

**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'S
MOTION TO COMPEL
PLAINTIFF OFCCP TO
DESIGNATE AND PRODUCE
30(b)(6) WITNESSES**

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San Francisco, Ca**

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I. INTRODUCTION

Oracle can now say with confidence: OFCCP simply does not want to provide Oracle meaningful discovery. Oracle has already filed a motion to compel to obtain proper responses to interrogatories and document requests. Mtn. to Compel, filed May 3, 2019. Now Oracle must do so to obtain 30(b)(6) depositions.

Oracle served a 30(b)(6) deposition notice seeking persons most knowledgeable on the facts asserted in OFCCP's Second Amended Complaint. OFCCP refuses to produce a witness or witnesses as to Topics 1 to 21.¹ It will only produce a witness or witnesses as to Topics 30 and 31, which relate to the allegations that Oracle refused or failed to produce documents. According to OFCCP, it produced the statistical analyses underlying its allegations and its witnesses have "limited knowledge" of the facts supporting its allegations. Therefore, OFCCP claims there is no need for a 30(b)(6) deposition. Neither assertion is valid—factually or legally.

First, regarding the facts, as already detailed in Oracle's Motion to Compel and Reply Brief thereto (filed May 3, 2019 and May 23, 2019), this case is not merely about statistics, even as OFCCP paints its case. For example, there are thousands of pages of documents OFCCP contends supports its allegations. There are also non-statistical facts, referenced in Oracle's May 3 and May 23 filings. Therefore, the production of statistical analyses does not excuse OFCCP.

Second, as a legal matter, the production of materials in response to written discovery requests is not grounds to refuse to produce a witness for deposition.

OFCCP's position that no one at OFCCP can testify intelligently about the facts supporting its own allegations is equally legally meritless. A plaintiff cannot refuse to produce a

¹ Given the resolution of certain claims, there is no need for a witness to appear as to Topics 22-29.

30(b)(6) witness based on the assertion that the information possessed is limited. OFCCP must find a person most knowledgeable or *prepare someone to fit that role*.

Finally, OFCCP contends that the information Oracle seeks in its 30(b)(6) Notice is privileged. Under the circumstances here, such an objection is simply not allowed. Oracle's topics do not, on their face, seek privileged information. They call for "[t]he facts that support the allegations of" various paragraphs. OFCCP can raise privilege objections to specific questions at the deposition. This is the proper recourse—not a blanket objection *ex ante*. Facts are not privileged, and OFCCP cannot use privilege to shield them.

In the end, as is clear by now, OFCCP seems to believe that it can operate under a different set of discovery rules than other litigants. Alternatively (or simultaneously), OFCCP wishes to drive up the pain and cost of this litigation to Oracle.

Whatever is the case, Rule 30(b)(6) expressly permits the deposition of "a governmental agency." Having chosen to initiate this action, OFCCP must comply with its discovery obligations because "when the Government seeks affirmative relief, it is fundamentally unfair to allow it to evade discovery of materials that a private plaintiff would have to turn over." *E.E.O.C. v. Corr. Corp. of Am.*, 2007 WL 4403528, at *1 (D. Colo. Dec. 13, 2007).

II. STATEMENT OF FACTS

OFCCP filed its complaint on January 17, 2017 and the First Amended Complaint ("FAC") on January 25, 2017. In the FAC, OFCCP alleged that Oracle discriminated against non-Asians in recruiting and hiring in its "PT1" job function, and discriminated against women, African Americans, Asians, and Hispanics in its Product Development, Support, and IT job functions.

Oracle's First Rule 30(b)(6) Notice. On May 31, 2017, Oracle served on OFCCP a Notice of Deposition Pursuant to 41 C.F.R. § 60-30.11 and Fed. R. Civ. P. 30(b)(6) ("Oracle's First 30(b)(6) Notice"). Declaration of Warrington Parker ("Parker Decl."), Ex. 1. The notice sought a witness or witnesses to testify regarding the facts supporting the allegations of the FAC. On June 21, 2017, OFCCP served its objections to Oracle's First 30(b)(6) Notice. *Id.*²

OFCCP objected to all of Oracle's requests and refused to produce a witness.

Judge Larsen's Order. On August 18, 2017, Oracle filed a Motion to Compel OFCCP to designate a witness on its 30(b)(6) topics. The Court granted Oracle's Motion on September 11, 2017, stating that "within fifteen days of the issuance of this Order, OFCCP must designate witnesses in response to Defendant's Rule 30(b)(6) notice . . . and make them available for deposition forthwith." *See* Order on Oracle's Motion to Compel, dated September 11, 2017 at 134-35. Shortly thereafter, the case was stayed. Order Staying Proceeding, October 30, 2017.

Oracle's Current Rule 30(b)(6) Notice. OFCCP filed its SAC on March 8, 2019. On April 3, 2019, Oracle served its Notice of Deposition Pursuant to 41 C.F.R. § 60-30.11 and Fed. R. Civ. P. 30(b)(6) (the "30(b)(6) Notice"). Parker Decl., Ex. 2. Oracle's requests seek to depose OFCCP concerning the facts supporting OFCCP's allegations in paragraphs 12-41 and 44-48 of its FAC (Topic Nos. 1-29, 30, 31) and the pay adjustments, lost compensation, interest and benefits of employment that OFCCP seeks as relief for the putative class (Topic 32).

² For OFCCP's Objections to Oracle's First 30(b)(6) Notice, Oracle refers this Court to Exhibit D of the Declaration of Gary Siniscalco, filed August 18, 2017. Similarly, Oracle refers the Court to this Court's file for the August 18, 2017 Motion to Compel, the Order of September 11, 2017, and the Order Staying Proceeding, October 30, 2017. Oracle will re-file these documents should this Court so request.

In an April 18, 2019 meet and confer call about Oracle's Request for Production, Set Two, OFCCP requested that Oracle withdraw Topic Nos. 1-29, stating that it intended to file a motion for a protective order because it believes a 30(b)(6) deposition on Topic Nos. 1-29 was no longer necessary in light of its production of the statistical analyses underlying its allegations. Parker Decl., ¶ 2.

OFCCP repeated its request for Oracle to withdraw Topic Nos. 1-29 in a letter dated May 9, 2019. *See* Parker Decl., Ex. 3 ("5/9/2019 Daquiz Letter"). OFCCP also raised the argument that its witnesses "have limited knowledge of the facts underlying the Second Amended Complaint." *Id.* at 1. Oracle responded in a May 13, 2019 letter, stating that it would not withdraw Topic Nos. 1-29 because its requests are not limited to the statistical analyses underlying OFCCP's claims. *See* Parker Decl., Ex. 4.³ The parties met and conferred telephonically on May 21, 2019. Parker Decl., ¶ 3. On May 24, 2019, OFCCP sent a letter confirming that it would not be producing a 30(b)(6) witness on Topics 1-29. Parker Decl., Ex. 7.

Because OFCCP has stated that it will not produce a 30(b)(6) witness in response to Oracle's Notice, Oracle brings this motion to compel a 30(b)(6) deposition of OFCCP on Topics 1-21 of its 30(b)(6) Notice.

III. OFCCP'S REFUSAL TO PRODUCE A 30(b)(6) WITNESS IS UNJUSTIFIED

A. The Federal Rules Entitle Oracle to Depose OFCCP's 30(b)(6) Designee

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. *Cable & Comp. Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997) (noting that

³ As noted in footnote 1, *supra*, Oracle is not moving on Topics 22 to 29.

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. P. 26(b)(1).

In addition, a party is entitled to take the 30(b)(6) deposition of an opposing party. Fed. R. Civ. P. 30(a)(1). The rule applies to private litigants and government agencies alike. Indeed, Rule 30 explicitly recognizes the right of a litigant to name as the deponent of a 30(b)(6) notice a “governmental agency.” Fed. R. Civ. P. 30(b)(6); *see also Corr. Corp. of Am.*, 2007 WL 4403528, at *1; *E.E.O.C. v. Greater Metroplex Interiors, Inc.*, 2009 WL 412934, at *2 (N.D. Tex. Feb. 17, 2009).

B. The Court Should Permit Oracle To Learn The Facts Supporting OFCCP’s Allegations

Each of the 30(b)(6) topics at issue in this motion seek “[t]he facts that support the allegations” of OFCCP’s SAC. *See* Oracle’s 30(b)(6) Notice at Topic Nos. 1-21. For certain allegations, the topics also request “any statistical or regression analysis, statistical or regression methodology and statistical or regression computation” (Topic Nos. 1-6, 7-21) or the “calculations that support” the allegation (Topic No. 7). *Id.*

Such requests are routine. They are uncontroversial. Courts grant motions to compel 30(b)(6) depositions and deny requests for a protective order, even when made by government agencies. *See, e.g., E.E.O.C. v. Kaplan Higher Educ. Corp.*, 2011 WL 2115878, at *1, 4 (N.D. Ohio May 27, 2011) (granting motion to compel 30(b)(6) deposition of government agency on topics seeking the “[f]actual information and documents that support or rebut” the agency’s allegations); *Serrano v. Cintas Corp.*, 2007 WL 2688565, at *2-3 (E.D. Mich. Sept. 10, 2007) (magistrate judge properly denied EEOC’s motion for a protective order and granted defendant

leave to take a Rule 30(b)(6) deposition of EEOC); *E.E.O.C. v. Reed Pierce's Sportsman's Grille, LLC*, 2012 WL 3150272, at *2 (S.D. Miss. Aug. 1, 2012) (denying government agency's motion to quash 30(b)(6) deposition where information sought by defendant was "all factual in nature"); *Greater Metroplex Interiors, Inc.*, 2009 WL 412934, at *2 (denying motion for protective order because "factual basis" of investigation is "unquestionably relevant").

The Court should order OFCCP to produce a 30(b)(6) witness to testify to the facts underlying its allegations.

C. Oracle May Depose OFCCP Regardless of Whether OFCCP Has Produced Its Statistical Analyses

OFCCP argues that Oracle is not entitled to a 30(b)(6) deposition because OFCCP has produced the statistical analyses underlying the SAC. Parker Decl., ¶ 2 & Ex. 3. But Oracle is not limited to one form of discovery. There is "no principle of law that precludes a party from pursuing during a deposition a topic about which it has already received information via other discovery devices." *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125–26 (D.D.C. 2005). Indeed, "[b]y its very nature, the discovery process entails asking witnesses questions about matters that have been the subject of other discovery." *Id.* at 126. Therefore, "the fact that information has been provided to plaintiff concerning a particular category does not, in itself, make that category an impermissible subject of a 30(b)(6) deposition." *Id.*; *see also*, *E.E.O.C. v. Luhn Food Sys., Inc.*, 2011 WL 649749, at *3 (E.D.N.C. Feb. 11, 2011) ("[T]he availability of information from other sources does not by itself insulate the targeted source from discovery."); *E.E.O.C. v. LifeCare Mgmt. Serv, LLC*, 2009 WL 772834, at * 2 (W.D. Pa. Mar. 17, 2009) ("Providing its investigative file simply does not relieve the EEOC of its obligation

under Rule 30(b)(6) to provide a witness to answer questions about those documents for purposes of clarification and interpretation.”).

Nor does producing data satisfy OFCCP’s other discovery obligations. Although OFCCP purports to have produced data and documents that support their allegations, including their damages allegations⁴, these productions do not justify withholding depositions. To the contrary, depositions have significant advantages over written or document discovery. “Because of its nature, the deposition process provides a means to obtain more complete information and is, therefore, favored.” *La. Pac. Corp. v. Money Mkt. 1 Inst. Inv. Dealer*, 285 F.R.D. 481, 486 (N.D. Cal. 2012). This is particularly important here because OFCCP purports to have produced data and documents that support their damages claim.

Oracle needs to ask questions about the missing data, as well as seek clarification on the already-produced data. Additionally, unlike a static document, a deposition gives the taking party the opportunity to test the accuracy of other discovery. *Luihn*, 2011 WL 649749, at *3 (“Defendant can test through deposition the accuracy and completeness of the information provided it from plaintiffs[’] investigative file.”). OFCCP cannot deny Oracle a deposition simply by producing its statistical analyses.

⁴ OFCCP’s production of data relating to damages has been fitful. Although Oracle hopes to reach resolution, this issue may require an additional motion to compel. For the past month, OFCCP has promised to provide documents and data that support their assertions of damages in the tables included in the SAC and the narrative allegations. On May 6, 2019, OFCCP produced data and documents. But, they were insufficient. Parker Decl., Ex. 5. On May 21, 2019 and May 24, 2019, OFCCP produced additional information. Parker Decl., Exs. 6, 7. Oracle is currently assessing this data, but it appears not to be complete.

Moreover, OFCCP's production of its statistical analyses also does not satisfy its obligation to comply with the 30(b)(6) Notice because the information contained in the statistical analyses does not exhaust the information Oracle seeks in Topic Nos. 1-21. In its 30(b)(6) Notice, Oracle seeks "facts supporting the allegations." Oracle's 30(b)(6) Notice, Topic Nos. 1-21. For example, the data cannot tell Oracle what factual basis exists for OFCCP's assertion—express and implied—that job title means people perform similar work, what facts OFCCP relied on to account for bona fide factors to justify pay differentials, or what facts exist that support OFCCP's allegation of discriminatory channeling.

As another example, as noted in its May 3, 2019 Motion to Compel, OFCCP references thousands of pages of documents. Oracle is entitled to ask what facts exist in those documents that support OFCCP's allegations. Indeed, there is very little option currently available to Oracle given that apparently OFCCP will point to these documents as containing facts supporting its claims. And yet, Oracle cannot discern where such information may be found in these thousands of pages.

D. OFCCP's Witnesses' Limited Knowledge Does Not Excuse OFCCP's Obligation

OFCCP also contends that its personnel have "limited knowledge of the facts underlying the Second Amended Complaint." 5/9/2019 Daquiz Letter at 1. But this fact is irrelevant because OFCCP's lack of knowledge is still not grounds to refuse a deposition despite its arguments to the contrary.

At this point OFCCP has a choice. It can produce a witness who claims to have limited knowledge and provide whatever facts he or she may have. If OFCCP pursues that course, it will be bound by that testimony. *Ierardi v. Lorillard, Inc.*, 1991 WL 66799, at * 2 (E.D. Pa. Apr. 15,

1991) (“[I]f Lorillard chooses to designate [30(b)(6)] witnesses who, because of failing memory of lack of knowledge says that ‘Lorillard does not know the answer’ to a given question, that is itself an answer and Lorillard will be bound by that answer”); *see also, Ierardi v. Lorillard, Inc.*, 1991 WL 158911, at *3 (E.D. Pa. Aug. 13, 1991) (providing clarification on Apr. 15, 1991 order and noting that, to avoid “trial by ambush,” if the designee testifies that the defendant does not know the answer to plaintiff’s question, defendant will “not be allowed effectively to change its answer by introducing evidence during trial.”)⁵

Or, OFCCP can do what the law requires. It can educate a witness.

Oracle is entitled to depose OFCCP on “information known or reasonably available *to the organization.*” Fed. R. Civ. P. 30(b)(6) (emphasis added). To the extent any individual’s knowledge falls short of this standard, OFCCP has an obligation to educate its designated 30(b)(6) witnesses. “The corporation has a duty to educate its witnesses so they are prepared to fully answer the questions posed at the deposition.” *La Pac. Corp. v. Money Mkt. 1 Inst. Inv. Dealer*, 285 F.R.D. at 486. “If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation.” *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2012 WL 1129852, at *1 (E.D.N.Y. Mar. 27, 2012) (ordering defendant to designate people with more knowledge or re-produce poorly prepared 30(b)(6) witnesses who must prepare by “speak[ing], or attempt[ing] to speak, to all present and former employees of [Defendant]” who are likely to have relevant factual information). The

⁵ At a minimum, neither this Court nor Oracle is required to accept a representation that every single person at OFCCP has “limited knowledge.” *See Luihn*, 2011 WL 649749 at *3

same is true here. If OFCCP's witnesses' memories are lacking, the solution is not to cancel the deposition. The solution is for OFCCP to do the work of educating its witnesses, just like any other private litigant, so that they are prepared to testify about information known or reasonably available to the organization.

OFCCP's argument based on its witnesses' knowledge is meritless and the Court should compel OFCCP to produce a satisfactorily-prepared witness for a 30(b)(6) deposition.

E. OFCCP's Privilege Objections Are Meritless

Lastly, OFCCP contends that Oracle should withdraw its 30(b)(6) Notice because "OFCCP personnel have limited information about the facts underlying the Second Amended Complaint, and most of which is information protected by the deliberative process privilege and/or attorney-client privilege." 5/9/2019 Daquiz Letter at 1-2. This argument fails. OFCCP cannot refuse to designate a 30(b)(6) witness on the basis of a blanket privilege objection. In what has become a common refrain in Oracle's briefing: the deliberative process privilege or the attorney-client privilege do not protect the facts underlying the SAC.

1. OFCCP Cannot Refuse To Designate Or Produce A 30(b)(6) Witness Based On Blanket Privilege Objections

OFCCP refuses to produce a 30(b)(6) witness on the basis of a blanket privilege objection. And yet, nothing on the face of Oracle's designated 30(b)(6) topics seeks privileged information.⁶ Indeed, as explained below, Oracle's topics seek *the facts* underlying OFCCP's

⁶ Oracle recognizes that there are circumstances in which a blanket privilege objection may be appropriate, such as when "the requested topics, on their face, call for testimony invading the attorney-client privilege or attorney work product doctrine." See, *McBride v. Medicalodges, Inc.*, 250 F.R.D. 581, 587 (D. Kan. 2008) (recognizing that a blanket privilege objection can be valid, but denying as premature defendant's protective order as to 30(b)(6) topics).

allegations, which are never privileged. In a circumstance such as this, a blanket privilege objection is inappropriate.

OFCCP cannot object based on privilege because Oracle has not yet asked OFCCP's 30(b)(6) witness a question. The fact that OFCCP can hypothesize questions it believes encroach on privilege does not mean that Oracle should be denied entirely the opportunity to conduct a 30(b)(6) deposition. *See E.E.O.C. v. Albertson's LLC*, 2007 WL 1299194, at *2 (D. Colo. May 1, 2007) (denying the EEOC's motion for a protective order and disapproving the blanket assertion of privilege).

In *Albertson's*, the EEOC objected to Defendant Albertson's deposition topics, which sought "factual information that supports or rebuts" the allegations. *Id.* at *1. EEOC moved for a protective order and argued that these categories sought information protected from discovery by the attorney work product doctrine and the deliberative process privilege. *Id.* at *2. The court disagreed, noting that the information Defendant sought was "obviously relevant," and rejected the EEOC's privilege argument. *Id.* at *1-2. As the court noted, if the EEOC believed that Albertson's topics sought privileged material, the proper procedure—as it is here—is to object during deposition. *Id.* at *2.

Similarly, in *Greater Metroplex Interiors, Inc.*, 2009 WL 412934, at *2, the EEOC sought a protective order to quash defendant's notice of deposition of an EEOC investigator. The EEOC argued that it should not have to produce the witness because defense counsel "may seek to invade the deliberative process privilege." *Id.* The court denied the motion, dismissing the EEOC's "generalized concerns" and noting that "[i]f defense counsel inquires into any matters that are privileged, cumulative, or otherwise improper, the EEOC may object on a question-by-question basis." *Id.*; *see also, e.g., LifeCare Mgmt. Servs., LLC*, 2009 WL 772834, at *2

("[U]nless and until Defendants actually ask a question at the deposition that intrudes upon the deliberative process privilege or any other alleged applicable privilege, the Court finds that the EEOC's objections are premature."); *Corr. Corp. of Am.*, 2007 WL 4403528 at *1 ("Plaintiff EEOC's blanket assertions of attorney-client privilege, deliberative process privilege, and work product doctrine are premature.").

If OFCCP believes that any of Oracle's questions invade a privilege, it may assert that objection in deposition. The Court should deny OFCCP's attempt to use a blanket privilege objection to block Oracle's right to take a deposition on "obviously relevant" topics.

2. OFCCP's Privilege Assertions Do Not Shield the Underlying Facts

As evidenced by Oracle's deposition topics, Oracle simply seeks the *facts* supporting OFCCP's allegations. Oracle's 30(b)(6) Notice, Topic Nos. 1-21. Neither the deliberative process privilege nor the attorney-client privilege protects the underlying facts from disclosure. *E.E.O.C. v. Bank of Am.*, 2014 WL 7240134, at * 4 (D. Nev. Dec. 18, 2014) ("Facts are never privileged.")

As to the deliberative process privilege, it "does not protect purely factual or objective material." *E.E.O.C. v. Reed Pierce's Sportsman's Grille, LLC*, 2012 WL 3150272, at *1 (S.D. Miss. Aug. 1, 2012) ("Information sought by Defendant, all factual in nature, does not implicate EEOC's deliberative process."); *see also, Luhn*, 2011 WL 649749, at *4 (EEOC conceded the "protections afforded it by the deliberative process privilege . . . do[] not prevent the taking of the depositions noticed by defendant or the disclosure of purely factual information"); *LifeCare Mgmt. Servs., LLC*, 2009 WL 772834, at *2 ("[T]he deliberative process privilege only protects

the opinions, recommendations, and deliberations of the EEOC, not the underlying factual information.”).

Similarly, the attorney-client privilege only protects communications between an attorney and her client.⁷ “The attorney-client privilege does not prevent the disclosure of facts communicated to an attorney.” *E.E.O.C. v. Caesars Ent’m’t., Inc.*, 237 F.R.D. 428, 433 (D. Nev. 2006) (denying defendant’s motion for a protective order for a 30(b)(6) deposition that sought the facts underlying defendant’s position statement); *see, also E.E.O.C. v. Chemsico, Inc.*, 203 F.R.D. 432, 434 (E.D. Mo. 2001) (ordering the EEOC to produce “a full disclosure of all purely factual materials” contained in a memorandum prepared by the EEOC investigator over which the EEOC asserted attorney-client privilege); *Bank of Am.*, 2014 WL 7240134, at *2 (“The attorney-client privilege protects confidential communications, not facts.”).

Oracle’s Topic Nos. 1-21 seek facts. Because “facts are never privileged,” OFCCP cannot rely on privilege to refuse to produce a 30(b)(6) witness and the Court should grant Oracle’s motion to compel.

IV. CONCLUSION

For the reasons set for above, Oracle respectfully requests that the Court grant its motion to compel OFCCP to designate a 30(b)(6) witness.

⁷ It is not clear which attorney-client relationship OFCCP believes would protect the factual information Oracle seeks in its 30(b)(6) Notice. OFCCP affirmed to Oracle that it does not represent any Oracle employee, current or former, and that OFCCP is not providing them legal advice. Declaration of Warrington Parker in Support of Oracle’s Second Motion to Compel the Production of Documents and Further Responses to Interrogatories, Ex. 12, at 31. Nevertheless, regardless of which attorney-client relationship OFCCP relies on, its argument fails.

May 29, 2019

Respectfully submitted,

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