

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

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

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

**ORACLE AMERICA, INC.'S
OPPOSITION TO OFCCP'S MOTION
TO COMPEL ORACLE'S
COMPENSATION ANALYSES**

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Law Judges

**ORACLE'S OPPOSITION TO OFCCP'S MOTION TO COMPEL ORACLE'S COMPENSATION
ANALYSES**

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I. INTRODUCTION

Oracle gave to OFCCP those documents that reflect Oracle's compliance with 41 C.F.R. § 60-2.17, as OFCCP acknowledges. Mot. at 5. OFCCP attempts to obtain more by its Motion—specifically Oracle's privileged compensation analyses.

First, the privileged compensation analyses are irrelevant. This Court has already determined that Oracle's compliance with 41 C.F.R. § 60-2.17 is not an issue in this case. *See* June 19, 2019 Order at 13.

Second, the entirety of OFCCP's Motion is based on a false premise—one that has neither a legal nor a factual basis. OFCCP asserts that the compensation analyses OFCCP now seeks were done, because they had to be done, in order to comply with 41 C.F.R. § 60-2.17 (“Section 2.17”). As a legal matter, this is not so. Section 2.17 does not say this. Section 2.17 does not specify how compliance is to be achieved. And not a single authority cited by OFCCP holds otherwise.

Next, Oracle did not perform its compensation analyses to comply with Section 2.17, whatever OFCCP wants to say. Instead, as Oracle informed OFCCP in June 2015, 18 months prior to the filing of OFCCP's First Amended Complaint, “With regard to pay audits to assess legal compliance with Oracle's non-discrimination obligations and to further ensure Oracle's compensation policies and practices are carried out, those are conducted by our outside EEO compliance counsel at Orrick.” June 19, 2019 Declaration of Laura C. Bremer in Support of OFCCP's Motion to Compel (“Bremer Decl.”), Ex. 9.

Without these false legal and factual premises, all of OFCCP's remaining arguments fail. The assertion of the privilege is appropriate because the compensation analyses were not prepared pursuant to contract or regulation. And OFCCP simply cannot dispute that such analyses that are prepared for the purpose of providing legal advice are protected by the attorney-client privilege. *See Melgoza v. Rush Univ. Med. Ctr.*, 2019 WL 2504094, at *7 (N.D. Ill. June 14, 2019) (report on pay equity was privileged because it was “requested by counsel for the

purpose of counsel's rendering legal advice to Defendant on pay equity issues.").

OFCCP cannot credibly challenge the method or timing of Oracle's assertion of the privilege. Oracle's position has always been consistent: the analyses OFCCP seeks were performed by, for, or under the direction of its outside counsel for the purpose of providing legal advice. Oracle took this position in 2015, when OFCCP first inquired about these analyses. Moreover, while OFCCP quibbles about a privilege log—about which it has not met and conferred—OFCCP ignores the statements made under oath (which are consistent with Oracle's assertion of the privilege made when this issue first arose in 2015) that Oracle prepared the compensation analyses at issue at the direction of counsel and for the purpose of seeking legal advice.

From there, OFCCP grasps at straws. First, consistent with its continued attacks on Oracle counsel, OFCCP says that the privilege should be vitiated because Oracle "coached" a witness. This base attack ignores the assertion of privilege since 2015. And the case cited by OFCCP holds that such an argument cannot sustain such relief. Second, throwing black letter law to the wind, OFCCP attempts to extract significance from the fact that some of the analyses were prepared and then sent to counsel. OFCCP must know that this is of no moment—they were prepared at the direction of counsel.

Finally, OFCCP contends it should get these compensation analyses because: (1) Oracle put its analyses at issue; (2) OFCCP will purportedly demonstrate that Oracle knew of a pay disparity; or (3) these compensation analyses can be used to impeach Oracle's analyses at trial.

Oracle did not place its analyses at issue. Oracle affirmatively is *not* relying on them to establish compliance with Section 2.17 or for any other purpose.

As to the remaining contentions, a party cannot pierce the attorney-client privilege by claiming that a privileged document is relevant. Moreover, OFCCP has the underlying pay data that Oracle used to prepare these analyses. It can argue all it wants that that data, if analyzed, would establish that Oracle had to know of a pay disparity.

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As to its impeachment argument, OFCCP bears the burden of proof at trial. Oracle is entitled to shoot holes in whatever OFCCP puts forth. The methodology by which Oracle conducted its internal analyses, whether before or during this action, is not relevant to the analyses it will present at trial, which are intended to rebut OFCCP's claims. In addition to violating privilege, allowing discovery into these analyses would waste time and confuse the issues at trial, as Oracle would need to explain in detail how its prior analyses were conducted and why they are not relevant here, whereas the focus of the hearing in this action will be on whether OFCCP's statistical claims prove the compensation disparities it alleges. There is no need for a sideshow into privileged, historic, and irrelevant analyses.

The Court should deny OFCCP's misguided attempt to obtain Oracle's privileged documents.

II. FACTUAL BACKGROUND

Oracle has stated under oath at least twice before – and now a third time – that its compensation analyses¹ were done at the direction of counsel and for the purpose of providing legal advice. *See* Bremer Decl., Ex. 2 (5/8/2019 S. Holman-Harries Depo. Tr.) at 116:14-17; 117:5-11; 178:1-4; July 2, 2019 Declaration of Warrington Parker in Support of Oracle's Opposition to OFCCP's Motion to Compel Oracle's Compensation Analysis ("Parker Decl."), Ex. A (7/27/18 K. Waggoner *Jewett* PMK Depo. Tr.) at 367:20-368:19; July 2, 2019 Declaration of Gary Siniscalco in Support of Oracle's Opposition to OFCCP's Motion to Compel Oracle's Compensation Analysis ("2019 Siniscalco Decl."), ¶¶ 6, 7. OFCCP has been on notice of this fact since 2015, when OFCCP first asked about Oracle's compensation analysis. Bremer Decl., Ex. 12 at DOL 587-588.

¹ As this Court will note, OFCCP has used the terms "compensation analyses," "pay equity analyses," and "self-audits" interchangeably. This Opposition will use the term "compensation analyses" unless the context requires use of the other terms. Regardless, the terms refer to the same items.

Further, OFCCP's allegations that Oracle changed its position regarding the compensation analyses that are the subject of its Motion are false. There are two key points to keep in mind:

1. OFCCP's inquiries about the various compensation analyses that Oracle performs changed over time, but its Motion misleadingly conflates Oracle's responses.
2. Oracle conducted privileged compensation analyses at the direction of its counsel and for the purpose of seeking legal advice that are entirely separate from its obligations under 41 C.F.R. § 60-2.17.

A. Federal Contractors Have Certain Obligations to Develop an Affirmative Action Program

As relevant here, Section 2.17 requires a federal contractor to undertake three tasks: (1) perform "in-depth analyses of its total employment process" to evaluate "whether there are gender-, race-, or ethnicity-based [compensation] disparities"; (2) "develop and execute action-oriented programs designed to correct any problems areas identified"; and (3) "develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program." The regulations do not specify what form these "analyses" must take.

41 C.F.R. § 60-2.10(c) requires contractors to "maintain and make available to OFCCP documentation of their compliance with" Section 2.17. The regulations also do not specify what form this "documentation" must take.

B. When OFCCP Asked About Oracle's "Pay Equity Studies" and "Self-Audits," Oracle Invoked The Privilege

OFCCP initiated its compliance review of Oracle's headquarters in September 2014. Mot. at 3. In January 2015, OFCCP interviewed Lisa Gordon, Oracle's Compensation Director. Shauna Holman-Harries, Oracle's Director of Diversity Compliance, was also present. In that interview, OFCCP asked, "Does Oracle conduct self-audits of its compensation?" Ms. Holman-Harries responded that "[c]ompliance does under attorney-client privilege." Bremer Decl., Ex. 13

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at p. 14. OFCCP also asked, “Does Oracle conduct pay equity studies?” Ms. Holman-Harries responded that “compliance does equity studies.” *Id.* Thus, OFCCP has been aware since at least January 2015 about the existence of these analyses, and that Oracle asserted privilege over them.

Importantly, **neither question** specifically asked about Oracle’s compliance with its affirmative action plan obligations, or any other obligations under 41 C.F.R. § 60-2.17. Rather, the questions asked whether Oracle conducts compensation studies generally. This is an important distinction. Companies like Oracle regularly perform internal, privileged compensation analyses for a variety of reasons entirely unrelated to Section 2.17. *See* August 25, 2017 Declaration of Gary R. Siniscalco in support of Defendant Oracle America, Inc.’s Opposition to OFCCP’s Motion to Compel, ¶ 7; *see also* 2019 Siniscalco Decl., ¶ 5. Assessing compliance and legal risks is good corporate governance and HR policy. *Id.* For instance, Oracle regularly seeks advice and assistance from its legal counsel to analyze employment decisions, policies, and practices, including as part of HR compliance and oversight. *Id.*

C. **When OFCCP Asks About Analyses “As Required Under 41 C.F.R. § 602.17,” Oracle Provides Information and Informs OFCCP That Its Pay Equity Analyses Are Privileged**

Following the interview described above, on April 27, 2015, OFCCP asked Oracle for the “Dates of any internal pay equity analysis conducted during the past three years, as required under 60-2.17. For each analysis, include: Dataset used for that analysis [and] Actions taken, if any, as a result of the analysis[.]” Bremer Decl., Ex. 8.

On June 2, 2015, Ms. Holman-Harries responded with a four-paragraph email explaining the actions Oracle took to comply with Section 2.17 and referring OFCCP to its prior interviews of Oracle employees, including the January 2015 interview referenced above. *Id.*, Ex. 9. Those actions include Oracle’s internal process for setting and reviewing pay, Oracle’s compensation policies and training materials, and the “focal review” process (whereby Oracle managers review employees’ salaries at one point in time to ensure that pay is properly based on performance and

consistent with comparators). *Id.*

With regard to the attorney-client privilege, that same email notes the following: “With regard to pay audits to assess legal compliance with Oracle’s non-discrimination obligations and to further ensure Oracle’s compensation policies and practices are carried out, those are conducted by our outside EEO compliance counsel at Orrick.” *Id.* OFCCP was therefore once again put on notice that Oracle conducted privileged compensation analyses that it was not producing to OFCCP.

On October 29, 2015, in response to further requests from OFCCP for “[i]nternal pay equity analysis conducted during the past three years, as required under 41 C.F.R. § 60-2.17,” Ms. Holman-Harries confirmed that Oracle had already responded to this question, referring to the January 2015 interview notes and June 2015 email above. Bremer Decl., Ex. 11.

At her deposition on May 8, 2019, Ms. Holman-Harries re-confirmed that Oracle did not provide any pay equity analyses to OFCCP. Parker Decl., Ex. B (5/8/2019 S. Holman-Harries Depo. Tr.) at 280:25-281:4² (“Q. And in response to OFCCP’s request for Oracle’s pay equity analyses conducted under the regulations, you did not provide any pay equity analysis to OFCCP. Correct? A. Correct.”).

D. OFCCP Serves Discovery Requests Seeking “Pay Equity Analyses Conducted Pursuant to 41 CFR 60-2.17”

Shortly after filing its First Amended Complaint, on February 21, 2017, OFCCP served a set of document requests on Oracle. Bremer Decl., ¶ 16, Ex. 16. Request Nos. 71 and 72 sought “pay equity analyses conducted pursuant to 41 CFR 60-2.17.” *Id.* Oracle objected to these requests. Following extensive meet and confer efforts and an August 14, 2017 discovery conference with Judge Larsen, Oracle amended its responses on August 16, 2017 to confirm that no responsive documents existed with respect to Request Nos. 71 or 72 because Oracle did not

² Though Plaintiff’s motion references this same testimony, the Bremer declaration fails to include page 281 of Ms. Holman-Harries’ deposition transcript.

conduct any pay equity analyses pursuant to § 60-2.17 (because pay equity analyses are not required by that regulation), and consequently Oracle had no documents responsive to Request Nos. 71 and 72.

OFCCP filed a Motion to Compel on August 18, 2017. In its opposition to that motion, Oracle explained that “OFCCP’s Requests (and its Motion) are based on the false premise that Oracle was required by federal regulations to prepare pay equity and the other analyses,” and pointed out that “none of OFCCP’s evidence demonstrates that Oracle conducted pay equity analyses pursuant to 41 C.F.R. § 60-2.17.” *See* Oracle’s August 25, 2017 Opposition to OFCCP’s Motion to Compel at 10. Judge Larsen ordered Oracle to produce any responsive document in its possession, custody, or control and noted that, if no documents are produced then Oracle admits that it does not have responsive documents. *See* September 11, 2017 Order Granting in Part, and Denying in Part, Plaintiff’s Motion to Compel at 2-7. Oracle did not produce any responsive documents, because none exist.

Of note, Judge Larsen did not rule on the attorney-client privilege issue present here. As the Order recognizes, the request at issue was specifically confined to analyses conducted pursuant to 41 C.F.R. § 60-2.17. *See* September 11, 2017 Order at 5. Because the analyses now sought were not conducted pursuant to 41 C.F.R. § 60-2.17, there was no need for Judge Larsen to decide the attorney-client privilege question at issue in this Motion. In addition, the document requests at issue in this Motion were not before Judge Larsen. *See* Section II.E.

E. OFCCP Acknowledges That Oracle Produced the Data on Which It Relies Under Section 2.17, But OFCCP Now Seeks Oracle’s Privileged Compensation Analyses, And Depos Ms. Holman-Harries

OFCCP acknowledges that Oracle has produced the data upon which Oracle relies under Section 2.17 to ensure that its compensation decisions are fair and equitable. Mot. at 5. However, OFCCP now seeks discovery of Oracle’s privileged analyses.

On September 1, 2017 and January 30, 2019, OFCCP served the document requests that

are the subject of this Motion. Bremer Decl., Exs. 23; 25. These requests are not limited to analyses “conducted pursuant to 41 C.F.R. § 60-2.17.” They were not therefore the subject of any prior Order. These requests call for, among other documents, the specific analyses referenced by Ms. Holman-Harries above. *Id.* at RFP Nos. 93, 95-98, 103, 104, 148, 150-155, 158, 159, 174.³ Oracle objected, including based on the attorney-client privilege and work product doctrine. *Id.* at Exs. 24; 26.

On May 8, 2019, OFCCP deposed Ms. Holman-Harries in her personal capacity. In response to various questions about Oracle’s privileged compensation analyses (and not about how Oracle complied with Section 2.17), Ms. Holman-Harries declined to answer questions on the instruction of counsel that related to the substance of Oracle’s privileged compensation analyses. Bremer Decl., Ex. 2 (5/8/2019 S. Holman-Harries Depo. Tr.) at 176:9-177:2; 247:3-248:8.

F. Oracle Served Two Privilege Logs on OFCCP

On October 26, 2017, Oracle served a 74-page privilege log on OFCCP. Bremer Decl., Ex. 38. Seventeen months later, on March 15, 2019, OFCCP sent a meet and confer letter asserting a variety of trivial issues with Oracle’s log. OFCCP complained that the log did not list the number of pages in each document, did not separately list document creation and transmission dates, and did not individually identify every attachment to privileged emails as a separate entry on the log. *Id.* at Ex. 39. Oracle explained to OFCCP that its log contained sufficient information for OFCCP to evaluate the nature and basis for the privilege, and that the length of a document did not determine whether it was privileged. *Id.* at Ex. 42 at 2.

³ For example, RFP No. 97 seeks “ALL DOCUMENTS RELATING TO ‘Oracle’s evaluation of its compensation system’ that Shauna Holman-Harries referenced in her June 2, 2015, e-mail at BSN DOL000001212 for YOUR Information Technology, Product Development, and Support lines of business during the RELEVANT TIME PERIOD, including but not limited to, all of the evaluations that YOU conducted, the underlying data and information considered in these evaluations, and the COMMUNICATIONS related to these evaluations.”

OFCCP claims in its Motion that Oracle's privilege log "did not identify any analyses of Oracle's compensation systems or related documents" and that OFCCP raised this issue to Oracle. Mot. at 6. In fact, the cited meet and confer correspondence contains no mention of this. Bremer Decl., Exs. 39-41.

On May 22, 2019, Oracle served a second privilege log on OFCCP, describing by category the analyses Oracle is withholding on the basis of attorney-client privilege and the work product doctrine. *Id.* at Ex. 43. OFCCP attempts to paint a causal connection between Ms. Holman-Harries' deposition and the categorical log. *See* Mot. at 6 ("Only after Ms. Holman-Harries admitted..."). This is false and OFCCP cites no evidence to support such a nexus. Nothing in Ms. Holman-Harries' deposition caused Oracle to prepare and serve the categorical log. Oracle served the log in response to the subsequent round of document requests described above that actually triggered the requirement for Oracle to log them. Any delay in serving the log was the result of, as the Court can appreciate, the considerable volume of work this action has generated. Further, although OFCCP's Motion includes a few complaints about the log scattered throughout (*see* Mot. at 7; FN2; FN8), OFCCP has not sought to meet and confer with Oracle regarding any issues it has with Oracle's categorical privilege log. Thus, any argument by OFCCP that relies upon purported inadequacies with Oracle's categorical privilege must be denied. *See* June 19 Order.

III. OFCCP'S MOTION SHOULD BE DENIED BECAUSE ALL THE ANALYSES IT SEEKS ARE PRIVILEGED

A. Oracle Has Properly and Timely Asserted the Privilege

Oracle has presented the facts necessary to support its assertion of the attorney-client privilege and work-product doctrine. *See* Bremer Decl., Ex. 2 (5/8/2019 S. Holman-Harries Depo. Tr.) at 116:14-17; 117:5-11; 178:1-4; Parker Decl., Ex. A (7/27/2018 K. Waggoner Jewett PMK Depo. Tr.) at 367:20-368:19; 2019 Siniscalco Decl., ¶¶ 6, 7; Bremer Decl., Exs. 9, 13, 24, 26; *see also In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992) (privilege log

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and supporting affidavits were sufficient to establish that attorney-client privilege applied to documents); *see also* Wright & Miller, 8 Fed. Prac. & Proc. Civ. § 2016.1 & n. 10 (3d ed.).

In response, OFCCP contends that when Oracle was “asked by OFCCP what steps Oracle had taken to meet its AAP obligations related to analyzing pay equity, Oracle admits that it conducted these compensation analyses[.]” Mot. at 10. OFCCP relies on only **two pieces of evidence** for this claim: (1) OFCCP’s notes from its January 2015 interview of Oracle employees during the compliance review (Bremer Decl., Ex. 13)⁴; and (2) Ms. Holman-Harries’ June 2015 email to OFCCP (Bremer Decl., Ex. 9). These arguments have no merit.⁵

First, this Court has already held that Oracle’s compliance with its obligations under Section 2.17 are not at issue in this lawsuit. In this Court’s words,

41 C.F.R. §§ 60-2.11 through 60-2.17 were not part of the list of regulations at issue in the SAC—in the section above they appear only in a quotation from the recordkeeping provision in 41 C.F.R. § 60-2.10(c). Whether or not, and how, Oracle complied with its legal [obligations] in 41 C.F.R. §§ 60-2.11 through 60-2.17 is not an issue in this case. ... OFCCP may not shoehorn a substantive probe of Oracle’s AAP into a recordkeeping allegation.

June 19, 2019 Order at 13.

Second, the January 2015 interview does not contain any admission that the analyses at issue in this Motion were conducted pursuant to Section 2.17. As described above in Section II.B., OFCCP only asked about self-audits and pay equity studies generally. OFCCP misleadingly takes Ms. Holman-Harries’ response to those general questions and conflates them with her responses to OFCCP’s later specific question about Section 2.17. *See* Mot. at 3

⁴ These notes are not a verbatim transcript, but instead are simply OFCCP’s summary of the interview. OFCCP’s reliance on the precise terms used in the notes is therefore dubious.

⁵ OFCCP also argues that the compensation analyses cannot be privileged because “at least some of these self-audits were conducted by Ms. Holman-Harries’ team and only later provided to Oracle’s attorneys.” Mot. at 16. OFCCP must know this to be a frivolous argument. The law recognizes that the attorney-client privilege attaches to work done at the direction of outside counsel. Outside counsel need not be the one creating a document or analyses for the privilege to attach. *See, e.g., Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 508 (S.D. Cal. 2003) (document created by non-attorney at the direction of counsel is privileged).

(referring to Ms. Holman-Harries' responses to "these requests"); Mot. at 10 ("When asked by OFCCP what steps Oracle had taken to meet its AAP obligations related to analyzing pay equity..."). That OFCCP feels the need to mischaracterize this evidence speaks volumes about the merits of its motion.

Third, in Ms. Holman-Harries' response in June 2015 to OFCCP's specific question about Section 2.17 compliance, Ms. Holman-Harries makes a clear distinction between what Oracle does to comply and those things it does that are privileged. Ms. Holman-Harries references "pay audits to assess legal compliance with Oracle's non-discrimination obligations and to further ensure Oracle's compensation policies and practices are carried out," *that are conducted at the direction of Oracle's outside counsel*. Bremer Decl., Ex. 9. To "assess legal compliance with Oracle's non-discrimination obligations" is not the same as conducting analyses pursuant to 41 C.F.R. § 60-2.17.

Also, one need not rely on OFCCP's interpretation of what it believes has been stated in interviews or emails. When the question has been directly presented to Oracle, Oracle has invoked the privilege. In addition to the discovery responses and correspondence described above, Oracle's PMK, Kate Waggoner, testified in the *Jewett* action that Oracle's pay audits are privileged:

Q. Do you know whether Oracle does internal pay audits?

* * *

THE WITNESS: I am aware that we – with internal counsel and with outside counsel, under their direction, that there have been audits taken – that have taken place. The – the – everything about that is covered under the attorney-client privilege and is done in order to give Oracle legal advice, and I'm not privy to speak on such things.

Parker Decl., Ex. A (7/27/18 K. Waggoner *Jewett* PMK Depo. Tr.) at 367:20-368:19.

And Ms. Holman-Harries re-confirmed at her deposition last month that any

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compensation analyses were performed at the direction of Oracle's attorneys:

Q. So your compliance group only conducted a compensation analysis if specifically directed by Oracle's attorneys?

A. Yes.

* * *

Q. Okay. Did your group conduct an analysis of employee compensation at a more high level to ensure compliance with Oracle's affirmative action obligations?

A. I've answered that. Any analysis my group did was as directed by our attorney, under attorney-client privilege and work product.

* * *

Q. And your group did not do any review or analysis of compensation unless it was specifically requested by Oracle's attorneys?

A. Correct.

Bremer Decl., Ex. 2 (5/8/2019 S. Holman-Harries Depo. Tr.) at 116:14-17; 117:5-11; 178:1-4; *see also* 2019 Siniscalco Decl.⁶

Finally, with not a shred of evidence, OFCCP resorts to an argument that does nothing but attempt, again, to sully Oracle's attorneys. OFCCP accuses Ms. Holman-Harries' testimony of being "coached" (Mot. at FN9), and claims as a result that the privilege cannot stand. The accusation does not deserve to be graced with a response. And even the case cited by OFCCP *rejects* the relief OFCCP seeks. *Welch v. Eli Lilly & Co.*, 2009 WL 700199, at *13-15 (S.D. Ind.

⁶ Oracle has taken the same, consistent position in the *Jewett* action. Parker Decl., Ex. C (May 23, 2018: "These reviews [of compensation data]—conducted by agents acting at counsel's direction—and communications with counsel regarding these reviews are protected from disclosure by the attorney-client privilege and the work product privilege."); Ex. D (June 22, 2018: "The subject analyses were not—contrary to your baseless assertion—conducted for the purposes of complying with any regulatory obligation, and thus there is no basis for disturbing the privilege protection that clearly attaches to these analyses and communications concerning them."); Ex. E (August 15, 2018: In response to RFP seeking "pay audits conducted to assess Oracle's legal compliance with its non-discrimination obligations or to ensure Oracle's compensation policies and procedures were carried out," Oracle explained, "Notwithstanding your incredulity, documents responsive to this request are protected by the attorney-client privilege and/or the work product doctrine.").

Mar. 16, 2009) (denying motion to waive the attorney-client privilege and noting “[f]inding a waiver of the attorney-client privilege is a serious sanction.”).

Thus, despite OFCCP’s strained efforts to portray Oracle as taking inconsistent positions, Oracle has been clear that it asserts attorney-client privilege and work product protection over any compensation analyses it performed.

B. Oracle Did Not Perform Its Privileged Compensation Analyses Pursuant to 41 C.F.R. § 60-2.17

OFCCP’s response to these hard truths is to assert, with no evidence or legal support, that Oracle *actually* conducted the compensation analyses at issue pursuant to 41 C.F.R. § 60-2.17. *See, e.g.*, Mot. at FN6 (“It is clear that Oracle conducted these analyses for the purposes of complying with their contractual obligations” because the analyses were conducted prior to this litigation); Mot. at 15 (“Oracle’s primary purpose in completing them was not to seek legal advice—but to comply with their contractual and regulatory requirements.”). This fails.

For starters, OFCCP does not cite any authority for the proposition that Section 2.17 requires the compensation analyses at issue here, any specific type of analysis or even a specific type of document. It simply asserts arguments like this: “[b]ecause the compensation analyses are made as required by regulation, Oracle well knew they would be subject to inspection by the government[.]” Mot. at 15-16. Missing is the basis for these arguments. OFCCP only offers *ipse dixit* and string cites to cases that do *not* hold that compensation analyses are required to comply with Section 2.17.⁷

Moreover, as explained above, Oracle conducts privileged compensation analyses for a variety of reasons that have nothing to do with Section 2.17. *See* Section II.B. The fact that some analyses may have commenced prior to any litigation or compliance review is meaningless.

⁷ In a slight variation of the foregoing argument, OFCCP further contends that even if legal communications about the analyses are privileged, the analyses themselves are not because “they are ‘mandatory’ business documents, required by regulation.” Mot. at 16. Again, this assertion assumes that any analyses were conducted pursuant to Section 2.17.

Further, OFCCP's claim is inconsistent with the facts. For example, as discussed above, Oracle never provided the analyses during the compliance review. And when OFCCP served document requests for analyses that sought "analyses conducted pursuant to 41 C.F.R. § 60-2.17," after meeting and conferring Oracle's responses confirmed that "no responsive documents exist." Bremer Decl., Ex. 22. OFCCP cannot simply make a fact-free assertion that privileged actions were performed for a non-privileged purpose in an effort to get Oracle's privileged documents.⁸ See, e.g., *Leadership Studies, Inc. v. Blanchard Training and Dev., Inc.*, 2017 WL 2819847, at *11 (S.D. Cal. June 28, 2017) (denying *in camera* review and upholding privilege because plaintiff failed to present any factual basis to support its challenge of the defendant's claim, supported by a privilege log, that the documents at issue were privileged). Similarly, OFCCP does nothing to confront the consistent testimony of Oracle's witnesses, cited above, that these analyses were not created pursuant to Section 2.17.

C. **OFCCP's Assertion that the Analyses Are Not Protected by the Work-Product Doctrine and Attorney-Client Privilege Is Unsupported by Fact and Law**

1. **OFCCP's Work Product Arguments Fail**

OFCCP contends that the work product doctrine cannot apply because Oracle "had a pre-existing duty to create" the compensation analyses and were made "pursuant to public requirements unrelated to litigation." Then, OFCCP argues that the privilege log is deficient. Mot. at 13-14. Again, these arguments are based on OFCCP's say-so, nothing more.⁹

As to the first argument, as already noted, OFCCP simply cannot provide a basis for its

⁸ OFCCP's argument also leads to the absurd result that no federal contractor could ever maintain privilege over internal, privileged analyses because OFCCP would simply make unsupported assertions—as it has done here—that the analyses are required by Section 2.17 and defeat the privilege. Not only would this make the privilege meaningless, it would discourage Federal contractors from conducting privileged reviews.

⁹ In fact, the compensation analyses are protected by the work product doctrine as further supported by the sworn testimony Oracle submits with this opposition. 2019 Siniscalco Decl., ¶ 6.

assertion that the compensation analyses were or had to be created pursuant to any federal regulation or any contract.

Regarding the privilege log, Oracle timely asserted all privileges where appropriate in response to OFCCP's requests both before and after the privilege log. Further, OFCCP has never met and conferred about Oracle's privilege log so that issue is not ripe for adjudication.

2. OFCCP's Attorney-Client Privilege Arguments Fail

OFCCP's arguments regarding the attorney-client privilege are a reprise of the ever-present false premise—that Oracle's primary purpose in having a compensation analyses was not to seek legal advice. Rather, the purpose was contract or regulatory compliance. Mot. at 15.

Again, Oracle's analyses were conducted for the **sole** purpose of securing legal advice, not for complying with Section 2.17. Therefore, the cases OFCCP cites that reject the privilege because the primary purpose of the communication was not to seek legal advice have no application. See *United States v. Salyer*, 853 F. Supp. 2d 1014, 1018 (E.D. Cal. 2012); *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1242 (D. Or. 2017); *Matter of Fischel*, 557 F.2d 209, 211-12 (9th Cir. 1977).

Nor are the other cases cited relevant. *OFCCP v. JBS*, 15-OFCCP-1, 2016 WL 11553368 (Nov. 25, 2016), has no application. There, the court found that the employer's audits were *not* conducted for purposes of obtaining legal advice because they were conducted regularly in the course of business, legal counsel did not play a key or even supporting role, and there was no evidence that witnesses believed the audits were privileged because they were for purposes of obtaining legal advice.¹⁰

¹⁰ *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009) does not support OFCCP's arguments either. There, the client's statements to his attorneys "were not 'made in confidence' but rather for the purpose of disclosure to the outside auditors," which the client was clearly aware of. Here, Oracle's privileged pay equity studies and related communications were intended to, and have been, kept in confidence. 2019 Siniscalco Decl., ¶ 6.

OFCCP cites *United States v. Eghbal*, 2009 WL 10671386, at *4 (C.D. Cal. June 4, 2009), where the court found no attorney-client privilege as to corporate governance documents (*i.e.*, operating agreement, certificate of action, minutes, and related documents) because there was no evidence “that the subject documents contain confidential legal communications” and because the defendants “did not provide a privilege log (or similar proof), which is necessary to make a prima facie showing that the documents are protected by the attorney-client privilege.” *Id.* The compensation analyses here find no parallel to the minutes of a meeting. There is a privilege log. There are statements under oath establishing the privilege.

Cloud v. Super. Ct., 50 Cal. App. 4th 1552, 1559 (1996), ordered production of analyses that were “required by federal law, and the analyses themselves are available for inspection by federal authorities.” Here, the analyses are not required by federal law. They were not made available for inspection by federal authorities.

OFCCP v. Disposable Safety Wear, No. 92-OFC-11 (ALJ Aug. 20, 1992) involved a contractor whose failure to produce records was a “deliberate, complete violation” of a conciliation agreement with OFCCP. Here, there is no conciliation agreement. There is no agreement of any kind to provide the compensation analyses at issue.

In *HUD v. S.T.C. Constr. Co.*, No. 77-OFCCP-5 (June 24, 1980), a contractor refused to provide access to records, refused to submit required reports and certifications, as well as “failed to have requested documents available for the compliance review, failed to respond to the Show Cause Notice and the follow-up letter of intent to recommend sanctions issued by HUD.” Here, there has not been a complete refusal by Oracle to produce records. In any case, that case does not say anything about compensation analyses and does not conclude that those analyses are not privileged.

And in *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 644–46 (S.D.N.Y. 1987), the court ordered the production of documents and memos that were prepared for the “essentially management” purpose of developing an AAP. Here, Oracle’s compensation analyses were not

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prepared for developing an AAP. Further, in *Hardy* there was no indication the documents at issue were prepared at the direction of outside counsel for the purpose of rendering legal advice. *Hardy* is inapplicable.

3. **The Remaining Cases Cited Have No Bearing on the Issues Here**

OFCCP also cites a series of cases that simply have no application. First, OFCCP argues that these compensation analyses are self-evaluative and are not therefore privileged. Mot. at 17. Second, OFCCP simply lards up its Motion with cases that have no conceivable relevancy.

As to the first argument, Oracle is *not* claiming a “self-evaluation” privilege. And in the cases cited by OFCCP it is that privilege that is at issue, **not the attorney-client privilege**. See *Martin v. Potomac Elec. Power Co.*, 1990 WL 158787, at *1 (D.D.C. May 25, 1990), *Capellupo v. FMC Corp.*, 1988 WL 41398, at *4 (D. Minn. May 3, 1988), *U.S. ex. rel. Sanders v. Allison Engine Co.*, 196 F.R.D. 310 (S.D. Ohio 2000), and *Witten v. A.H. Smith & Co.*, 100 F.R.D. 446 (D. Md. 1984), *aff’d*, 785 F.2d 306 (4th Cir. 1986). Once this is understood, OFCCP’s claim that courts “have repeatedly required production of self-evaluative analyses and related elements of federal contractors [*sic*] AAPs,” (Mot. at 17) is misleading and frivolous.

Now for the utterly irrelevant cases. *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 367 (D.D.C. 1979) stands for the unremarkable proposition that an Administrative Law Judge has the authority to compel contractors to participate in depositions and respond to discovery. That is not an issue in this Motion.

Administrator v. Fernandez Farms, Inc., et al., No. 2014-TAE-00008 (ALJ Aug. 25, 2016) is an immigration case which holds that, where an employer does not maintain required records of compliance with the law, it is reasonable to infer that the employer did not comply with the law. That is neither here nor there.

OFCCP cites *Gonzales v. Police Dep’t, City of San Jose, Cal.*, 901 F.2d 758, 761 (9th Cir. 1990) for the proposition that evidence of an employer violating its own affirmative action

plan may be relevant to discriminatory intent. *Gonzales* also states (which OFCCP omits) that “failure to follow an affirmative action plan is not per se a prima facie violation of Title VII.” *Id.* In any event, this case does not state that OFCCP is entitled to pierce a privilege on its way to proving anything.

Anderson v. Boeing Co., 222 F.R.D. 521, 537 (N.D. Okla. 2004) made no holdings about what evidence must be provided in discovery. *Boeing* simply holds that evidence of failure to correct disparities despite knowledge is relevant. That may be. But, *Anderson* does not hold that a privileged analysis must be produced.

The same is true of *Moze v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1044 (7th Cir. 1991). It holds that failure to monitor compliance may be evidence of discriminatory intent. There is nothing said about the attorney-client privilege or obtaining documents protected by the privilege.¹¹

D. Oracle Did Not Waive Any Privileges by Putting Them “At Issue” or Not Timely Asserting Them

OFCCP claims that Oracle waived any privileges by putting them “at issue” by denying that it violated the “core disclosure requirements of 41 C.F.R. § 60-2.17(c)[.]” Mot. at 18. Relatedly, OFCCP complains that the privilege “may not be used as a sword and a shield” and that “Oracle cannot both claim it complied with its promises under its contract ... and claim all records regarding its compliance cannot be disclosed due to privilege.” Mot. at 2.

Oracle has not placed at issue its compensation analyses. It has stated that it complied with regulatory requirements and provided the documents underlying that assertion. That is not a waiver of any privilege. *See Treat v. Tom Kelley Buick Pontiac GMC, Inc.*, 2009 WL 1543651,

¹¹ The cases cited in footnote 5—*Allen v. Sundstrand Corp.*, 2000 WL 1335738, at *3 (N.D. Ill. Sept. 5, 2000); *Chang v. Univ. of Rhode Island*, 606 F. Supp. 1161, 1183–84 (D.R.I. 1985); and *Antol v. Perry*, 82 F.3d 1291, 1301 (3d Cir. 1996)—are simply cumulative of the point that compliance with AAPs may be relevant to intent. These cases do not bear on the attorney-client privilege.

at * 12-13 (N.D. Ind. June 2, 2009) (finding that employer had not placed investigation at issue because “[t]o waive the attorney-client privilege, a defendant must do more than merely deny a plaintiff’s allegations”) (internal quotation marks omitted).

Nor is this an instance where the sword/shield trope works. Sword and shield means that a party relies on privileged materials as a substantive defense while refusing to disclose them. *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). Oracle has *not* asserted that the compensation analyses reflect compliance with Section 2.17. In fact, Oracle has affirmatively stated that the analyses have nothing to do with its Section 2.17 compliance.

E. That OFCCP Claims That Privileged Compensation Analyses Are Conceivably Relevant to Its Case Does Not Make Them Discoverable

OFCCP believes that Oracle’s privileged compensation analyses may demonstrate that Oracle was aware of a pay disparity and did not correct it, or that it can impeach Oracle’s statistical analyses at trial with older methodologies it previously used. Mot. at 1. OFCCP does not cite a single case (and it will never find one) holding that the attorney-client privilege can be breached because an opposing party in litigation claims that the privileged document is relevant for some other purpose.

Also, this will create a sideshow. OFCCP has some statistical analysis it will present to establish pay discrimination. OFCCP then wants to take Oracle’s compensation analyses and try to impeach it, presumably with OFCCP’s own analysis. This creates a trial within a trial—why there are differences, etc. This is to no purpose as it is OFCCP that must come forward with its own evidence—which it claims to have already.

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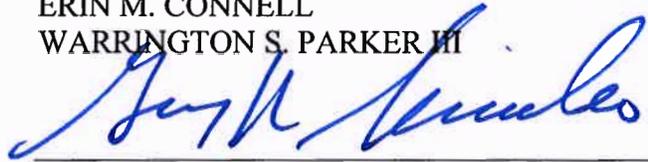
IV. CONCLUSION

For all the foregoing reasons, the Court should deny OFCCP's motion to compel Oracle's privileged analyses.

July 3, 2019

Respectfully submitted,

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