

**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 MOTION IN
LIMINE NO. 5 RE ORACLE'S
COMPENSATION ANALYSES**

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NOV 15 2019

Office of Administrative Law Judges
San Francisco, Ca

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	1
A. Oracle’s Compensation Analyses Are Privileged and OFCCP Cannot Comment on Oracle’s Exercise of Privilege.....	1
B. Even if the Court Finds Minimal Probative Value in Such Evidence, the Court Should Nonetheless Exclude It Because It Will Waste Time, Confuse the Issues, and Mislead the Court.....	3
III. CONCLUSION.....	4

TABLE OF AUTHORITIES

	Page
Cases	
<i>Broyles v. Cantor Fitzgerald & Co.</i> , 2016 WL 7656028 (M.D. La. Sept. 8, 2016).....	1, 3
<i>Crosby v. U.S. Dep’t of Labor</i> , 53 F.3d 338 (9th Cir. 1995)	2, 3
<i>Diederich v. Providence Health & Servs.</i> , 742 F. App’x 177 (9th Cir. 2018)	4
<i>Duran v. City of Maywood</i> , 221 F.3d 1127 (9th Cir. 2000)	4
<i>In re Itron, Inc.</i> , 883 F.3d 553 (5th Cir. 2018)	2
<i>King Drug Co. of Florence, Inc. v. Cephalon, Inc.</i> , 2016 WL 278054 (E.D. Pa. Jan. 22, 2016).....	2, 3
<i>Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.</i> , 383 F.3d 1337 (Fed. Cir. 2004).....	2
<i>McKesson Info. Sols., Inc. v. Bridge Med., Inc.</i> , 434 F. Supp. 2d 810 (E.D. Cal. 2006).....	2, 3
<i>Nabisco, Inc. v. PF Brands, Inc.</i> , 191 F.3d 208 (2d Cir. 1999), <i>abrogated on other grounds</i>	2
Rules and Regulations	
29 C.F.R. § 18.403	3
Reporter’s Note 29 C.F.R. § 18.403	4

I. INTRODUCTION

Defendant Oracle America, Inc. (“Oracle”) moves for an order *in limine* precluding OFCCP from introducing any evidence or arguments at hearing referencing Oracle’s privileged compensation analyses. *See* Order Granting in Part and Denying in Part Plaintiff’s Motion to Compel Oracle’s Compensation Analyses (“Order”) (Sept. 19, 2019).¹

On September 19, 2019, this Court ruled that not only are the compensation analyses privileged, but also that Oracle never waived these privileges. *See* Order at 7, 10. The Court specifically recognized that Oracle “consistently maintained that the purpose of any audits or analyses was to provide to Oracle’s attorneys, not [to] comply with the affirmative action regulations.” Order at 14. In fact, “whatever ‘high-level’ pay analyses were completed were not done to comply with any regulations but because Oracle’s attorneys asked for information/analyses in the course of representing and advising Oracle.” Order at 15. Consequently, the Court stated that the “actual evidence presented favors the conclusion that these analyses were not part of Oracle’s compliance.... They are thus subject to attorney-client privilege and work-product protection.” Order at 17.

Despite this Court’s explicit findings and its Order denying OFCCP’s Motion to Compel, OFCCP has inappropriately referenced Oracle’s privileged compensation analyses, as well as actions taken (or not) by Oracle purportedly in response to its privileged analyses in OFCCP’s Motion for Summary Judgment (“Motion”). Further, Oracle anticipates OFCCP will continue to make similar arguments at the hearing.

II. ARGUMENT

A. Oracle’s Compensation Analyses Are Privileged and OFCCP Cannot Comment on Oracle’s Exercise of Privilege

Neither the invocation of the attorney-client privilege nor a party’s actions in response to a privileged matter can be used as evidence. *See, e.g., Broyles v. Cantor Fitzgerald & Co.*, 2016

¹ OFCCP has used the term “compensation analyses,” “pay equity analyses,” and “self-audits interchangeably. This Motion will use the term “compensation analyses” unless the context requires use of the other terms.

WL 7656028, at *2 (M.D. La. Sept. 8, 2016) (precluding party from offering evidence or argument concerning a party's invocation of the attorney-client privilege and from asking questions of the party's witnesses where the questions would elicit invocation of the attorney-client privilege); *King Drug Co. of Florence, Inc. v. Cephalon, Inc.*, 2016 WL 278054, at *2-3 (E.D. Pa. Jan. 22, 2016) (precluding plaintiffs from offering evidence or argument concerning defendant's invocation of the attorney-client privilege and from asking questions that would elicit invocation of the attorney-client privilege); *Crosby v. U.S. Dep't of Labor*, 53 F.3d 338 at *2 (9th Cir. 1995) (“[I]t is not appropriate to draw adverse inferences from the failure to produce documents protected by the attorney-client and work product privileges.”).²

Where, as here, a party asserts the privilege only for defensive purposes, courts have granted preclusive orders to prevent the parties' opponents from using the privilege against them. In *McKesson Info. Sols., Inc. v. Bridge Med., Inc.*, 434 F. Supp. 2d 810, 811 (E.D. Cal. 2006), the defendant asserted the attorney-client privilege over an opinion from its counsel regarding a patent at issue, and sought to preclude any evidence or testimony regarding its assertion of the privilege. In granting the defendant's motion *in limine*, the court reasoned that if it were “to permit such evidence, even with a cautionary instruction imposing [] limitations (of no adverse inference), the jury would nevertheless be left to speculate why [the defendant] would not reveal its counsel's opinion. It is inescapable that the jury would likely conclude that [the defendant] received an unfavorable opinion, otherwise [the defendant] would reveal it.” *Id.* The court explained that this was “precisely the negative inference [the case law] prohibits.” *Id.* at 12. In so ruling, the court emphasized “the sanctity of the privilege,” and rejected the notion that it could “honor the shield of the attorney-client privilege and then allow [the plaintiff] to use it as a sword to prove its case.” *Id.*

² The policy of encouraging persons to seek legal advice without fear of adverse consequences precludes drawing a negative inference from a party's assertion of the attorney-client privilege. See *In re Itron, Inc.*, 883 F.3d 553, 561 (5th Cir. 2018) (“These benefits accrue only if clients remain free from the consequences or the apprehension that a court might order their confidential communications involuntarily disclosed.”) (internal quotes omitted); *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 226 (2d Cir. 1999), *abrogated on other grounds*; see also *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1341 (Fed. Cir. 2004).

Despite this case law, OFCCP filed a Motion for Summary Judgment that repeatedly and inappropriately references Oracle's privileged analyses. *See, e.g.*, Motion at 11. In its Motion, OFCCP erroneously argues that Oracle took no action in response to the privileged pay equity analyses it conducted. Such an assertion inappropriately speculates that Oracle's privileged pay equity analyses contained harmful information that required redress. *Crosby*, 53 F.3d 338 at *2. Even further, OFCCP's assertions regarding Oracle's actions taken in response to its privileged compensation analyses would undoubtedly lead to questions regarding the substance of the analyses themselves. *See Broyles*, 2016 WL 7656028, at *2; *King Drug Co.*, 2016 WL 278054, at *2-3. Such evidence and arguments are clearly prohibited by case law and thus must be precluded.

As in *McKesson*, there is no way that the Court should allow OFCCP to brandish Oracle's privilege as a sword while respecting the sanctity of the privilege. As a matter of law, it is improper to comment on or present evidence of a party's legally protected invocation of a privilege.

B. Even if the Court Finds Minimal Probative Value in Such Evidence, the Court Should Nonetheless Exclude It Because It Will Waste Time, Confuse the Issues, and Mislead the Court

Even if OFCCP were permitted to comment on Oracle's privileged pay analyses, any minor probative value they might have is substantially outweighed by the danger they will confuse the issues, waste a significant amount of time, and mislead the Court. 29 C.F.R. § 18.403. Allowing OFCCP to introduce evidence of Oracle's privileged compensation analyses would require the Court to take unnecessary and time-consuming detours to delve into the specifics of that evidence. Oracle will have to spend time explaining that its privileged analyses were done for the purpose of informing legal advice and in anticipation of litigation – not to comply with regulatory requirements, and OFCCP may not imply any negative inference based on Oracle's privilege assertion. Particularly given the substantial amount of time the parties and the Court already have devoted to establishing these facts during motion practice, the minimal probative value of the compensation analyses does not justify the Court and the parties spending

part of the limited time set for the hearing on these detours. *See, e.g., Duran v. City of Maywood*, 221 F.3d 1127, 1133 (9th Cir. 2000) (affirming exclusion of evidence that would have required “fullblown trial within this trial”); Reporter’s Note to 29 C.F.R. § 18.403.

Moreover, this evidence poses a substantial threat of confusing the issues before this Court and that might come before any reviewing court. *Diederich v. Providence Health & Servs.*, 742 F. App’x 177, 180 (9th Cir. 2018) (evidence excluded where it would result in “trial within a trial” and confusion about what legal theories are at issue); Reporter’s Note to 29 C.F.R. § 18.403. Again, as described above, OFCCP may not use the fact the Oracle conducted privileged pay analyses against Oracle (and similarly, Oracle has not argued – and does not intend to argue) that Oracle’s credibility should somehow be bolstered by the fact that it performs privileged pay analyses. Accordingly, there is little point to devoting time to them at trial. Indeed, any time involved in addressing these issues at the hearing risks misleading the Court and any reviewing court “into believing the issue to be of major importance and accordingly into attaching too much significance to it in its determination of the factual issues involved.” Reporter’s Note to 29 C.F.R. § 18.403.

III. CONCLUSION

For the foregoing reasons, Oracle respectfully requests that the Court exclude any evidence or arguments related to Oracle’s privileged compensation analyses, including any actions taken by Oracle in response to these privileged analyses, because OFCCP may not use Oracle’s invocation of privilege against Oracle, and because any negligible probative value is substantially outweighed by the risk of wasting time, confusing the issues, and misleading the Court.

November 15, 2019

Respectfully submitted,

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