

**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

**REPLY IN SUPPORT OF
ORACLE AMERICA, INC.'S
MOTION TO COMPEL OFCCP
TO DESIGNATE AND PRODUCE
30(B)(6) WITNESSES**

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Office of Administrative Law Judges
San Francisco, Ca

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**REPLY ISO ORACLE'S MOTION TO COMPEL OFCCP TO DESIGNATE AND PRODUCE 30(B)(6)
WITNESSES**

CASE NO. 2017-OFC-00006

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I. INTRODUCTION

What is striking about OFCCP's Opposition is that it does not mention—let alone try to distinguish—those cases cited by Oracle allowing just what Oracle seeks: 30(b)(6) depositions of government agencies seeking the facts underlying the allegations leveled against a defendant.

What is equally striking is that, even in light of this Court's June 10 Order, which was filed two days before OFCCP filed its Opposition, OFCCP premises its Opposition on the argument that "Oracle has all factual material underlying each and every allegation" in the SAC. (Opp. at 1). That is not true, as the June 10 Order attests. It also is ultimately irrelevant to Oracle's Motion. Again, case law discussed in Oracle's Motion and left untouched by OFCCP's Opposition counsels that a 30(b)(6) deposition is still allowed under the circumstances that pertain in this case.

And what is striking is that OFCCP's arguments establish—at least for the statistical analyses set forth in the Second Amended Complaint—that OFCCP has waived work product and attorney-client privilege protections.

In sum, the Court should grant Oracle's Motion.

II. ARGUMENT

A. The Work Product Doctrine Does Not Protect OFCCP From Offering A 30(b)(6) Witness.

As noted in Oracle's Motion, Courts allow the deposition of government agency 30(b)(6) witnesses. (Motion at 5-6). OFCCP says nothing about these cases. It does not even attempt to distinguish them.

Instead, OFCCP plows ahead with its own line of cases, claiming that they are dispositive of the issue. They are not. For example, in *EEOC v. HBE Corp.*, 157 F.R.D. 465 (E.D. Mo. 1994), the Court disallowed a 30(b)(6) deposition notice because EEOC had (1) fully complied with the defendant's discovery requests, (2) turned over its investigative file, and (3) identified all witnesses requested by the defendant and known to have relevant information. On its face,

HBE is distinguishable. OFCCP has *not* complied with Oracle’s discovery requests. OFCCP has *not* identified witnesses. On this same ground, *SEC v. Buntrock*, 2004 WL 1470278 (N.D. Ill. June 29, 2004), is distinguishable as the Court pointed to the extensive discovery provided *and* “a 12-page list of witnesses, investigative testimony from 49 witnesses and accompanying exhibits.” *Id.* at * 2; *see also EEOC v. McCormick & Schmick’s Seafood Rest., Inc.*, 2010 WL 2572809, at *4 (D. Md. June 22, 2010) (noting there were other means of obtaining the information sought).¹

OFCCP has not provided complete discovery. There is nothing like a full or complete witness list. OFCCP has in fact resisted providing one. And, OFCCP acknowledges that the individual OFCCP personnel Oracle has noticed for deposition “have very limited knowledge of the facts underlying the SAC.” (Opp. at 11).

OFCCP also cites cases in which the topics on which a deposition is sought are simply objectionable. That appears to be the case in *SEC v. Rosenfeld*, 1997 WL 576021 (S.D.N.Y. Sept. 16, 1997), which sought depositions on topics like “the circumstances, negotiations and arrangements surrounding the possession by the SEC of the deposition [of defendant] taken by the Ontario Securities Commission.” *Id.* at * 1. The topics listed here, by contrast, are tied to the allegations OFCCP chose to make in the operative complaint.

Finally, OFCCP cites cases that do not apply in light of the facts of this case, because here Oracle is not asking for an interpretation of facts. For example, Oracle is not asking OFCCP to make a determination of what facts support *and* refute its claims. *See EEOC v. JBS*

¹ One theme in these cases is that the only purpose of the 30(b)(6) deposition the defendant sought was, in the Court’s view, to invade work product or attorney-client privilege protections. For example, the Court in *Buntrock* noted more than once that the 30(b)(6) deposition was the only deposition pursued by defendant despite the identification of witnesses. Here, there can be no argument that the purpose or motive of the 30(b)(6) deposition is to seek such information. Oracle has no other source of the information sought. OFCCP has not provided complete discovery. And what is sought are the facts of the case—nothing more. That is allowed. (Motion at 5-6); *see also EEOC v. Greater Metroplex Interiors, Inc.*, 2009 WL 412934, at *2 (N.D. Tex. Feb. 17, 2009) (citing cases).

USA, LLC, 2012 WL 169981 (D. Neb. Jan. 19, 2012) (asking for deposition regarding the facts that support and rebut allegations); *EEOC v. Source One Staffing, Inc.*, 2013 WL 25033 (N.D. Ill. Jan. 2, 2013) (same); *SEC v. Nacchio*, 614 F. Supp. 2d 1164, 1176-78 (D. Colo. 2009) (requested deposition was not limited facts). Instead, Oracle seeks merely facts regarding the allegations OFCCP has made—facts necessarily known to OFCCP.

B. Oracle Questioning Does Not Depend On Eliciting Opinion Work Product, Although It Appears That OFCCP Has Waived Work Product As It Relates To Its Statistical Analysis

OFCCP claims that Oracle seeks “core opinion work product information.” (Opp. at 9). OFCCP then argues that, with regard to the statistical information, Oracle has what it needs. (*Id.*). Further, OFCCP argues that the statistical analysis in the SAC will be superseded by a forthcoming analysis. (*Id.*).

It is simply untrue that the only area that Oracle could explore in a 30(b)(6) deposition is opinion work product. There are facts that Oracle is entitled to explore. For example, Oracle can ask whether there was any Asian, female, or African-American employee that said that he or she was discriminated against in terms of pay due to her race and/or gender. Oracle could ask a follow up: Did the person identify who engaged in that discriminatory conduct? Was it an immediate supervisor or someone above them? What were the actions taken that the witness believed were discriminatory?²

In addition, even were it true that Oracle had full discovery (which it does not), as noted in Oracle’s Motion, Oracle is still entitled to ask questions that follow up or clarify the information provided in discovery. (Motion at 6-7 (citing cases)). Again, OFCCP makes no attempt to distinguish these cases.

² This Court has already determined that, in light of OFCCP’s position on discovery, the work product doctrine—to the extent it would shield factual information—must give way. June 10 Order. This should resolve the bulk, if not all, of OFCCP’s arguments. OFCCP does not claim otherwise. In fact, OFCCP simply ignores this Court’s June 10 Order entirely in this regard.

These clarifying questions are important even against OFCCP's claims that its present statistical analysis is no longer the operative analysis, or at least will be superseded by some other analysis later in the case. (Opp. at 9). Oracle is entitled to ask factual questions about the present statistical analysis, such as OFCCP's factual basis for deciding that the controls it included in the statistical model underlying the SAC were appropriate and sufficient to compare similarly situated employees and to account for legitimate pay differences among them.

Why? First, OFCCP put the present statistical analyses at issue. It asserted them in its SAC (after two-plus years of litigation, and more than four years since the underlying compliance review began), produced them in discovery, and sent letters to current and former Oracle employees asserting—based on those analyses—that it had statistical evidence of discrimination to the tune of \$600 million. It has sought thousands and thousands of documents on the back of these statistics. It is deposing Oracle personnel because of these statistics. And it has argued that these statistical analyses, and the sweeping discrimination they allegedly evidence, furnish a basis for OFCCP to issue burdensome discovery. *See, e.g.*, OFCCP's Mot. To Compel Historical Data (Apr. 10, 2019) at 13 (citing SAC ¶¶ 14-16) (asserting that additional compensation data sought was relevant “regardless of any purported burden” because “OFCCP has already identified that its analysis of wages due through 2016 alone exceeds \$400 million”). The analyses OFCCP used to ground the operative complaint are thus part of this case.

Second, the analyses will remain part of this case going forward. Oracle is entitled to pit any forthcoming expert opinion against the statistical analyses OFCCP deemed sufficient to allege hundreds of millions of dollars' worth of discrimination. If the two sets of analyses use the same controls and are structured in the same way, that provides certain information and basis for examination of OFCCP's testifying expert; if they differ, that fact furnishes a different basis for inquiry and questioning. Oracle is entitled to compare and contrast the models that OFCCP now asserts cause Oracle to be liable—which OFCCP paints as “the basis for alleging liability” (Opp. at 9)—with whatever OFCCP may present at trial, which necessitates deposition

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questioning to understand the structure of and bases for the present analyses. These are not attorney opinion questions; they are fact questions, and OFCCP should be required to produce a witness competent to testify to them

Finally, as is noted in the section immediately below, particularly with regard to the statistical analysis, it appears that there has been a waiver of any work product protections and any attorney-client privilege.

C. OFCCP's Assertion Of The Attorney-Client Privilege Is Not Well Taken.

Generally, OFCCP does not actually assert the attorney-client privilege. It just suggests that the privilege might be an issue, arguing that a deposition “*could* implicate attorney-client communications.” (Opp. at 10 (emphasis added)). However, with regard to the statistical analysis, OFCCP is more pointed. It argues that there is an attorney-client privilege at stake. OFCCP argues that “counsel for OFCCP directed the work of OFCCP’s staff labor economists and worked closely with them to develop the statistical analysis in the SAC.” (*Id.*) Therefore, “[q]uestions that go to the ‘methodology’ OFCCP attorneys directed its staff to employ are also privileged as attorney-client communications.” (*Id.*)

As to the first argument—the assertion that there *could* be a privilege issue—that is no basis for denying the Motion. Courts disapprove of more strongly stated blanket assertions of privilege. (Motion at 10-12). Thus, the mere hint that the attorney-client privilege *might* or *could* be implicated is certainly not enough.

As for the issue with the statistician, it must be that someone can state facts that support the statistical methodology, such as why certain controls were included, and why certain employees are compared to others in the statistical model. So, a blanket assertion of privilege appears to be misplaced.

But, let’s take OFCCP at its word. OFCCP’s decision to disclose its statistical analysis, its decision to produce the underlying methodology, and its decision to tell thousands of Oracle

employees that this statistical analysis justifies an award of \$600 million, constitute a waiver of the attorney-client privilege and work product doctrine.

It is a waiver because, according to OFCCP, counsel for OFCCP had a statistician do work at counsel's direction, and together they developed a statistical analysis. (Opp. at 10). OFCCP then had a choice. It could disclose the analysis, as it did here. Or, it could not disclose. Having disclosed, OFCCP cannot now claim that there is any protection. The disclosure is a waiver. As courts have recognized, the decision to disclose and use the results of reports or studies affirmatively is antithetical to later claiming that which underlies the report or study is protected by work product protections or the attorney-client privilege. OFCCP is not entitled to use either the work product doctrine or the attorney-client privilege as a sword and a shield. *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 473 (S.D.N.Y. 1996); *Ahern v. Pac. Gulf Marine, Inc.*, 2007 WL 9723901, at * 4 (M.D. Fla. Nov. 8, 2007).

Thus, in *Ahern*, the court found waiver of the work product privilege when defendant used the conclusion of an expert report to support its position, but refused access to the underlying report. In so holding, the court noted "well settled is the notion that one cannot simultaneously invoke the work product privilege while making affirmative use of the materials it wishes to protect from disclosure." 2007 WL 9723901, at * 3. And in *In re Kidder Peabody*, the court found waiver of the attorney-client privilege when a party made representations about the outcome of an investigation, but claimed that the investigation was otherwise privileged. In concluding that there was a waiver, the court stated a party "may waive the privilege if he makes factual assertions the truth of which can only be assessed by examination of the privileged communication." 168 F.R.D. at 470.

Finally, this situation is not like the cases relied on by OFCCP. *See* Opp. at 9-10 & n. 8. In neither case relied on by OFCCP is there any indication that there was an actual existing statistical analysis. It appears that, in both cases, an analysis was forthcoming. *See EEOC v. Texas Roadhouse, Inc.*, 2014 WL 4471521 (D. Mass Sept. 9, 2014); *Source One Staffing*, 2013

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WL 25033. Indeed, in *Texas Roadhouse*, 2014 WL 4471521, at *5, the parties agreed to postpone any deposition awaiting the completion of a statistical analysis by EEOC's expert.

D. The Claim Of Wasted Resources And Argument That OFCCP's Assertion Of The Attorney-Client Privilege Is Not Well Taken.

The final arguments in OFCCP's Opposition (Sections C and D) are little more than repetitions of the arguments already addressed. Section C simply asks this Court to accept the notion that there will be blanket objections because there is nothing more that OFCCP can say in terms of facts. As noted, that is not so.

For example, based on the present set of interrogatory responses, Oracle could ask "where in this thousand page document, identified in response to interrogatory no. 50, is the policy you reference in this interrogatory" or "where in this document, identified in response to interrogatory no. 49, is the anecdotal evidence that you claim is referenced in this document." Both questions are clarifying.³ Neither call for work product information or privileged information. Other examples have been given in this reply, which further demonstrate the type of permissible discovery sought that does not implicate work product protections or privilege.

Section D notes that OFCCP is producing witnesses in response to certain 30(b)(6) topics and that otherwise a 30(b)(6) deposition will result in OFCCP invoking work product objections. It is true that OFCCP is producing a witness as to three topics. Those topics concern OFCCP's claim that Oracle failed to produce information or documents. Oracle has not contended otherwise. As for the claims that OFCCP will simply invoke the work product doctrine in response to the topics at issue in this Motion, that would be frivolous, as set forth in the Motion and this Reply.

³ Oracle is aware that additional responses are forthcoming. Nonetheless, it is using the present set of interrogatory responses to note that clarifying questions are necessary and do not, by any stretch, seek privileged or protected information.

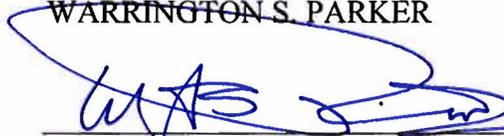
III. CONCLUSION

For all the reasons set forth above, Oracle respectfully requests that the Court grant Oracle's motion.

June 19, 2019

Respectfully submitted,

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PROOF OF SERVICE BY ELECTRONIC MAIL

I am more than eighteen years old and not a party to this action. My business address is Orrick, Herrington & Sutcliffe LLP, The Orrick Building, 405 Howard Street, San Francisco, California 94105-2669. My electronic service address is jkaddah@orrick.com.

On June 19, 2019, I served the interested parties in this action with the following document(s):

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by serving true copies of these documents via electronic mail in Adobe PDF format the documents listed above to the electronic addresses set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 19, 2019, at San Francisco, California.



Jacqueline D. Kaddah