogatory No. 49 and to include “ANY anecdotal evidence,” without arbitrary limitations or irrelevant distractions.

E. OFCCP Should Be Compelled To Identify The Oracle Policies, Practices, Procedures, And Tests That OFCCP Contends Operate To Have A Disparate Impact (Interrogatory No. 50)

Oracle’s Interrogatory No. 50 requests that if OFCCP contends that any of the discrimination alleged in the SAC is based on a theory of disparate impact, it identify the policies, practices, procedures, and tests that OFCCP contends operate to have a disparate impact. Oracle’s 2d Rogs at Interrogatory No. 50. Oracle propounded a nearly identical Interrogatory in its first set of Interrogatories. Oracle’s 1st Rogs at Interrogatory No. 25. Judge Larsen agreed with Oracle that OFCCP must answer. Order at 134. However, OFCCP appears, yet again, to rely on inappropriate tactics to avoid giving a complete answer.

In response to Interrogatory No. 50, OFCCP states that Oracle’s practices “include” a variety of practices that may have a disparate impact. Oracle did not request a subset of the

¹² As explained above, contrary to OFCCP’s assertions, neither the government informant’s nor the common interest privilege shields this information.

whole. OFCCP claims to have evaluated Oracle's policies and practices and OFCCP is under an obligation to state definitively and completely what policies and practices it contends have a disparate impact.

Furthermore, the response is not specific in what the actual policies and practices are. It provides categories of things that may be a policy or practice but is devoid of specifics.

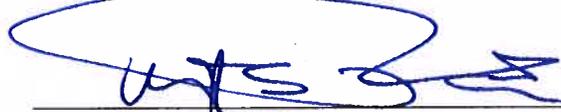
CONCLUSION

For the reasons set forth above, Oracle respectfully requests that the Court grant its motion to compel.

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Respectfully submitted,

GARY R. SINISCALCO
ERIN M. CONNELL
WARRINGTON S. PARKER



ORRICK, HERRINGTON & SUTCLIFFE LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5700
Facsimile: (415) 773-5759
Email: grsiniscalco@orrick.com
econnell@orrick.com
wparker@orrick.com

Attorneys for Defendant
ORACLE AMERICA, INC.