

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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DEFENDANT ORACLE AMERICA,
INC.'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF MOTION TO COMPEL OFCCP
TO COMPLY WITH THE COURT'S
DISCOVERY ORDERS REGARDING
REDACTED INTERVIEW
MEMORANDA AND 30(b)(6)
TESTIMONY; REQUEST FOR
EXPEDITED BRIEFING**

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San Francisco, Ca**

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I. INTRODUCTION

Oracle does not relish burdening the Court with another motion to compel. But OFCCP's conduct leaves Oracle no choice. Unfortunately, OFCCP has not complied with this Court's Orders of June 10 and July 2, or this Court's Order of July 1 – thus, this Motion. The Court ordered OFCCP to re-produce its heavily redacted notes of interviews with potential witnesses, this time redacting only two categories of information: (1) information that discloses the employee's identity; and (2) opinion work product. *See* June 10 and July 2, 2019 Orders. The Court also ordered OFCCP to produce a 30(b)(6) witness to answer certain questions where the Court found OFCCP had waived any privilege. *See* July 1, 2019 Order. Regrettably, and with the most generous of glosses, the Court's Orders have been more honored in the breach than in the observance.

The interview notes remain incomprehensible. In response to the Court's Order, OFCCP redacted every single question as “core opinion work product” that supposedly reveals its strategic impressions about this case. The resulting answers, which are challenging enough to understand without the questions that prompted them, are *also* redacted into oblivion. They are shot through with work product and government informant redactions. But OFCCP has waived any work product protection with respect to questions disclosed to, or information received from, current and former employees with whom OFCCP has no privileged relationship. Moreover, OFCCP has added an entirely new category of redaction not permitted by the Court's Order (or discovery rules, even were there no order): certain questions and responses are apparently “not responsive” in OFCCP's estimation, and those have been redacted as well.

Separately, at the Court-ordered deposition of OFCCP's 30(b)(6) witness (for which OFCCP tendered the statistician who ran the model upon which OFCCP's Second Amended Complaint (“SAC”) is based), OFCCP's counsel instructed the witness not to answer questions about the facts OFCCP considered in developing the model. The Court *specifically* held that Oracle was entitled to this information in its Order granting Oracle's Motion to Compel a 30(b)(6) deposition. OFCCP's counsel also instructed its 30(b)(6) witness not to answer certain

questions because OFCCP believed the question required the witness to answer in his personal capacity. This is improper. Each question was squarely within Oracle's noticed 30(b)(6) topics and the instructions not to answer violated the Court's Order.

Oracle does not intend to repeat all the arguments it made in the extensive meet and confer efforts and its motions to compel that led to the Court's Orders. In short, OFCCP's interview notes do not comply with the Court's Orders, and Oracle seeks an *in camera* review. Similarly, OFCCP improperly instructed its 30(b)(6) witness not to answer questions that are squarely within the Court's Order, and Oracle therefore seeks to continue the deposition and compel answers to its questions.

In an effort to avoid this motion, Oracle and OFCCP met and conferred extensively regarding the conduct described above. OFCCP offered, in fits and starts, to unredact only certain questions or answers in the notes, leaving many improper redactions—including the wholly-unauthorized redaction of information OFCCP claims is “not responsive.” OFCCP also offered to submit a “template” interview memo to this Court with a joint letter. But the redactions prevent Oracle from assessing whether the “template” is representative of its actual interviews with employees. And in fact, it likely is not as OFCCP admitted that different interviewers will ask different questions. In short, after three hours of telephonic meet and confers and multiple email exchanges, OFCCP's proposals are not acceptable. They simply do not comply with this Court's Orders. As for the 30(b)(6) deposition testimony, counsel for Oracle and OFCCP conferred extensively at the deposition and telephonically thereafter, but OFCCP still refuses to commit to answering the questions at issue.

As of the time this Motion is filed, OFCCP will have been in violation of the Court's Order for nearly a month regarding the interview notes, and nearly two weeks regarding the deposition testimony. OFCCP cannot stave off this motion by making incremental efforts to comply with the Court's Order and insisting that Oracle engage in an eternal meet and confer or else be accused of “rushing to court.” Oracle's experts are working on their rebuttal reports, fact discovery is over, fact depositions are nearly finished, and Oracle is preparing a motion for

summary judgment and for trial. Oracle needs the facts and answers to its questions now. Any additional delay further prejudices Oracle. Oracle therefore requests the following relief:

First, Oracle would ask that this motion be briefed on a shortened schedule, giving OFCCP three days to respond.

Second, Oracle asks that this Court review *in camera* the unredacted and redacted interview memos to determine the propriety of the redactions.

Third, Oracle asks this Court to compel the testimony of the 30(b)(6) witness.

Fourth, Oracle asks this Court to bar OFCCP from introducing any evidence at trial that is not disclosed to Oracle due to these improper redactions or objections.

II. STATEMENT OF FACTS

A. The Court Granted Oracle's Motion to Compel Unredacted Interview Notes, but OFCCP Did Not Comply

Oracle's Motion to Compel Documents and Interrogatories. On May 3, 2019, Oracle filed its Second Motion to Compel Plaintiff OFCCP to Produce Documents and Further Respond to Interrogatories. As relevant to this motion, Oracle challenged OFCCP's assertion of both the government informant and the work product privileges to shield facts revealed in its interviews with potential witnesses.

The Court's June 10 and July 2 Orders. On June 10, 2019, the Court issued an Order granting in part and denying in part Oracle's Second Motion to Compel. The Court ordered OFCCP to, among other tasks, produce by July 5, 2019 all notes and memoranda from its interviews with potential witnesses with redactions only for (1) information that could identify the employee and (2) opinion work product that reflects attorney impressions, opinions, and strategy. *See* June 10 Order at 26.

On June 17, 2019, OFCCP filed a Motion for Clarification or, in the Alternative, for Reconsideration of the Court's Order Requiring Production of Documents Protected by the Attorney Work Product Doctrine. The Court rejected OFCCP's Motion for Clarification and/or Reconsideration on July 2, 2019.

The Two Sets of Interview Notes. There are two sets of interview notes at issue here:

- (1) Memoranda/notes from OFCCP's interviews with Oracle employees in 2015 during the compliance audit (the "2015 memos")¹; and
- (2) Memoranda/notes from OFCCP's interviews with Oracle employees in 2019, during the litigation (the "2019 memos"), many of which were conducted in response to OFCCP's mass mailing that was the subject of Oracle's Motion for a Corrective Notice.

The subject of Oracle's May 3 Motion to Compel and resulting June 10 Order were the 2015 memos. In its June 10 Order, the Court directed OFCCP to "re-do *all* of its redactions" of the 2015 memos and correct its "facially unacceptable" redactions, including the "facially incredible levels [of redaction] with nearly everything deemed disclosure of an informant's identity." *See* June 10, 2019 Order at 13-14 (emphasis in original). The Court also ordered OFCCP to provide some indication of the basis for each remaining redaction, such as a privilege log. *Id.* The June 10 Order is clear that OFCCP must *both* correct its unacceptable government informant redactions *and* provide the basis for any remaining redactions. The Court advised OFCCP that "[f]actual content that will not specifically identify the informant may not be obscured in these redactions" and that the privilege "does not permit withholding information on the grounds that a creative attorney can postulate some way in which the information could narrow the potential sources." June 10, 2019 Order at 14 and July 2, 2019 Order at 9 n.3.

Oracle made clear in its May 3, 2019 Motion that the memos it submitted (Exhibit 13 to the supporting Parker Declaration) represented only a subset of interview memos produced by OFCCP. There over 40 2015 interview memos. To date, OFCCP has re-done redactions on 26 of them. July 30, 2019 Declaration of David P. Fuad ("Fuad Decl."), ¶ 4. OFCCP has not re-done redactions on the remainder. *Id.* Ex. E at 71-73. This violates the Court's June 10 Order.

OFCCP's Post-Order Production. This Court's June 10 Order required the production of interview memos by July 5. Over the course of twelve document productions on July 5, 8, 9,

¹ A subset of these 2015 interview memos was attached to Oracle's May 3, 2019 Motion as Exhibit 13 to the Parker Declaration, which this Court referenced in its June 10 Order at 14.

10, 11, 12, 22, 24, 25, 26, 28, and 29, OFCCP produced to Oracle: (1) new, never-before-produced witness interviews (the 2019 memos) with numerous redactions based on the government informant and work product privileges, and in some instances a “not responsive” assertion. (Fuad Ex. at ¶ 3; Ex. A²); (2) revised and less-redacted 2019 memos as part of the parties’ meet and confer (*id.*, Ex. B); (3) revised and less-redacted 2015 memos as part of the parties’ meet and confer (*id.* at ¶ 3); (4) supplemental interrogatory responses; (5) a privilege log dated July 8, 2019 (*id.*, Ex. C); and (6) a privilege log dated July 15, 2019 (*id.*, Ex. D).

Until July 22, OFCCP had not re-produced *any* 2015 memos. Fuad Decl., ¶ 4. Instead, OFCCP asserted that revisions to its privilege logs satisfied its obligations under the June 10 Order. As noted below, OFCCP still has not produced the 2015 memos in full. One reason given: since Oracle knows the identity of the persons interviewed, OFCCP need not correct its redactions—this despite the fact that the sole redactions at issue are government informant privilege redactions and not work product or attorney client privilege. Fuad Decl., Ex. E at 73.

The Parties’ Meet and Confer. Oracle sent OFCCP a meet and confer letter regarding deficiencies in OFCCP’s productions on July 10, 2019. Fuad Decl., Ex. E at 1-6. OFCCP responded by email on July 12, 2019. *Id.* at 7-16. The parties met and conferred telephonically on July 16, 2019. *Id.* at ¶ 2. The parties exchanged multiple meet and confer letters in the following days. *Id.*, Ex. E. As a result of this meet and confer effort, Oracle agreed not to move to compel further responses to OFCCP’s supplemental interrogatory responses (though it still contends they do not comply with the Court’s order because they repetitively refer Oracle to thousands upon thousands of documents without specifying why they are responsive to each interrogatory).

The parties met and conferred telephonically a second time on July 23, 2019. Fuad Decl. at ¶ 2. In the meet and confers, instead of agreeing to simply correct its flawed production,

² Oracle attaches as Exhibit A to the Fuad Declaration only a selection of the redacted interview memoranda OFCCP produced. Should the Court order *in camera* review, Oracle can provide all of the approximately 230 interview memoranda to the Court.

OFCCP attempted to negotiate and offer alternatives to compliance with the Court's Order. For example, OFCCP offered to do witness summaries that would ostensibly reflect redacted information. Oracle noted that this Court already rejected this alternative. Moreover, some of the summaries OFCCP pointed to—short summaries in OFCCP's supplemental interrogatory responses—contained information directly contrary to the little information that could be gleaned from the interview memos. *See, e.g.*, Fuad Decl., Ex. E at 4-5, 26-27.

As another example, in response to Oracle pointing out that every question in the July 5 to 15 productions of the 2019 interview notes was redacted as work product, OFCCP offered to produce a less-redacted version of the notes. Fuad Decl., Ex. E at 39-40. This less-redacted set of exemplar notes, however, still contains numerous redactions of questions posed to employees (*i.e.*, redactions of facts that OFCCP was obtaining from witnesses), and the aforementioned redactions of so-called non-responsive information. *Id.*, Ex. B.

Ultimately, Oracle concluded that the extraordinarily time-consuming process of meeting and conferring and pleading with OFCCP to simply comply with the Order was not productive or necessary given that the Court already ruled in its favor on all of these issues. *See* June 26 Order on Communications with Oracle Employees at 12-13. (“The point of the meet and confer requirements is to have counsel actually talk and resolve their disputes without needing to adjudicate issues attorneys ought to be able to figure out on their own. It was not intended as another litigation tool designed to slow down or thwart the resolution of issues in the case.”)

B. The Court Ordered OFCCP to Answer Certain Questions About Its Statistical Model, but OFCCP Did Not Comply

On April 3, 2019, Oracle served its Notice of Deposition Pursuant to 41 C.F.R. § 60-30.11 and Fed. R. Civ. P. 30(b)(6) (the “30(b)(6) Notice”).³ On May 29, 2019, Oracle filed a Motion to Compel Plaintiff OFCCP to Designate and Produce 30(b)(6) Witnesses on Topics 1 to 21.

³ Oracle's 30(b)(6) Notice is attached as Exhibit 2 to the May 29, 2019 Declaration of Warrington Parker in Support of Oracle's Motion to Compel OFCCP to Designate and Produce 30(b)(6) Witnesses.

The Court's Order Granting Oracle's Motion to Compel. On July 1, 2019, the Court granted Oracle's Motion to Compel Plaintiff OFCCP to Designate and Produce 30(b)(6) Witnesses and ordered OFCCP to designate and produce a witness or witnesses as to Topic Nos. 1-21, each of which concerned the factual support for certain allegations in OFCCP's Second Amended Complaint.

OFCCP Instructs Its 30(b)(6) Witness Not to Answer. OFCCP offered two witnesses to comply with this Court's Order. One witness was to speak to the statistical analyses that underlie the allegations. Another witness was designated to testify as to any non-statistical facts.⁴ July 29, 2019 Declaration of Kathryn G. Mantoan ("Mantoan Decl."), Ex. A.

With regard to the statistical analyses, OFCCP designated Dr. Michael Brunetti, the statistician responsible for running the statistical analyses used in the SAC, as the agency's most knowledgeable person for Topic Nos. 1-21. Mantoan Decl. at ¶ 3, Ex. A. Oracle took the deposition of Dr. Brunetti on July 17, 2019. *Id.* at ¶ 4. During the deposition, counsel for OFCCP instructed Dr. Brunetti not to answer a variety of questions, including questions specifically addressed in the July 1 Order. *Id.* at ¶ 4, Ex. B. Many of these questions tracked exactly the language of the Court's July 1 Order that set forth what testimony OFCCP was required to provide. *Compare, e.g.,* July 1 Order at 18 ("[OFCCP] may not withhold answers to what facts its attorneys and statisticians considered when they made choices about the statistical model.") *with* Mantoan Decl., Ex. B (excerpts of the transcript of Dr. Brunetti's deposition containing questions posed in this form that OFCCP's counsel instructed the witness not to answer).

The Parties' Meet and Confer Efforts Regarding OFCCP's Instructions. During the July 17 deposition, Oracle met and conferred with OFCCP about its objections. Mantoan Decl. at ¶ 5. That evening, Oracle sent OFCCP a letter confirming that the parties had met and conferred in the course of the deposition, but nevertheless offering a time for a further meet and confer.

⁴ The second witnesses' testimony is set to take place on August 14, 2019. Although this Court required the 30(b)(6) depositions to take place within 30 days of its July 1 Order, OFCCP represented that its fact 30(b)(6) witness was not available until August. Oracle acceded to the representation.

Mantoan Decl., Ex. C at 1-2. OFCCP responded on July 18, requesting a further meet and confer. *Id.* at 13. The parties met and conferred by phone on July 22, 2019. Mantoan Decl. at ¶ 7. In that conversation, OFCCP discussed some alternative ways of resolving the issues—including by having its 30(b)(6) fact witness answer the questions during his or her August 14 deposition. *Id.*

Oracle sought a firm commitment from OFCCP by Thursday, July 25 regarding OFCCP's willingness to produce a witness to answer the specific questions at issue. Mantoan Decl. at ¶ 7. OFCCP did not provide any substantive response on that date; instead, in a late afternoon e-mail on Friday, July 26, OFCCP asked a series of questions—apparently an attempt to re-open the meet and confer discussion. Mantoan Decl., Ex. C at 4-8.

Because OFCCP refuses to comply with the Court's Orders of June 10, July 1, and July 2, Oracle is left with no option but to seek the intervention of the Court.

III. ARGUMENT

A. OFCCP's Redactions to the Interview Memoranda Remain Deeply Flawed and the Court Should Conduct an *In Camera* Review

OFCCP's numerous redactions violate the Court's Orders and render both the 2015 and the 2019 interview memoranda largely meaningless. For all the reasons explained below, Oracle respectfully requests the Court conduct an *in camera* review of OFCCP's redactions.

1. OFCCP's redactions do not comply with the Court's June 10 and July 2, 2019 Orders

Below is a brief description of the myriad ways OFCCP's production does not comply with the Court's June 10 and July 2 Orders.

a. OFCCP did not "re-do all of its redactions" for the 2015 memos as ordered by the Court

OFCCP has not redone the redactions for *all* of its 2015 memos, as the Court ordered. Instead, OFCCP re-did *some* redactions and claims that it is excused from re-doing the rest because it produced a privilege log explaining its redactions. Fuad Decl., Ex. E at 33, 71-73. OFCCP also contends that Oracle was present at these interviews and therefore knows who the employee was and can interview that person itself. *Id.* Not so. To be clear, the only 2015 memos

that this Motion concerns are the interviews where Oracle was *not* present.

OFCCP appears to believe that it is permitted to redact opinion work product from the 2015 memos. That is not what Court's Order says. When OFCCP originally produced the 2015 memos, it asserted only the government informant privilege to justify its redactions. It did not assert any work product privilege. As the Court's June 10 Order recognized, OFCCP's use of the government informant privilege in those memos was facially overbroad. June 10 Order at 14. Therefore, OFCCP must un-redact *any and all* information from the 2015 memos that does not actually identify the interviewee in question. If the information does not identify the employee, no other privilege protects its disclosure.

OFCCP's privilege log also does not excuse it from complying with the Court's Order. Rather than justifying the redactions, the privilege log underscores just how misapplied they are. For example, OFCCP redacts such information as "info about experience with coworkers" (Fuad Decl., Ex. C at 839) and "info re promotions" (*id.* at 826, 827). This sort of overbroad redacting conceals more than simply the person's identity.

The Court already ordered OFCCP to produce this information in 2017 and again in 2019. The Court should compel, yet again, OFCCP to re-redact and re-produce *all* 2015 memos with appropriate government informant redactions.

b. OFCCP's opinion work product redactions are overbroad

On June 10, the Court ordered OFCCP to produce its interview notes, redacted **only** for opinion work product and employee-identifying information. June 10 Order at 25-26. The Court reiterated in its July 2 Order that OFCCP must "redact the opinions and produce the facts." July 2 Order at 8. Opinion work product is only "impressions, opinions, and strategy." June 10 Order at 26. Despite these two clear orders, OFCCP produced notes of interviews conducted in 2019 (the 2019 memos) that (1) redact all attorney questions, rendering the facts contained in the interviewee answers meaningless, and (2) redact whole pages of text, including all facts. As noted above, OFCCP offered to un-redact some additional questions and answers during the parties' meet and confer process, but even these less-redacted notes are still unacceptable

because OFCCP has not articulated how factual questions posed to nonparty Oracle employees would disclose its impression, opinions, or strategy. Indeed, the fact that these questions were voluntarily disclosed to parties with whom OFCCP has no privileged relationship waives any work product protection.

In response to the Court's Order, OFCCP redacted every attorney question, including those that appear to solicit facts directly at issue in this case. OFCCP's redactions (and even the "less-redacted" memos) leave disembodied and meaningless answers. Without the questions, the answers "Yes," "No," "Male," "2018," and "Redwood Shores," for example, violate the Court's Order to produce "the factual content of communications with third parties." June 10 Order at 27; Fuad Decl., Ex. A at DOL000042111-19. (originally redacted memos); Ex. B (OFCCP's "less-redacted" memos). These words standing alone are not facts. Longer answers are left equally unusable because Oracle can only guess at what the specific question was that prompted them.

OFCCP even redacted entire pages from the 2019 memos, including all facts contained in those pages. *See, e.g.*, Fuad Decl., Ex. A at DOL000042117; DOL000041471; DOL000042687; DOL000040826; DOL000040900 (except for the words "SEE ABOVE"); DOL000040903 (except for the word "NO"); DOL000040943-46. In fact, in at least two instances, OFCCP redacted *the entire memorandum* as work product. *Id.* at DOL000042959-67; DOL000042986-92. This level of redaction was obviously not intended by the Court's Order. OFCCP has not produced all the facts in the notes. And the Court already rejected "OFCCP's hint that all of its interview notes constitute opinion work product" and held that "the mere fact that an attorney might be able to make guesses about opinions from facts does not turn all records of fact into opinion work product." July 2 Order at 7. Nothing justifies OFCCP's sweeping, page- or interview-long redactions.

OFCCP claims that its legal theories cannot be extricated from the questions. This is not credible. OFCCP's theories in this case are already on display in the SAC and in countless other filings. For example, in the less-redacted memos that OFCCP provided, it turned out OFCCP

was redacting as opinion work product the following questions:

- During your Oracle interview were you asked about your prior pay?
- Did you ever get a raise?
- Did your supervisor give you annual performance review?

Compare Fuad Decl., Ex. A at DOL000041141 *with* Fuad Decl., Ex. B at DOL000041141.⁵ The SAC contains numerous allegations about Oracle’s pay practices, and it is preposterous to assert that these basic questions about pay reveal OFCCP’s “impressions, opinions, and strategy” about a compensation discrimination case.

c. OFCCP’s government informant redactions are overbroad

The 2019 memos also over-redact information based on the government informant privilege. For example, OFCCP redacted information such as “type of departure” (Fuad Decl., Ex. C at 40803), “employment tenure” (*id.* at 40806), and “termination month” (*id.* at 040987). This is the type of information that could only hypothetically be matched to an individual.

OFCCP also obscured the race of the interviewee in every memorandum. OFCCP argues that revealing race is tantamount to revealing identity because there are so few employees of certain races at Oracle. Fuad Decl., Ex. E at 34. Again, this is the type of information that could only hypothetically be used by a creative attorney to narrow the field of possible witnesses. Race is central to OFCCP’s allegations. Without knowing the race of the interviewee, the facts in the memoranda lack context to make them meaningful. For example, one employee believes that other employees are making more money than him. *See, e.g.*, Fuad Decl., Ex. A at DOL000042408-42417. Without knowing the race of this employee, and therefore which of OFCCP’s claims he relates to, this fact is meaningless. Oracle cannot determine whether it provides anecdotal support for OFCCP’s allegations or Oracle’s defenses. OFCCP’s redactions are not limited to information that would *actually* reveal the identity of the witness.

⁵ OFCCP provided this “template” during the meet and confer process. Fuad Decl., Ex. E at 55-61. Its less-redacted memos which appear in Exhibit B to the Fuad Declaration are understood to follow the redaction pattern found in this template.

d. OFCCP improperly redacted for responsiveness

The Court's Order was clear that OFCCP could only redact (1) employee-identifying information and (2) opinion work product. June 10 Order at 26. Yet OFCCP has suddenly decided to redact information as "non-responsive," or, even more inexplicably, "Non-responsive, WP-AQ, GI." *See, e.g.*, Fuad Decl., Ex. A. at DOL000042083 and Ex. B at DOL000041144-45.

In meet and confer discussions, OFCCP claimed that it applied these non-responsive redactions to information that relates to the now-resolved hiring claims. Fuad Decl., Ex. E at 35. This is both improper and demonstrably untrue. Information relevant to hiring or recruitment practices of employees in the compensation "class" whom Oracle actually hired is relevant to OFCCP's remaining allegations. OFCCP continues to allege that pay discrimination occurs as part of the hiring process, in that Oracle allegedly "assigns" women and persons of color to lower-paying jobs. SAC, ¶¶ 18-22. OFCCP also alleges Oracle discriminates with respect to starting pay. SAC, ¶¶ 22. Because of these allegations, statements by employees about whether they were hired into a different job than they applied for, or about purported discrimination based on their starting pay, are relevant and discoverable.

Moreover, as pled in the SAC, OFCCP's hiring claim related solely to college recruiting in the PT1 job group. By definition, the members of that college recruiting "class" were never hired by Oracle. Yet the notes at issue are from interviews with current or former Oracle employees who, again by definition, were not victims of alleged hiring discrimination. Thus, the statements from employees in these notes cannot relate to the dismissed college recruiting claim at all because those persons were never hired and therefore never interviewed.

And even were none of this so, and even were there no Court Orders, the rules of discovery do not allow these type of redactions. Courts do not permit parties to unilaterally redact purportedly immaterial information from otherwise relevant and responsive documents. "Redaction is generally an inappropriate tool for excluding information that a party considers to be irrelevant or nonresponsive from documents that are otherwise responsive to a discovery request." *Doe v. Trump*, 329 F.R.D. 262, 276 (W.D. Wash. 2018); *see also, Bartholomew v.*

Avalon Capital Grp., Inc., 278 F.R.D. 441, 451-52 (D. Minn. 2011). The Federal Rules of Civil Procedure require the production of “documents,” “not of excerpts of documents or subsets of words within documents.” *Trump*, 329 F.R.D. at 275; *Bartholomew*, 278 F.R.D. at 451; Fed. R. Civ. Pro. Rule 34. Where, as here, a party selectively redacts, it renders the documents “confusing” and “difficult to use,” and frequently “gives rise to suspicion that relevant material harmful to the producing party has been obscured.” *Trump*, 329 F.R.D. at 276; *see also In re Medeva Sec. Litig.*, 1995 WL 943468, at *3 (C.D. Cal. May 30, 1995).

The Court should order OFCCP to remove these unauthorized “non-responsive” redactions.

B. The Court Should Conduct an *In Camera* Review of OFCCP’s Redactions

Given OFCCP’s apparent unwillingness to redact in compliance with the Court’s Orders, Oracle respectfully requests that the Court conduct an *in camera* review of OFCCP’s redactions. To justify an *in camera* review, the requesting party must show a “factual basis sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged.” *In re Grand Jury Investigation*, 974 F.2d 1068, 1075 (9th Cir. 1992). This threshold is “minimal.” *Id.* at 1071, 1074. “*In camera* review allows the Court to determine whether an alleged work product concern is real, or only speculative.” *Gruss v. Zwirn*, 296 F.R.D. 224, 231 (S.D.N.Y. 2013) (internal quotation marks omitted). The multiple deficiencies in OFCCP’s redactions detailed above more than meet this minimal burden.

Because the Court retains discretion whether to grant *in camera* review, the Ninth Circuit has identified certain factors for a court to consider in its assessment, including: (1) the amount of material the court is asked to review; (2) the relevance of the alleged privileged material to the case; and (3) the likelihood that *in camera* review will reveal whether the documents are privileged. *In re Grand Jury Investigation*, 974 F.2d at 1072-73. All three considerations support the Court conducting an *in camera* review of OFCCP’s redactions. First, where large numbers of documents are at issue, such as here, *in camera* review is appropriate. *See Applied Med. Res. Corp. v. Ethicon, Inc.*, 2005 WL 6567355, at *3 (C.D. Cal. May 23, 2005) (granting *in camera*

review for 400-500 documents as the “most appropriate method for resolving the privilege dispute” because “[r]equiring affidavits or a similar individualized showing would be unduly burdensome.”). Second, the information in the interviews memos is highly relevant. The interview memoranda could include “anecdotal evidence of discrimination or evidence of discriminatory policies or practices at Oracle.” July 2 Order at 2. This evidence is central to this case. As the Court recognized, OFCCP “is proceeding, potentially, on both a disparate treatment and disparate impact claim. In a disparate treatment claim, evidence of treatment at Oracle could be important. In a disparate impact claim, evidence of informal policies and practices and their impact could be important These are all claims that could involve evidence from Oracle employees.” *Id.* at 7. Finally, the Court will be able to determine from a review of the unredacted documents and without reference to external documents whether the opinion work product redactions are proper.

Oracle requests that the Court exercise its discretion to conduct an *in camera* review for the additional reason that the parties are now in expert discovery with summary judgment motions due in September, and further delay would prejudice Oracle. Allowing OFCCP another shot at complying with the Court’s Orders when it has already twice failed to provide properly-redacted interviews only delays Oracle’s access to essential information and prejudices its defense in this case.

In requesting this *in camera* review, Oracle is sensitive to the fact that it is asking the Court to review unredacted and unverified statements about Oracle from current or former employees without any opportunity to cross-examine or address those statements. Oracle anticipates that the cohort of employees contacting OFCCP about their pay or position at Oracle necessarily include primarily employees who feel they have been treated unfairly. At trial, Oracle will of course have its own witnesses who will confirm Oracle does not discriminate in compensation or job assignments and intends to fully rebut any negative statements within these notes.

C. OFCCP's Instructions to its 30(b)(6) Witness Were Baseless and Contrary to the Court's Order

1. OFCCP instructed its 30(b)(6) witness not to answer questions expressly authorized by the Court's Order

In its July 1 Order, the Court held that OFCCP waived any claims of privilege over (1) the factual basis for the statistical model that forms the basis of the SAC; (2) choices made with respect to the model; and (3) how the model works. July 1 Order at 17-18. In so ordering, the Court expressly permitted Oracle to pose questions about “what facts [OFCCP’s] attorneys and statisticians considered when they made choices about the statistical model.” *Id.* OFCCP ignored this Order when it instructed its witness not to answer Oracle’s questions.

Throughout Dr. Brunetti’s deposition, counsel for Oracle posed questions such as “Did OFCCP consider [] the full list of data files produced in October of 2017 when it made choices about the statistical model in the SAC?” or “Did OFCCP consider any information about the products and services that Oracle provides when it made choices about the statistical model in the SAC?” *See* Mantoan Decl., Ex. B at 64:7-12; 64:14-20.⁶ Each of these questions seeks to confirm the factual basis for the statistical model that underlies the SAC, including what facts were or weren’t considered by OFCCP and/or Dr. Brunetti when developing that model. However, despite Oracle pointing OFCCP to the clear language of the Court’s July 1 Order, OFCCP nevertheless repeatedly asserted a privilege objection that the answer “may reveal attorney-client communications or attorney work product” and instructed its witness not to answer. *See, e.g., id.* at 62:8-22.

OFCCP now takes the *post hoc* position that its privilege instructions were actually objections that Dr. Brunetti was not properly prepared to answer these questions because he was

⁶ To facilitate the Court’s review, Oracle attaches as Exhibit B to the Mantoan Declaration excerpts of the transcript of Dr. Brunetti’s deposition reflecting all the questions Oracle posed in response to which OFCCP instructed its witness not to answer and on which Oracle now seeks a further order compelling testimony, along with the complete objections and instructions provided in response. Should the Court prefer to review the deposition transcript in full, Oracle will provide it.

proffered to testify only about the statistical analyses themselves, not the factual basis for them, and has intimated that a forthcoming further 30(b)(6) designee might be so prepared. Mantoan Decl. at ¶ 7. Although OFCCP designated Dr. Brunetti as the appropriate witness to answer Oracle's questions on behalf of OFCCP about the statistical analyses because he ran the statistical model, Oracle is willing to conduct a second deposition of Dr. Brunetti or another 30(b)(6) designee who is actually prepared. OFCCP, however, has refused to assure Oracle – either at the deposition (*see, e.g.*, Mantoan Decl., Ex. B at 98:6-100:14; 170:6-171:24) or subsequently (*id.* at ¶ 7) – that any forthcoming additional witness will, in fact, give substantive answers to these questions.

OFCCP's instructions violate the Court's Order. The Court should order OFCCP to provide a 30(b)(6) witness to answer Oracle's questions identified in Exhibit B to the Mantoan Declaration, as well as any follow-up questions Oracle deems necessary (as it was prevented from asking such questions in Dr. Brunetti's deposition).

2. OFCCP improperly instructed its witness not to answer questions that fall within Oracle's designated topics

OFCCP also instructed Dr. Brunetti not to respond to Oracle's questions about what Dr. Brunetti reviewed in preparing the SAC statistical model, claiming that the questions required Dr. Brunetti to answer in his "individual capacity." *See, e.g.*, Mantoan Decl., Ex. B at 93:16-21. This is an improper instruction. "As a rule, instructions not to answer questions at a deposition are improper." *Detoy v. City & Cty. of San Francisco*, 196 F.R.D. 362, 365 (N.D. Cal. 2000). A party may only instruct a witness not to answer a deposition question on the basis of privilege, to enforce a limitation directed by the court, or to present a motion that the deposition is being conducted in bad faith or to annoy, embarrass or oppress the deponent or party. *Id.* at 366. *Id.* A party may *not* instruct a witness not to answer based on the scope of noticed 30(b)(6) topics. *See id.* at 366-67 (where there is a dispute about the scope of the 30(b)(6) notice, the proper procedure is to object to the question, allow the deponent to answer, and later seek a ruling from the trial judge about whether the witness was testifying in his representative or

individual capacity).

Further, Oracle's questions fall squarely within the scope of Oracle's noticed topics, which seek "the facts" that support various allegations in the SAC, including "any statistical or regression analysis, statistical or regression methodology and statistical or regression computation." See Oracle's 30(b)(6) Notice, Topic Nos. 1-21. For example, Oracle asked "Did you review any off-cycle pay justifications for any Oracle employee?" (Mantoan Decl., Ex. B at 94:11-15), "Were you provided a list of the data files that had been produced in the case so you could determine which might be meaningful for you to review?" (*id.* at 94:17-24), and "Did you review any information about the products and services that Oracle provides?" (*id.* at 95:2-6).⁷ Dr. Brunetti testified that he performed the statistical analyses on which the SAC is based. *Id.* at 25:20-24. Therefore, whatever Dr. Brunetti did in connection with the statistical model, he did for OFCCP as its agent. These questions are plainly within the scope of Oracle's 30(b)(6) Notice and the Court's July 1 Order. The fact that Dr. Brunetti may have some personal knowledge that overlaps with OFCCP's knowledge is immaterial. As long as a question is within the scope of the noticed topics, he must answer as OFCCP's 30(b)(6) witness. A 30(b)(6) witness is often chosen based on their personal knowledge of the underlying topics and it is unnecessary, if not impossible, to parse out question-by-question how the witness came to know particular facts.

Indeed, even if Oracle's questions were specifically addressed to Dr. Brunetti in his personal capacity, a deposing party is permitted to ask questions outside the scope of the 30(b)(6) Notice. See, e.g., *Kuennen v. Wright Med. Tech., Inc.*, 2015 WL 795032, at *3 n. 6 (N.D. Iowa Feb. 25, 2015) ("[T]he questioning of a Rule 30(b)(6) deponent is not limited to those subjects identified in the Rule 30(b)(6) notice. That is, a witness may testify—in his individual capacity, and not as a representative of the company—regarding any personal knowledge which he may have regarding relevant issues."); see also *Am. Gen. Life Ins. Co. v. Billard*, 2010 WL 4367052 at *4 (N.D. Iowa Oct. 28, 2010) (collecting cases); *Detoy*, 196 F.R.D.

⁷ The relevant excerpts of the deposition transcript are contained in Exhibit B to the Mantoan Declaration.

at 366-67.

The Court should compel, again, a 30(b)(6) witness to answer these questions. Additionally, as discussed below, the Court should enter sanctions against OFCCP for its frivolous and baseless instructions.

D. The Court Should Bar Any Information Not Disclosed from Trial

The Court has discretion to impose sanctions for a party's failure to comply with a discovery order. 29 C.F.R. § 18.57; *see also* Fed. R. Civ. P. 37. Among other sanctions, the Court can strike claims from the pleadings, prohibit the disobedient party from supporting or opposing designated claims or defenses, or direct that the matters embraced by the order be taken as established for the purposes of the proceeding. 29 C.F.R. §§ 18.57(b)(1)(i)-(iii).

Here, Oracle requests that OFCCP not be permitted to introduce any evidence at trial that was not disclosed with its full context during discovery. Thus, if the Court permits OFCCP to continue redacting any questions or answers from the interview notes, OFCCP should not be permitted to later un-redact the question or answer for trial and use that fact, even if Oracle currently has access to part of the question or answer. Likewise, if OFCCP continues to redact the race of employees, it should not be permitted to unmask that employee at trial and use that person's race or other experience as evidence.

E. The Court Should Grant an Expedited Briefing Schedule

Written fact discovery is over. The parties are nearing the end of fact witness depositions and expert discovery is in full swing. Every day that passes without a meaningful production of the facts in OFCCP's interview memoranda prejudices Oracle's experts ability to prepare reports and prejudices Oracle's ability to mount an adequate defense.

As mentioned above, OFCCP proposed as a supposedly faster process a joint letter to the Court requesting an *in camera* review of its opinion work product redactions. This proposal does not work for several reasons. A joint letter addressing only the opinion work product redactions would not allow Oracle to address the other issues with OFCCP's production, such as the non-responsive redactions or the redactions of employees' races. A joint letter also would not address

