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JUN 12 2019

Office of Administrative Law Judges
San Francisco, Ca

ATTORNEYS FOR OFCCP

**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'S OPPOSITION TO ORACLE AMERICA INC.'S MOTION TO COMPEL
OFCCP TO DESIGNATE AND PRODUCE 30(b)(6) WITNESS**

I. INTRODUCTION

Oracle has all factual material underlying each and every allegation in the Second Amended Complaint (“SAC”). OFCCP has identified Oracle’s documents and data, provided materials from OFCCP’s investigation, and provided the specific mathematical instruction set that support the allegations in SAC. To be clear, OFCCP has produced all the facts underlying the allegations in the SAC and there is no factual data or information left to provide. The only area left for testimony is OFCCP’s counsel’s mental impressions about those facts in drafting the SAC. In light of the comprehensive factual bases for the SAC available to Oracle, Oracle’s attempt to depose OFCCP on the “facts that support the allegations” of specific paragraphs in SAC, “including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation” devolves to nothing more than an impermissible attempt to depose OFCCP’s counsel to discover core attorney work product. Indeed, courts quash precisely the same type of 30(b)(6) topics Oracle includes in its Notice seeking “all facts” that support allegations on this basis. *See* Section III.A., *infra*. Accordingly, this court should deny Oracle’s Motion.

II. BACKGROUND

Deposition topics 1-21 seek the “facts that support the allegations” of specific paragraphs in the Second Amended Complaint, “including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.”¹ Declaration of Warrington Parker filed with Oracle’s Mot. to Compel (“Parker Decl.”), Ex. 2 (Oracle’s Notice of Dep. of OFCCP).

The factual bases for the allegations in the SAC are overwhelmingly found in the documents and data produced by Oracle. In response to discovery requests, OFCCP has identified with specificity the databases and a description of the operations for OFCCP’s analysis of the data. In cooperation with Oracle, OFCCP re-produced documents back to Oracle that were

¹ Oracle does not move to compel on topics 22 to 29, which are no longer in dispute due to the parties’ resolution of the hiring claim. OFCCP has agreed to produce a deponent for the remaining topics 30-32.

created by Oracle to ensure accuracy and avoid asking Oracle to sift through its voluminous production. These documents included Oracle training materials and handbooks, and data compilations summarizing employee information including identifying information regarding race, gender, compensation, work history at Oracle, previous experience, whether the employee is exempt from coverage under the FLSA, whether the employee is full or part-time, how that employee is identified by global career level, specialty designation, and job title. Declaration of Abigail Daquiz (“Daquiz Decl.”) ¶ 2 and Ex. 1. In formulating its SAC, a staff labor economist for OFCCP, working at the direction of OFCCP’s counsel, applied an econometric model to the data produced by Oracle. The elements of that model (*e.g.* how to group employees, which factors to control for, what time period was relevant, what elements of Oracle’s employment system should be analyzed, etc.) were decided upon by OFCCP’s counsel, after review of the information available from the compliance review and from discovery. Declaration of Jeremiah Miller (“Miller Decl.”), ¶¶ 4-5. Some of the results of this analysis are reported in the SAC at ¶¶ 14-17, 19-21, 23-24, 26-28 and 30-31, Tables 1-8. *Id.* at ¶ 5.

In addition to producing all the facts OFCCP’s counsel considered and employed as described above, OFCCP has provided the complete mathematical instructions necessary to reproduce the results of the econometric model found in the SAC in the form of instruction files (known as DO files or *.do files). Daquiz Decl. at ¶ 4, Ex. 2. OFCCP has attempted to determine what additional factual information Oracle hoped to learn from the 30(b)(6), but remains unaware of any information that Oracle could be seeking other than materials protected by the work product doctrine. *Id.* OFCCP remains committed to providing whatever additional factual information there is to be had related to the SAC. For example, OFCCP is not opposed to answering questions Oracle might have about the particular mathematical operations described in the DO files OFCCP provided (*e.g.* the reason for squaring a term in the calculation, or the particular type of regression selected) as those questions do not reach attorney work product. Oracle’s insistence that the documents produced and procedures described is insufficient is

perplexing given the parties' recent litigation history and extensive efforts to resolve these issues in mediation. Miller Decl., ¶¶ 2, 4. The parties have familiarity with the systems and operations used to calculate the deficiencies reported in the SAC and the information provided in discovery is the same as the databases and operations the parties used to attempt to come to resolution. *Id.*

OFCCP has provided Oracle with all factual bases for the allegations in the SAC. Any remaining questions for OFCCP about its statistical or regression analysis or methodology, how it otherwise ordered the facts gathered, or how those facts "support" allegations in the SAC would require OFCCP attorneys to explain how and why they analyzed those facts. OFCCP asked Oracle to withdraw these requests and communicated that OFCCP would otherwise move for a protective order as to these topics. OFCCP agreed to produce a 30(b)(6) witness on all other noticed topics and diligently worked with Oracle to schedule the deposition. Daquiz Decl., ¶¶ 5-6.

After receipt of Oracle's 30(b)(6) Notice in April, OFCCP began its dialogue with Oracle about the data and information that it was producing and disclosing in written discovery and how that information could satisfy Oracle's need for a 30(b)(6) deposition on topics 1-29. Daquiz Decl., ¶ 5. On May 6, 2019, OFCCP offered that its witness for the remaining topics could be available during the week of June 3, 2019 as scheduled on Oracle's Notice of Deposition. *Id.* This invitation to schedule was reiterated in a May 9, 2019 letter to Oracle and OFCCP received no call or other communication requesting to set the deposition that week until a letter from counsel dated May 13, wherein Oracle stated it was amenable to that week but did not specify when they wanted to set the date. *See* Exs. 3 and 4 to the Parker Decl. filed with Oracle's Mot. to Compel. The parties had a teleconference to discuss discovery issues on May 21, 2019 during which counsel for OFCCP offered a range of dates for OFCCP's agency witnesses including the 30(b)(6) designee. Daquiz Decl., ¶ 6. During the call, counsel for Oracle did not commit to any dates and asked for OFCCP to put the witnesses' availability in writing which OFCCP did a few days following the call. Daquiz Decl., ¶ 6. Focusing in on the 30(b)(6) designee, OFCCP offered

that the agency witness could be deposed in San Diego, CA during the week of June 17, or in San Francisco on June 25, 26 or 27. Daquiz Decl., ¶ 6. Oracle by email on June 3, 2019, informed OFCCP that it intended to set the 30(b)(6) deposition on June 26. *Id.*, Ex. 3. The parties worked cooperatively to confirm the depositions of the remaining fact witnesses. *Id.*

OFCCP's attorneys are the individuals with the knowledge of the remaining subject matter covered by Oracle's topics 1-21. OFCCP advised Oracle that the individuals Oracle noticed for deposition, Robert LaJeunesse, Jane Suhr, Hea Jung Atkins, and Milton Crossland,² have very limited knowledge of the facts supporting the allegations in the SAC. Despite their limited knowledge, OFCCP agreed to produce all noticed fact witnesses except Mr. LaJeunesse due to his very limited involvement in this case and his role within the agency.³ OFCCP has worked diligently to schedule the depositions Oracle noticed for OFCCP personnel, the first of which took place on June 10, and the subsequent two are scheduled to take place on June 18 and 26.

Further, as OFCCP stated in the SAC, OFCCP will not rely on the econometric model in the SAC to prove liability or damages at trial. Rather OFCCP will rely on an entirely separate analysis, produced by an outside testifying expert or experts, which will be based on the information Oracle produced in discovery. The expert disclosure deadline is July 19, 2019. After that, Oracle can depose the testifying expert about their analysis and methodology.

III. ARGUMENT

A. Oracle Improperly Seeks to Obtain Attorney Work Product Through 30(b)(6) Deposition Testimony.

1. Additional information on topics 1-21 necessarily requires OFCCP to reveal the mental impressions of OFCCP's attorneys.

² Oracle has also issued Notices of Deposition for two other individuals, Bryan Mikel and Hoan Luong. They no longer work for OFCCP and it is OFCCP's understanding that Oracle is not going to seek their deposition in this matter.

³ Oracle's argument in Section III.D of its Motion to Compel is irrelevant here as OFCCP did not raise witnesses' limited knowledge as reason for not producing a 30(b)(6) witness on topics 1 through 21. Rather it raised this issue with respect to Oracle's noticed depositions of individual OFCCP personnel.

Topics 1-21 of Oracle's Notice necessarily invade attorney work product. OFCCP has already provided "the facts that support the allegations of" the Second Amended Complaint. There is no additional factual information beyond what OFCCP has already given to Oracle that a witness could provide during deposition that would not impermissibly reach theories and impressions of OFCCP's counsel. Having all the facts in its possession, what Oracle now seeks is access to the *process* by which OFCCP's counsel has built its case and its *interpretation* of the evidence available at the time OFCCP filed the SAC. This is impermissible under the work product doctrine.

It is well-established that the work product doctrine protects from disclosure materials prepared in anticipation of litigation by a party, an attorney, or other representatives of the party. *Hickman v. Taylor*, 329 U.S. 495 (1947); Fed.R.Civ.P. 26(b)(3). Significantly, Rule 26(b)(3) distinguishes between ordinary work product, which requires a party to show substantial need in order to compel disclosure, and opinion work product including the mental impressions, conclusions, opinions, or legal theories of an attorney, which is entitled to *nearly absolute protections*. See *O'Connor v. Boeing N. Am., Inc.*, 216 F.R.D. 640, 642 (C.D. Cal. 2003) (citation omitted); *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997); *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (suggesting that in the Ninth Circuit, in order to discover opinion work product, the movant must establish that "mental impressions are *at issue* in a case" in addition to establishing that the need for "the material is compelling") (emphasis in original).⁴

The attorney "work product doctrine reflects the strong public policy against invading the privacy of an attorney's course of preparation." *In re Sealed Case*, 856 F.2d 268, 273 (D.C. Cir. 1988) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)); see also *Admiral Ins. Co. v. United States District Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) (the purpose of the work product rule

⁴ Similarly, work completed by a party's non-attorney agent is also protected as attorney work product if prepared with the direction of counsel. *O'Connor*, 216 F.R.D. at 643 (citation omitted); see also *Yurick ex rel. Yurick v. Liberty Mut. Ins. Co.*, 201 F.R.D. 465, 473 (D. Ariz. 2001) (citing *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 372 (N.D. Ill. 1972)).

is to “prevent exploitation of a party's efforts in preparing for litigation”). A party seeking work-product must show, at a minimum, a “substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” *Holmgren*, 976 F.2d at 576 (quoting Fed.R.Civ.P. Rule 26(b)(3)). However, if the work product constitutes “opinion” work product— counsel’s “mental impressions, conclusions, opinions, or legal theories,”—such materials are “virtually undiscoverable.” Rule 26(b)(3)(B); *Dir., Office of Thrift Supervision*, 124 F.3d at 1307.

Here, OFCCP’s counsel culled through tens of thousands of Oracle’s documents and data, evaluated this information, which it has produced or identified to Oracle, and directed OFCCP’s staff labor economist to conduct a statistical analysis based on counsel’s evaluation of the facts.⁵ *See* Section II, *supra*. Any remaining questions for OFCCP about the facts supporting its allegations, including its statistical or regression analysis or methodology, would require OFCCP to reveal its counsel’s *analysis* of the facts produced, *i.e.* mental impressions, conclusions, opinions, or legal theories squarely in the purview of opinion work-product protection.

Examination delving into OFCCP’s counsel’s impressions of the case and evidence, as well as their legal theories—which topics 1-21 require— is highly improper and undermines one of the primary purposes of the work product doctrine: to prevent one party from exploiting the other party’s efforts to prepare for litigation. *Holmgren*, 976 F.2d at 576. “[I]t is the selection and compilation of the relevant facts that is at the heart of the work product doctrine.” *E.E.O.C. v. HBE Corp.*, 157 F.R.D. 465, 466 (E.D. Mo. 1994); *see S.E.C. v. Nacchio*, 614 F. Supp.2d 1164, 1177 (D. Colo. 2009) (“when inquiring as to how [the agency] assembled the facts it had obtained in its investigation into the set of *allegations* set forth in the” complaint, Defendant “would almost certainly cross into territory protected by the Work Product privilege.”); *In re Allen*, 106 F.3d 582, 608 (4th Cir. 1997) (holding selection and compilation of discoverable

⁵ This analysis was clearly created “in anticipation of litigation” as the work product doctrine requires. Indeed, the analysis was completed after this litigation commenced in furtherance of the case.

documents by counsel is opinion work product and not discoverable). As the Supreme Court determined long ago, “[p]roper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.” *Hickman*, 329 U.S. at 511.

In keeping with these principles, numerous federal courts have rejected attempts to take Rule 30(b)(6) testimony on *precisely* the same kind of topics included in Oracle’s Notice, namely those seeking all “factual information” supporting a party’s claims or defenses, finding that such examination improperly invades attorney work product.

For example, where topics of depositions for an agency are “[f]actual information and documents that support or rebut” the agency’s allegations in its complaint, and “[s]tatistical information, facts and analysis considered, used, developed, or prepared by” the agency, and the agency already produced those facts in discovery, the notice of deposition “does not ask for the underlying facts, but [the agency’s] counsel’s interpretation of the facts and how they have chosen to proceed in preparing their case.” *E.E.O.C. v. McCormick & Schmick’s Seafood Restaurants, Inc.*, 2010 WL 2572809, at *1, *5 (D. Md. June 22, 2010). Such notices are “in effect, notices to depose opposing counsel of record” and are not permitted as they violate the attorney work-product doctrine. *Id.* This is so because where the “request is framed as one for ‘factual information’ and ‘documents’” supporting or rebutting allegations in a complaint, a witness responding to questions in a deposition “would necessarily be asked to interpret the facts and discuss how the [agency] decided to proceed in preparing the case.” *E.E.O.C. v. Texas Roadhouse, Inc.*, 2014 WL 4471521, at *3 (D. Mass. Sept. 9, 2014).⁶

The understanding that deceptively phrased deposition topics about factual bases for complaint allegations by governmental units are improper is widely shared. *See S.E.C. v.*

⁶ As explained in *McCormick*, “law enforcement agenc[ies] without independent knowledge of the transactions giving rise to the litigation and responsive information would only be known through work product efforts of its counsel”, “the process of preparation of any designee who was not counsel would inevitably result in intrusion into attorney opinion work product, and ... the availability of other forms of discovery to elicit factual evidence in the case” render the deposition unnecessary. *McCormick*, 2010 WL 2572809, at *3.

Buntrock, 217 F.R.D. 441, 444-46 (N.D. Ill. 2003) (Rule 30(b)(6) deposition notice seeking examination as to facts supporting complaint allegations was improper attempt to depose opposing counsel and delve into theories and opinions of SEC attorneys); *see also American Nat'l Red Cross v. Travelers Indemnity Co. of Rhode Island*, 896 F. Supp. 8, 13-14 (D.D.C. 1995) (holding corporate designee properly invoked work product doctrine when refusing to answer questions regarding facts and documents contended to be supportive of affirmative defenses); *E.E.O.C. v. JBS USA, LLC*, 2012 WL 169981, at *8 (D. Neb. Jan. 19, 2012) (quashing deposition regarding “factual information that supports or rebuts” various allegations in the complaint); *E.E.O.C. v. Source One Staffing, Inc.*, 2013 WL 25033, at *2, *7-8 (N.D. Ill. Jan. 2, 2013) (barring deposition of EEOC on topics including “information that supports or rebuts” various allegations in the complaint and names and contact information of class members and witnesses); *S.E.C. v. Rosenfeld*, No. 97 CIV. 1467 (RPP), 1997 WL 576021, at *2-3 (S.D.N.Y., Sept. 16, 1997) (holding Rule 30(b)(6) deposition notice seeking examination as to facts supporting complaint allegations improperly sought attorney work product and granting protective order); *HBE Corp.*, 157 F.R.D. at 466 (same).

Here, Oracle already possesses all non-privileged, factual information—statistical or otherwise—that supports the allegations in the SAC and now seeks insight into how OFCCP’s attorneys selected and synthesized these facts.⁷ OFCCP attorneys sifted through the same facts produced or identified to Oracle, decided what was significant and directed an OFCCP staff person to develop a statistical model based on the attorneys’ interpretation of the facts provided. Any additional inquiry would require OFCCP’s attorneys to explain mental impressions, conclusions, opinions, or legal theories wholly protected as attorney work product.

2. Oracle cannot make the requisite showing of exceptional circumstances that would justify invading attorney work product.

⁷ Discovery in this case is ongoing. OFCCP will continue to supplement discovery in accordance with its discovery obligations and the Court’s June 10, 2019 Order.

What Oracle seeks here is core opinion work product information; information that is generally simply beyond the bounds of discovery. *Dir., Office of Thrift Supervision*, 124 F.3d at 1307. No circumstance exists here that could justify intruding on the nearly absolute protection of opinion work product. However, even if the information sought was ‘ordinary’ work product information, Oracle cannot show the “substantial need” necessary to overcome the ordinary work-product protection. Fed. R. Civ. P. 26(b)(3).

While Oracle has not articulated *any* need for the mental impressions of counsel, any argument Oracle might offer regarding alleged need is without merit precisely because Oracle already possesses all the facts supporting the allegations in the SAC relating to OFCCP’s pay discrimination claims, including all documents, data, and other materials on which OFCCP relied in drafting the SAC, its statistical analysis, and the instructions to run the calculations at the heart of that analysis. Any purported “need” for counsel’s mental impressions of the facts produced would be that of any litigant who seeks to gain tactical advantage through insight into the opposition’s litigation strategy.

Not only does Oracle have all the facts on which OFCCP and its counsel relied in developing OFCCP’s statistical analysis underlying the SAC, this is no longer the operative analysis. At trial, OFCCP will rely on an entirely separate statistical analysis of its outside expert, which will be based on information produced in discovery, including information Oracle has only recently produced at the very end of May and beginning of June, which is still being reviewed. While OFCCP’s statistical analysis provided the basis for alleging liability, OFCCP will not use this analysis to prove liability at trial. Oracle can fully depose OFCCP’s expert(s) on their model and analysis and the methodology used, during expert discovery.

For these same reasons, the court in *Texas Roadhouse* determined a deposition topic seeking “the statistical analysis, including procedures, methodology, and criteria, used by Plaintiff” to support its discrimination claim was premature and unnecessary “as defendants can depose plaintiff’s expert concerning statistical analysis procedures and methodology.” 2014 WL

4471521, at *5.⁸ Because Oracle will be afforded the opportunity to fully explore any statistical analysis OFCCP will use at trial through the deposition of its expert(s), no justification exists that could warrant invading attorney work-product or deposing OFCCP's counsel of record.

B. Topics 1-21 Require Disclosure of Confidential Attorney-Client Communications.

Contrary to Oracle's suggestion (Motion at 13), topics 1-21 could implicate attorney client communications. At any time during investigation and beyond, OFCCP may communicate with its attorneys seeking legal advice. Both pre and post-litigation communications between OFCCP personnel and their attorneys in the Office of the Solicitor are protected by the attorney-client privilege. The attorney-client privilege can be invoked by federal agencies on the same basis as any other litigant. *In re County of Erie*, 473 F.3d. 413, 418 (2d. Cir. 2007) (citing cases); *Rein v. U.S. Patent and Trademark Office*, 553 F.3d 353, 376 (4th Cir. 2009); *EEOC v. Texas Hydraulics, Inc.*, 246 F.R.D. 548, 554 (E.D. Tenn. 2007). Accordingly, communications between OFCCP personnel and/or agents and OFCCP's attorneys in the Office of the Solicitor are privileged attorney-client communications.

Here, as described above, counsel for OFCCP directed the work of OFCCP's staff labor economist and worked closely with them to develop the statistical analysis in the SAC. Questions that go to the "methodology" OFCCP attorneys directed its staff to employ are also privileged as attorney-client communications.⁹

C. A 30(b)(6) Deposition on Topics 1-21 Will Result in Wasted Resources.

Oracle's solution to the issues OFCCP raised with respect topics 1-21 is for

⁸ Similarly, the court noted in *Source One*, until the expert reviews the data and organized the information obtained from the employer, the agency cannot reasonably be expected to identify the class members or provide more information about the discrimination claim. 2013 WL 25033, at *3-4.

⁹ An attorney's involvement in statistical analyses does not necessarily result in the analyses themselves being privileged. For example, where a contractor is carrying out the statistical analyses to comply with OFCCP's AAP regulations and therefore has a business purpose in creating the analyses, the contractor cannot withhold the analyses on the basis of the privilege just because attorneys were involved. *See Cloud v. Superior Court*, 58 Cal. Rptr. 2d 365, 370 (Cal. Ct. App. 1996). But that is not the case here where OFCCP's attorneys were involved during active litigation. Additionally here, OFCCP has provided both the directions for creating the econometric model and the results to Oracle.

OFCCP to produce a witness and object to specific questions at that time. (Motion at 2, 10-12). This would require the parties to travel and expend the resources involved in taking and defending a deposition that will consist of the witness asserting the privileges discussed in this opposition. This is neither an efficient nor cost-effective way of conducting discovery. Courts have recognized that such an approach is unduly burdensome since it would require extensive preparation and would “repeatedly tread upon arguably privileged grounds” because of the nature of the issues listed in the notice and the questions “would constantly be intruding upon the work product privilege.” *Nacchio*, 614 F. Supp.2d at 1178. This would “result in an unnecessary additional burden for the parties and the court in resolving the inevitable” privilege questions. *McCormick*, 2010 WL 2572809, at * 4. Accordingly, in order to avoid such waste here, the Court should deny Oracle’s motion to compel to designate a witness to testify on topics 1-21.

D. OFCCP has Agreed to Provide Witnesses that are Prepared to Testify.

OFCCP has agreed to designate a witness to testify on 30(b)(6) topics that do not elicit purely privileged information. That deposition is already scheduled to take place on June 26. OFCCP has never taken the position that no one at OFCCP can testify about the subject matter covered under topics 1-21 in the Notice of Deposition; indeed, OFCCP’s counsel can. Oracle’s assertion to the contrary (Motion at 1-2, 8-10) conflates the issue OFCCP raised with respect to the individual OFCCP personnel Oracle noticed for deposition—who have very limited knowledge of the facts underlying the SAC—and OFCCP’s position that the 30(b)(6) topics 1-21 would invade attorney work product.

Nor has OFCCP refused to produce a witness on topics 1-21 merely because it produced the factual information in another form of discovery. Rather, there is no additional purely factual information to be gained on topics 1-21 during deposition. A deposition on these topics would consist entirely of OFCCP’s counsel, or counsel’s proxy, invoking the work-product doctrine in response to every question and/or referring Oracle to the information already produced.

IV. CONCLUSION

Topics 1-21 of Oracle's 30(b)(6) Notice necessarily seek the testimony of OFCCP's counsel on its work product. Oracle has all of the facts on which OFCCP relied to support the allegations in its SAC. Oracle is not entitled to depose OFCCP's counsel on their mental impressions of the evidence. No circumstance exists here that could justify intruding on the nearly absolute protection of attorney opinion work product. The Court should therefore deny Oracle's motion.

Dated: June 12, 2019

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

LAURA C. BREMER
Senior Trial Attorney



JEREMIAH MILLER
Counsel for Civil Rights

CERTIFICATE OF SERVICE

I certify that on this 12th day of June, 2019, the foregoing PLAINTIFF'S OPPOSITION TO ORACLE AMERICA INC.'S MOTION TO COMPEL OFCCP TO DESIGNATE AND PRODUCE 30(B)(6) WITNESS, and DECLARATIONS OF JEREMIAH MILLER AND ABIGAIL DAQUIZ IN SUPPORT OF PLAINTIFF'S OPPOSITION were served upon the following individuals via email at the following addresses:

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U.S. Department of Labor

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.

Case No. 2017-OFC-00006

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JUN 12 2019

Office of Administrative Law Judges
San Francisco, Ca

**DECLARATION OF ABIGAIL G. DAQUIZ IN SUPPORT OF OFCCP'S OPPOSITION
TO ORACLE'S MOTION TO COMPEL OFCCP TO DESIGNATE AND PRODUCE
30(B)(6) WITNESSES**

I, Abigail Daquiz, state and declare as follows:

1. I am a Senior Trial Attorney for the U.S. Department of Labor, Office of the Solicitor. I submit this declaration in support of OFCCP's Motion to Compel the Deposition of Oracle America, Inc. I have personal knowledge of the matter set forth in this declaration, and I could and would competently testify thereto if called upon to do so.

2. On April 5, 2019, I responded to Oracle's RFPs, Set Two, identifying which specific documents from Oracle's voluminous production we analyzed and relied upon for the allegations contained in the SAC. Attached to this declaration as **Exhibit 1** is a true and correct copy of an excerpt of the narrative responses that describes the documents produced. From Oracle's production, we identified the training materials and handbooks it relied upon (the Sourcing Handbook, Customer Services Compensation Training, Master U.S. Manager Orientation, and presentations on Managing Compensation and Global Compensation Training).

OFCCP also identified the spreadsheets and databases created and maintained by Oracle that the agency analyzed. These spreadsheets include years of information about Oracle employees that include individual employee identifiers, compensation, gender, race or ethnicity, their job functions, time spent working at Oracle, employee's previous experience, exemption status under the Fair Labor Standards Act, whether the employee is employed as a full or part time employee, and the employees' global career level, specialty designation, and job title assigned by Oracle.

3. On April 9, 2019 I responded to Oracle's Interrogatories, Set Two, and provided Oracle with a similar list of all of the data sets used to arrive at the allegations asserted in OFCCP's Second Amended Complaint and further informed Oracle that it was waiting for the production of databases and was currently reviewing the document production and that the statistical model OFCCP intends to rely upon at the hearing is still being developed.

4. Counsel for Oracle and I met and discussed the discovery responses as it related to OFCCP's statistical analysis. I had prepared to address questions about the data and the operations OFCCP undertook and counsel did not engage in a discussion about our production, and instead insisted that OFCCP produce its instruction files (*.do files). On April 26, 2019 I supplemented our production to include the .do files for use in the SAS/STATA programs that OFCCP used in preparation for filing the Second Amended Complaint. This was in the form requested by counsel for Oracle because it is the same program that the parties used extensively during mediation when sharing their analysis. Attached to this declaration as **Exhibit 2** is a true and correct copy of the email that transmitted this supplementation from me to Mr. Parker, dated April 26, 2019. After this exchange, counsel for Oracle has not asked for further information about the statistical analysis and it is unclear what other factual information Oracle seeks with this request for a 30(b)(6) designee on these topics.

5. After I received Oracle's 30(b)(6) Notice in April, I began talking with counsel for Oracle about the data and information that it was producing and disclosing in the written discovery and how that information could satisfy Oracle's need for a 30(b)(6) on Topics 1-29. On May 6, 2019, OFCCP offered that its witness for the remaining topics could be available

during the week of June 3, 2019 as scheduled on Oracle's Notice of Deposition. This invitation to schedule was reiterated in a May 9, 2019 letter to Oracle (Exhibit 3 to Mr. Parker's Declaration in support of the instant motion) and OFCCP received no call or other communication requesting to set the deposition that week until a letter from counsel. On May 13, Oracle stated it was amenable to that week but did not specific when they wanted to set the date. Exhibit 4 to Mr. Parker's Declaration in support of the instant motion.

6. The parties had a teleconference to discuss discovery issues on May 21, 2019 during which I offered a range of dates for OFCCP's agency witnesses including the 30(b)(6) designee. During the call, counsel for Oracle did not commit to any dates and asked for OFCCP to put the witnesses' availability in writing which OFCCP did a few days following the call. I offered that the agency witness could be deposed in San Diego, CA during the week of June 17, and available in San Francisco on June 25, 26 or 27. Mr. Parker by email on June 3, 2019, informed OFCCP that it intended to set the 30(b)(6) deposition on June 26. Attached to this declaration as Exhibit 3 is a true and correct copy of an email from Mr. Parker to me, dated June 3, 2019. The parties worked cooperatively to confirm the depositions of the remaining fact witnesses.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in Seattle, Washington on June 12, 2019.



ABIGAIL G. DAQUIZ
Senior Trial Attorney

EXHIBIT 1
DAQUIZ DECLARATION

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

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
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OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE'S AMENDED
REQUEST FOR PRODUCTION, SET
TWO AND OFCCP'S RESPONSES
THERE TO**

The United States Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), by and through the Office of the Solicitor, hereby responds and lodges its objections to Defendant Oracle America, Inc.'s Amended Request for Production, Set Two.

Discovery in this matter is currently ongoing. Each and every following response is rendered and based upon information reasonably available to OFCCP at the time of preparation of these responses. As an initial matter, OFCCP has produced its investigative file for Oracle HQCA, OFCCP Case No. R00192699. To the extent that Oracle's requests seek information already produced in this litigation, OFCCP will not be reproducing those documents. OFCCP reserves the right to amend the responses to these Requests as discovery progresses. OFCCP will provide supplemental responses in the event any further responsive material comes within its knowledge, possession, custody or control. Further, OFCCP will disclose its expert witness and will supplement these responses according to the schedule agreed upon by the parties, and adopted by Judge Clark on March 6, 2019.

OFCCP has not completed its respective discovery in this action. OFCCP, therefore,

specifically reserves the right to introduce any evidence from any source which may hereinafter be discovered in testimony from any witness whose identity may hereafter be discovered.

REQUEST FOR PRODUCTION NO. 87:

All DOCUMENTS RELATING to YOUR “evaluation of Oracle’s employment practices” that “reveal[] widespread discrimination at HQCA” as alleged in Paragraph 11 of the Second Amended Complaint.

RESPONSE:

OFCCP objects to this Request to the extent it seeks information protected by the attorney-client privilege, attorney work-product doctrine, including the common interest doctrine, the government’s deliberative process privilege, the governmental privilege for investigative files and techniques, the government’s informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.

OFCCP objects on relevance grounds. Materials reflecting OFCCP’s internal deliberations and processes in its investigation are not relevant because they will not show, one way or the other, whether Oracle violated its equal opportunity obligations, including through engaging in systemic compensation and hiring discrimination.

OFCCP objects to this Request to the extent it seeks documents that were created after March 11, 2016, which was the date the Notice of Violation was issued, because any such documents were created in anticipation of litigation and are protected by the work product doctrine, trial preparation privilege, and/or attorney-client privilege.

OFCCP objects to the phrase “relating to” as overbroad and unduly burdensome.

By referring to Paragraph 11 of the Second Amended Complaint (SAC), OFCCP understands this request to seek information about its continued evaluation of Oracle’s employment practices in light of the data and information it provided to OFCCP.

Subject to and without waiving the foregoing objections, OFCCP responds as follows:

OFCCP will produce the following documents (including re-producing documents produced by Oracle to OFCCP):

BEGBATES	FILENAME
ORACLE_HQCA_0000020125	Sourcing Handbook.pdf
ORACLE_HQCA_0000042098	Customer Services Comp Training 3 15 - w_new arrows.pptx
ORACLE_HQCA_0000042101	MASTER US Manager Orientation 1202 lg.pptx
ORACLE_HQCA_0000056234	2016_Managing_Compensation_July_2016_v3.ppt
ORACLE_HQCA_0000062858	AAP_Location List.xlsx
ORACLE_HQCA_0000062859	Candidate Offers.xlsx
ORACLE_HQCA_0000070721	AllEarnings.xlsx
ORACLE_HQCA_0000070738	Emp_Personal_Experience_Qualification_Assign_Details.xlsx
ORACLE_HQCA_0000070741	gsi_comp_history.xlsx
ORACLE_HQCA_0000128176	PT1_HQCA_IREC_MAIN.xlsx
ORACLE_HQCA_0000364272	Global Compensation Training - 2011 Salary Ranges Final.pptx
DOL000039877	Directive 310- Calculating Back Pay.pdf
DOL000039894	rr-18-07.pdf
DOL000039913	2017-12-08 ORACLE Ltr re OFCCP Data Questions.pdf
DOL000039915	2017-12-18 ORACLE Ltr re OFCCP Data Questions.pdf
DOL000039918	2018-6-29 - [Oracle] Pitcher ltr to Bremer.pdf
DOL000039928	2018-7-13 - Pitcher ltr to Laura Bremer.pdf
DOL000039931	DEPT_OF_LABOR_2013.xlsx
DOL000039932	DEPT_OF_LABOR_2014.xlsx
DOL000039933	DEPT_OF_LABOR_2015.xlsx
DOL000039934	DEPT_OF_LABOR_2016.xlsx
DOL000039935	STATA_RV_11302018-179.csv
DOL000039936	STATA_RV_11302018-263.csv
DOL000039937	STATA_RV_11302018-413.csv
DOL000039938	STATA_RV_11302018-765.csv

OFCCP further responds that it has produced the investigative file for Oracle HQCA, OFCCP Case No. R00192699.

Discovery in this matter is ongoing and OFCCP will supplement its responses as appropriate. Specifically, OFCCP will disclose its expert witness and will supplement these responses according to the schedule agreed upon by the parties.

REQUEST FOR PRODUCTION NO. 88:

All DOCUMENTS RELATING to the allegation in Paragraph 11 of the Second Amended Complaint “that Oracle discriminated against women, Asians, and African Americans or Blacks in compensation, and discriminated in favor of Asians against non-Asians in hiring,” including, but not limited to, any “models, results, and theories of causation.”

way or the other, whether Oracle violated its equal opportunity obligations, including through engaging in systemic compensation and hiring discrimination.

Subject to and without waiving the foregoing objections, OFCCP responds that it has no responsive documents.

REQUEST FOR PRODUCTION NO. 243:

All COMMUNICATIONS between YOU and a THIRD PARTY regarding DOCUMENTS or information designated CONFIDENTIAL by DEFENDANT.

RESPONSE:

OFCCP objects to this Request on the grounds that it seeks information protected by attorney-client privilege (including the common interest doctrine), attorney work-product doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.

OFCCP further objects on relevance grounds. Materials reflecting OFCCP's internal deliberations and processes in its investigation are not relevant because they will not show, one way or the other, whether Oracle violated its equal opportunity obligations, including through engaging in systemic compensation and hiring discrimination.

Subject to and without waiving the foregoing objections, OFCCP responds that it has no responsive documents.

DATED: April 5, 2019

KATE S. O'SCANNLAIN
Solicitor of Labor

JANET M. HEROLD
Regional Solicitor

JEREMIAH E. MILLER
Counsel for Civil Rights

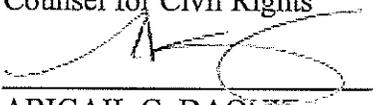

ABIGAIL G. DAQUIZ
Senior Trial Attorney
Attorneys for OFCCP
Office of the Solicitor, U.S. Department of Labor

EXHIBIT 2
DAQUIZ DECLARATION

Daquiz, Abigail - SOL

From: Daquiz, Abigail - SOL
Sent: Friday, April 26, 2019 8:32 AM
To: 'Parker, Warrington'
Cc: Siniscalco, Gary R.; Connell, Erin M.; Mantoan, Kathryn G.; Grundy, Kayla Delgado; Riddell, J.R.; Giansello, John; Heath, Jacob M.; Garcia, Norman - SOL; Song, Charles C - SOL; Jeremiah - SOL Miller (Miller.Jeremiah@dol.gov); Bremer, Laura - SOL
Subject: RE: OFCCP v. Oracle, Case No. 2017-OFC-00006, Oracle's Requests
Attachments: basepay_over_time.do; Oracle_Combine_Data.do; Oracle_ordered_logits_assignment.do; Oracle_Regressions.do; Starting Salary.do; wage changes.do; OFCCP Privilege Log 2019-04-26.pdf

Good morning Warrington,

Attached is an updated privilege log. Also, as you requested, we are preparing a written response to your letters of April 11, and April 16.; and along with that we may be further supplementing the privilege log.

Statistical Analysis. As we discussed on April 18, OFCCP produced all of the information and data we used, including a description of how we analyzed the data provided by Oracle, to arrive at the allegations contained in the Second Amended Complaint. Following your letters requesting supplementation, I had prepared to discuss the questions you posed about the analysis. However, you were not interested in having that discussion during the scheduled call, but instead asked for OFCCP's analysis. This information is protected from disclosure as work product and under Fed. R. Civ. P. 26(b)(4)(D). I understand that in the course of attempting to mediate this matter, in addition to the databases used by OFCCP in its analysis, OFCCP had also produced files to allow Oracle to duplicate the statistical analysis. As requested, attached are the .do files for use in the SAS/STATA programs that OFCCP used in preparation for filing the Second Amended Complaint (as to the analysis regarding the compensation claims). It's my understanding that this should satisfy the request and I remain ready to answer any questions you or your team may have.

30(b)(6) as to statistical analysis. Because with these back up files produced today Oracle now has everything that OFCCP had and the information about what it did regarding the statistical analysis, we ask that Oracle withdraw the topics 1-29 from its planned 30(b)(6) deposition. As noted above, outside of the facts as initially described and produced, OFCCP's work product in preparation for filing its SAC is protected under Fed. R. Civ. P. 26(b)(4)(D). Now with the production of the attached files, there is no further factual information to be gained during a deposition regarding those topics. As a side note, I fail to see how this request focused on the statistical analysis is related to the 30(b)(6) deposition that OFCCP has noticed and Oracle's objections to the topics requested there.

Depositions. Regarding the depositions noted for June—while it might be more productive to discuss scheduling on a call, I wanted to let you know that Jane Suhr is out of the country from June 1-14, B. Mikel and H. Luong no longer work for OFCCP, and R. LeJeunesse works in Washington D.C. so we will not be producing him in San Francisco.

Interview memos. In your letter of April 22, you refer to the review and production of interview memos and you asked that they be produced by April 25. As part of our April 5 production we re-produced documents with revised redactions to reflect the review you and I discussed. A letter from someone else on your team this week indicated that they wanted to designate portions of those interview memos that we produced as confidential. Please advise if you need more information about the production.

I look forward to working through these issues with you. Thank you, Abby

Abigail G. Daquiz
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EXHIBIT 3
DAQUIZ DECLARATION

Daquiz, Abigail - SOL

From: Parker, Warrington <wparker@orrick.com>
Sent: Monday, June 3, 2019 9:28 AM
To: Daquiz, Abigail - SOL
Cc: Connell, Erin M.; Fuad, David; Kaddah, Jacqueline D.; Siniscalco, Gary R.; Bremer, Laura - SOL; Garcia, Norman - SOL; Miller, Jeremiah - SOL; Song, Charles C - SOL; Richardson, Cedrick P - SOL
Subject: RE: OFCCP v. Oracle, Case No. 2017-OFC-00006, Supp Interr. Response & Correspondence

To follow up on our discussion of this morning.

Depositions

- June 26 for the 30b6 topics that are not the subject of Oracle's motion to compel. It will take place in SF.
- Atkins—You will confirm whether June 10 is still available. Alternative dates if not are June 17 and June 24-July 3
- Crossland—June 13
- Jane Suhr—you offered July 24 to July 3. We select June 26.

Damages

- You will make further inquiry.

RFAs

- We discussed our positions. You will notify me if OFCCP will stand on its current response or provide a different response.

SCER

- I will respond in writing to your May 31, 2019 letter regarding this.

LaJuenesse

- OFCCP will not be producing him.

From: Daquiz, Abigail - SOL [mailto:Daquiz.Abigail@dol.gov]
Sent: Friday, May 31, 2019 9:34 PM
To: Parker, Warrington <wparker@orrick.com>
Cc: Connell, Erin M. <econnell@orrick.com>; Fuad, David <dfuad@orrick.com>; Kaddah, Jacqueline D. <jkaddah@orrick.com>; Siniscalco, Gary R. <grsiniscalco@orrick.com>; Bremer, Laura - SOL <Bremer.Laura@dol.gov>; Garcia, Norman - SOL <Garcia.Norman@DOL.GOV>; Miller, Jeremiah - SOL <Miller.Jeremiah@dol.gov>; Song, Charles C - SOL <Song.Charles.C@dol.gov>; Richardson, Cedrick P - SOL <Richardson.Cedrick.P@DOL.gov>
Subject: Re: OFCCP v. Oracle, Case No. 2017-OFC-00006, Supp Interr. Response & Correspondence

Talk to you then. Should I call your direct line or cell?
Have a good weekend, all!

From: Parker, Warrington <wparker@orrick.com>

Sent: Friday, May 31, 2019 5:35:13 PM

To: Daquiz, Abigail - SOL

Cc: Connell, Erin M.; Fuad, David; Kaddah, Jacqueline D.; Siniscalco, Gary R.; Bremer, Laura - SOL; Garcia, Norman - SOL; Miller, Jeremiah - SOL; Song, Charles C - SOL; Richardson, Cedrick P - SOL

Subject: Re: OFCCP v. Oracle, Case No. 2017-OFC-00006, Supp Interr. Response & Correspondence

Thank you. Let's plan to talk at 830 on Monday. Let's settle on depo dates on Monday. We will respond to your attachments as is necessary. I have not read them as of this email.

Sent from my iPhone

On May 31, 2019, at 16:56, Daquiz, Abigail - SOL <Daquiz.Abigail@dol.gov> wrote:

Warrington,

Please see the attached letter.

Also, please find OFCCP's Supplemental Response to Interr. No. 27.

You requested a meeting and I regret that I do not have time today. I am travelling on Monday and will be in trial, back in the office on Thursday. However, if you're free, we can schedule time on Monday morning before I have to head to the airport. Do you have any time between 8:30-10 AM? I can schedule almost anytime on Thu or Fri of next week.

I've also provided you with dates for the depositions of other deponents and have not heard back from you. We can work to confirm those dates, too.

Abigail G. Daquiz
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<OFCCP Responses Oracle Interrogatories Set Two, Supp. No. 27 (2019-05-31).pdf>

<2019-05-31 Daquiz Letter to Parker.pdf>

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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.

Case No. 2017-OFC-00006

RECEIVED

JUN 12 2019

Office of Administrative Law Judges
San Francisco, CA

**DECLARATION OF JEREMIAH MILLER IN SUPPORT OF OFCCP'S OPPOSITION
TO ORACLE'S MOTION TO COMPEL OFCCP TO DESIGNATE AND PRODUCE
30(B)(6) WITNESSES**

I, Jeremiah Miller, state and declare as follows:

1. I am Counsel for Civil Rights for the U.S. Department of Labor, Office of the Solicitor, and co-counsel for Plaintiff in this action. I submit this declaration in support of OFCCP's Motion to Compel the Deposition of Oracle America, Inc. I have personal knowledge of the matter set forth in this declaration, and I could and would competently testify thereto if called upon to do so.

2. Between October of 2017 and winter of 2018, the parties to this litigation engaged in extended mediation in an attempt to resolve this case. The parties had extensive, substantive discussions about the nature of the case and the allegations involved, including discussions of specific data and information produced during discovery.

3. In preparing to file OFCCP's motion for leave to amend the complaint, I helped prepare a draft second amended complaint to be filed with the motion.

4. In drafting the second amended complaint, I reviewed materials produced in discovery by Oracle, and materials from OFCCP's compliance review. The materials from OFCCP's compliance review that I reviewed were principally documents produced by Oracle during the investigatory phase of this matter. These documents were all available to the parties before mediation commenced in October of 2017. My analysis of those materials, including the way I weighed those materials, what I believed was important, and the conclusions to be drawn from those materials informed the allegations made in the second amended complaint.

5. In drafting the second amended complaint, I determined that a statistical analysis should be included to support the allegations in the complaint. I therefore directed a staff labor economist at OFCCP to make certain econometric models supporting those allegations. I directed the staff labor economist as to what data to use, how to arrange the data, what time period was relevant, which elements of Oracle's employment systems to review and which factors should serve as controls. I also asked the staff labor economist to make damages estimates for those econometric models. I included the results of those models in numbered paragraphs in the second amended complaint, including at ¶¶ 14-17, 19-21, 23-24, 26-28 and 30-31, Tables 1-8.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in Seattle, Washington on June 11, 2019.



JEREMIAH MILLER
Counsel for Civil Rights