



Issue Date: 01 July 2019

CASE NO.: 2017-OFC-00006

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,
U.S. DEPARTMENT OF LABOR,
Plaintiff,

v.

ORACLE AMERICA, INC.,
Defendant.

**ORDER GRANTING DEFENDANT ORACLE’S MOTION TO COMPEL PLAINTIFF
OFCCP TO DESIGNATE AND PRODUCE 30(b)(6) WITNESSES**

This matter arises under Executive Order 11246 (30 Fed. Reg. 12319), as amended, (“EO 11246”) and associated regulations at 41 C.F.R. Chapter 60. It has been pending at the Office of Administrative Law Judges (“OALJ”) since January 17, 2017. Plaintiff Office of Federal Contract Compliance Programs (“OFCCP”) filed the operative Second Amended Complaint (“SAC”) on March 13, 2019. Defendant Oracle America, Inc. (“Oracle”) answered the SAC on April 2, 2019. Hearing is set to begin on December 5, 2019. On May 29, 2019, Oracle filed a Motion to Compel Plaintiff OFCCP to Designate and Produce 30(b)(6) Witnesses (“DM”).¹ OFCCP filed an Opposition to Oracle America Inc.’s Motion to Compel OFCCP to Designate and Produced 30(b)(6) Witness (“PO”)² on June 12, 2019, and Oracle filed a permitted reply brief (“DR”) on June 19, 2019.

For the reasons set forth below, Oracle’s Motion to Compel Plaintiff OFCCP to Designate and Produce 30(b)(6) Witnesses is granted.

I. LEGAL STANDARD

This proceeding is governed by the “Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30.” 41 C.F.R. § 60-1.26(b)(2). Where the rules in 41 C.F.R. §§ 60-30.1 *et seq.* do not provide a rule, the Federal Rules of Civil Procedure apply. 41 C.F.R. § 60-30.1. Where a rule is needed and neither 41 C.F.R. Part 60-30.1 nor the Federal Rules supply one, the Rules of Practice and Procedure for Administrative Hearings Before OALJ in 29 C.F.R. Part 18, subpart A apply. *See* Pre-Hearing Order at 2 n.2.

The pending motion concerns depositions, which are provided for in 41 C.F.R. § 60-30.11:

¹ The motion is supported by a Declaration of Warrington Parker (“PD”) with seven attached exhibits (“DX 1-7”).

² The opposition is supported by a Declaration of Jeremiah Miller (“MD”) and Declaration of Abigail G. Daquiz (“DD”) with three attached exhibits (“PX 1-3”).

After commencement of the action, any party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination. A party desiring to take a deposition shall give reasonable notice in writing to every other party to the proceeding, and may use an administrative subpoena. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall also set forth the categories of documents the witness is to bring with him to the deposition, if any. A copy of the notice shall be furnished to the person to be examined unless his name is unknown.

41 C.F.R. § 60-30.11(a); *see also* 41 C.F.R. § 60-30.15(m) (subpoena authority).

When a deposition is noticed on a party,

It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Unless the parties agree otherwise, depositions shall be held within the county in which the witness resides or works.

41 C.F.R. § 60-30.11(b).

Federal Rule of Civil Procedure 30 supplements the proceeding-specific rule. As relevant here, it provides that

In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

Fed. R. Civ. P. 30(b)(6).

The scope of discovery is governed by Rule 26 of the Federal Rules of Civil Procedure:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Further:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Fed. R. Civ. P. 26(b)(2)(C).

If a party believes that disclosure or discovery responses have been inadequate, it may, after conferring or attempting to confer in good faith, file a motion compelling discovery, including a motion to produce documents. 41 C.F.R. § 60-30.11(b); Fed R. Civ. P. 37(a)(1), (3)(B)(ii). If a motion to compel is denied or denied in part, the court may issue a protective order under Rule 26(c). Fed. R. Civ. P. 37(a)(5)(B)-(C). Under Rule 26(c), a court “may for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” by, among other things, forbidding or limiting the discovery. Fed. R. Civ. P. 26(c)(1).

II. BACKGROUND

On April 3, 2019, Oracle served OFCCP with a Notice of Deposition of OFCCP, listing 32 topics for deposition pursuant to Rule 30(b)(6).³ *See* DX 3. Topics 1-21 are at issue here:

1. The facts that support the allegations of Paragraphs 12 and 41 of the Second Amended Complaint that Oracle discriminated against qualified female employees in its Product Development, Information Technology, and Support Job Functions at HQCA based upon sex by paying them less than comparable males employed in similar roles, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
2. The facts that support the allegations of Paragraphs 12 and 41 of the Second Amended Complaint that Oracle discriminated against qualified Asian and Black or African American employees in its Product Development job function at Oracle's headquarters based on race or ethnicity by paying them less than comparable White employees employed in similar roles, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
3. The facts that support the allegations of Paragraphs 13 and 41 of the Second Amended Complaint that Oracle systematically undercompensated female and Asian employees with respect to their total compensation, including, any analyses and any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
4. The facts that support the allegations in Paragraphs 14 and 41 of the Second Amended Complaint that there are disparities between the total compensation for females and males at Oracle's headquarters, corresponding to a loss of at least \$165,000,000 in total compensation for women at Oracle, including, any statistical or

³ Oracle points out that it filed a similar motion on May 31, 2017, which Judge Christopher Larsen granted on September 11, 2017. DM at 3; *see also* PX 1. Judge Larsen's order is part of the procedural history of this case, but I do not give it any independent weight below.

- regression analysis, statistical or regression methodology and statistical or regression computation.
5. The facts that support the allegations of Paragraphs 15 and 41 of the Second Amended Complaint that there are disparities between the total compensation for Asian employees and White employees at Oracle's headquarters, corresponding to a loss of at least \$234,000,000 in total compensation for Asian employees at Oracle, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 6. The facts that support the allegations of Paragraphs 16 and 41 of the Second Amended Complaint that Black or African Americans are significantly undercompensated relative to their White peers for some years in the Product Development, resulting in a loss of more than \$1,300,000 to those employees, including, OFCCP's analysis of base compensation and any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 7. The facts that support the allegations of Paragraphs 17 and 41 of the Second Amended Complaint that there is an underpayment of at least \$401,000,000 in total compensation and the facts and calculations that support the alleged total cost of Oracle's discrimination.
 8. The facts that support the allegations of Paragraphs 18, 22 and 41 of the Second Amended Complaint that Oracle pays women and Asians less on hire, either by suppressing their pay relative to other employees in the same or comparable job, or by hiring them for lower-paid jobs, including OFCCP's analyses, evaluation of the likelihood that a given employee would be assigned to a higher level within Oracle's global career level framework, and any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 9. The facts that support the allegations of Paragraphs 19 and 41 of the Second Amended Complaint that women were only 70% as likely as men to be assigned to higher global career levels as individual contributors, and only 42% as likely as men to be assigned to higher global career levels as managers, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 10. The facts that support the allegations of Paragraphs 20 and 41 of the Second Amended Complaint that Black or African American employees were only 17% as likely as Whites to be assigned to higher global levels as individual contributors and that there were zero Black or African American employees in management career levels at Oracle between 2013 and 2016, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 11. The facts that support the allegations of Paragraphs 21 and 41 of the Second Amended Complaint that Asians were only 49% as likely as Whites to be assigned into higher global career levels as managers, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 12. The facts that support the allegations of Paragraphs 22 and 41 of the Second Amended Complaint that Oracle discriminates against female, Asian and Black or African American employees by placing those employees in lower global career levels and that Oracle discriminates against Asians and women in their base compensation upon hiring them, including, OFCCP's analyses, and any statistical or

- regression analysis, statistical or regression methodology and statistical or regression computation.
13. The facts that support the allegations of Paragraphs 23 and 41 of the Second Amended Complaint that the female employees are paid less than male employees on hire at Oracle, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 14. The facts that support the allegations of Paragraphs 24 and 41 of the Second Amended Complaint that Asian employees are paid less than White employees on hire at Oracle, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 15. The facts that support the allegations of Paragraphs 25, 29 and 41 of the Second Amended Complaint that the systematic underpayment of female, Black or African American, and Asian employees continued and worsened throughout their employment at Oracle and that Oracle suppressed the pay of female and Asian employees by ensuring they remained in lower-paid positions relative to other employees, or at the lower end of the pay range relative to other employees in the same positions, including, OFCCP's analyses, evaluation, and any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 16. The facts that support the allegations of Paragraphs 26 and 41 of the Second Amended Complaint that the pay gap increases for female employees as they remain at Oracle for longer periods of time, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 17. The facts that support the allegations of Paragraphs 27 and 41 of the Second Amended Complaint that the pay gap increases for Asian employees as they remain at Oracle for longer periods, including any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 18. The facts that support the allegations of Paragraphs 28 and 41 of the Second Amended Complaint that the pay gap increases for Black or African American employees as they remain at Oracle for longer periods, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 19. The facts that support the allegations of Paragraphs 30 and 41 of the Second Amended Complaint that women experienced slower wage growth than their male peers, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 20. The facts that support the allegations of Paragraphs 31 and 41 of the Second Amended Complaint that Asians experienced slower wage growth than their non-Asian peers, including, any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.
 21. The facts that support the allegations of Paragraphs 32 and 41 of the Second Amended Complaint that the systematic underpayment of female, Black or African American and Asian employees may be due, in part, to Oracle's reliance on prior salary in setting compensation for employees upon hire, including, OFCCP's analyses, evaluations, and any statistical or regression analysis, statistical or regression methodology and statistical or regression computation.

PX 3 at 2-5. These are all “factual support” topics. Oracle identified factual claims in the SAC premised on calculations or statistical analysis and seeks a witness or witnesses who can testify as to the factual

support for those claims. The topics generally call for someone who can testify about the facts related to and statistical basis of each allegation.⁴

During a call between the parties on April 18, 2019, OFCCP asked Oracle to withdraw its Notice of Deposition as to the relevant topics on the grounds that OFCCP had produced the statistical analysis and a deposition was unnecessary. OFCCP indicated that it would seek a protective order if Oracle did not withdraw the topics. PD at ¶ 2. This request was renewed in an April 26, 2019, email claiming that production of some attached files eliminated any additional factual information that could be procured by a deposition. PX 2 at 1. It was renewed again in a May 9, 2019, letter in which OFCCP asked that the topics be withdrawn because “[t]he documents produced to date should satisfy any questions about the statistical or regression analysis and, outside of the facts as initially described and produced, OFFCP’s work product in preparation for filings its SAC is protected...” DX 3 at 1. OFCCP also stated that OFCCP personnel “have limited knowledge of the facts underlying the [SAC].” *Id.* OFCCP then added that “most” of the information about the facts underlying the SAC is “protected by the deliberative process privilege and/or attorney-client privilege.”⁵ *Id.* at 2.

On May 9, 2019, Oracle declined to withdraw the topics, though it offered to “reconsider” if OFCCP would “stipulate that its proof as to the matters covered by [the relevant topics] is limited solely to statistical analyses.” DX 4 at 1. As to privilege claims, Oracle represented that it did not intend to “invade” privileges, but that these points could be handled by objections during the depositions. *Id.* at 1-2. Meet and confer continued on this and related topics. *See* PD at ¶ 3; DD at ¶¶ 5-6; DX 5; DX 6. On May 24, 2019, OFCCP confirmed to Oracle that it would not produce a witness to testify about the topics relevant here. DX 7 at 1. Oracle’s motion to compel followed.

Oracle’s motion asks that I compel OFCCP to designate a witness or witnesses to testify about topics 1-21. DM at 1-2, 13. Oracle deems the request “routine” and uncontroversial” and of the sort ordinarily ordered by courts, even where the party-opponent is a government agency. *Id.* at 5-6. It contends that prior production of the statistical analysis and other discovery does not excuse OFCCP from its obligation to produce a witness because Oracle is entitled to pursue multiple forms of discovery and being able to question witnesses about issues that are the subject of other discovery is part of the normal process. It avers that the ability to question a witness has advantages over other forms of discovery because it enables parties to probe issues, in this instance to ask questions about missing information and seek clarification of data that has been produced. *Id.* at 6-7.

Oracle adds that the topics seek more than statistical analysis, including examination of the factual basis for the ways the analysis was conceived in reference to Oracle’s employees. *Id.* at 8. Further, since, in Oracle’s view at least, OFCCP’s responses in other discovery have been deficient, a deposition would enable Oracle to get answers about the factual basis for the complaint that have not been provided. *Id.* Oracle maintains that OFCCP cannot evade a deposition on relevant topics by claiming that its witnesses lack knowledge, but must either find witnesses who can testify on the topics or prepare witnesses to do so, just like any other organizational litigant. *Id.* at 8-10. Finally, Oracle argues that OFCCP cannot refuse a Rule 30(b)(6) deposition with blanket claims of privilege because the topics do not seek privileged information on their face and Oracle hasn’t asked any questions seeking privileged

⁴ Topics 22-29 take on a similar form. *See* PX 3 at 5-6. However, given that parts of this case subsequently settled, those topics are no longer relevant and are not at issue here. *See* DM at 1 n.1; PO at 1 n.1. Topics 30-32 are not at issue because OFCCP has agreed to produce a witness to testify on its behalf as to those topics. *See* PO at 11; DR at 7.

⁵ The letter also generally references additional privileges—the investigative files privilege and government informant’s privilege. DX at 2.

information. It avers that OFCCP must make its privilege objections in the deposition, but argues that no privileges can shield testimony about the facts. *Id.* at 10-13.

OFCCP contends that Oracle already has the material underlying all of the allegations in the SAC and has been given underlying documents and data with instructions. It asserts that there is no more factual material to provide and now Oracle is actually seeking to depose a witness to discern the mental impressions of OFCCP's attorneys. PO at 1. It maintains that the underlying information about its statistical models are based on directions given by OFCCP's counsel after reviewing various material, with the results given in the SAC. *Id.* at 2. OFCCP represents that it is willing to informally answer questions about the mathematical operations at issue, but finds this request perplexing given the history between the parties. *Id.* at 2-3. It asserts that any explanation about how underlying facts support the allegations in the SAC would violate privileges because it would require attorneys to explain how they analyzed facts. *Id.* at 3. OFCCP adds that it "will not rely on the econometric model in the SAC to prove liability or damages at trial" and that Oracle can seek discovery of its testifying expert once discovery closes. *Id.* at 4.

OFCCP's central argument is that inquiry into the topics would necessarily require OFCCP to reveal mental impressions of its attorneys and thus work product protection applies. *Id.* at 4-8. It contends that Oracle has not and cannot show the sort of need that would override the work product protection. *Id.* at 8-10. It explains that it is not its position that Oracle is limited to one form of discovery for the factual material, but only that there is no further factual material to discover. *Id.* at 11. OFCCP also argues that the topics in question could require breaching the attorney-client privilege by inquiring into communications between OFCCP and the Office of Solicitor concerning directions counsel provided to OFCCP employees. *Id.* at 10. Last, OFCCP argues that pursuing deposition on the topics would waste resources because it will require the parties to prepare for and travel to a deposition, only for OFCCP to object to all questions on the grounds of privilege. *Id.* at 10-11.

In reply, Oracle stresses that OFCCP did not attempt to distinguish the line of cases it relied on to support the propriety of the topics. DR at 1. It also stresses that a recent June 10, 2019, order in this case found that OFCCP had not complied with its discovery obligations as to the production of documents and interrogatories, and so OFCCP has no basis to contend that its discovery is complete and no witness needs to testify. *Id.* Oracle argues that the work product doctrine cannot excuse OFCCP from providing a witness to testify about the identified topics, distinguishing the various cases OFCCP relied upon. *Id.* at 1-3. It further contends that even if the topics probed work product, OFCCP waived the protection by putting them in contention in the SAC and other filings. It adds that even if the statistical analysis will be supplanted, it remains relevant to the case going forward. *Id.* at 3-5. Oracle argues that the attorney-client privilege has no clear application here and in any event would be waived because the relevant communications were put at issue when OFCCP disclosed its analysis. *Id.* at 5-7. Finally, Oracle contends that OFCCP cannot premise a "waste of resources" argument on its plan to make frivolous objections to all questions posed. *Id.* at 7.

III. DISCUSSION

Rule 30(b)(6) explicitly applies to "a governmental agency." Fed. R. Civ. P. 30(b)(6). "Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action." *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009). Hence, Oracle "has the right to take a 30(b)(6) deposition from [OFCCP], subject to privilege and work product claims available to all litigants as well as special privileges enjoyed by the Government." *S.E.C. v. Merkin*, 283 F.R.D. 689, 694 (M.D. Fla. 2012).

Blanket assertions of privilege are “extremely disfavored.” *Clarke v. America Commerce Nat’l Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (quoting *In re Grand Jury Witness (Salas and Waxman)*, 695 F.2d 359, 362 (9th Cir. 1982)). Privileges ordinarily must be asserted on a point by point basis as to specific documents and questions. *Id.* “A general refusal to cooperate is not enough.” *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974). “It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.” *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979). Hence, courts are reluctant to accept “sweeping arguments that a deposition could not go forward because of the *possibility* that some questions might seek protected information.” *Merkin*, 283 F.R.D. at 695 (emphasis in original) (collecting cases).

The briefing somewhat narrows the issues in dispute. OFCCP downplays the importance of the facts and statistical analysis underlying the SAC, stating that it will be supplanted by evidence it is developing to support the pled conclusions. *E.g.* PO at 4. Oracle replies that the evidentiary basis for the complaint remains relevant. DR at 4-5. OFCCP does not genuinely dispute that point. There is no question that the material sought in these topics is relevant. Nor could there be—each topic probes an allegation in OFCCP’s SAC. OFCCP’s opposition also clarifies some points and moots some of the arguments that Oracle makes. OFCCP is not contending that there is no witness who can testify to these topics because of limited knowledge—it maintains that its attorneys can do so. PO at 3 n.4, 11. Nor does OFCCP maintain the OFCCP is limited to one form of discovery. *Id.* at 11. Its claims rather, is that there is no factual information to procure and that the topics are simply attempts to probe material protected by attorney-client privilege and attorney work-product protection.

A. Attorney Work-Product Protection

Attorney work-product protection applies to “documents and tangible things prepared by a party or his representative in anticipation of litigation.” *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989); *see also Hickman v. Taylor*, 329 U.S. 495 (1947). “To qualify for work-product protection, documents must: (1) be ‘prepared in anticipation of litigation or for trial’ and (2) be prepared ‘by or for another party or by or for that other party’s representative.’” *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (quoting *In re Grand Jury Subpoena, Mark Torf/Torf Envtl. Mgmt. (Torf)*, 357 F.3d 900, 907 (9th Cir. 2003)). Generally, attorney work product prepared in anticipation for litigation or trial is not subject discovery, but may be discoverable if it is otherwise discoverable and party seeking discovery “shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Fed. R. Civ. P. 26(b)(3)(A). Even where the materials are discoverable, a court “must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. P. 26(b)(3)(B). A party claiming work-product protection bears the burden of establishing its application to the documents in question. *See, e.g., Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138, (3d Cir. 2000). The protection applies to material prepared by attorneys as well as agents of attorneys, such as investigators. *Torf*, 357 F.3d at 907 (citing *United States v. Nobles*, 422 U.S. 225, 239 (1975)).

Initially, none of the topics in dispute appear to probe attorney work product. Each topic asks OFCCP to produce a witness who can testify about the facts underlying the SAC. Facts are not subject to work product protection, although documents prepared in anticipation of litigation that recount facts do receive protection. *Am. Civil Liberties Union of N. Cal. v. U.S. Dep’t of Justice*, 880 F.3d 473, 488 (9th Cir. 2018); *see also Wright and Miller*, 8 Fed. Prac. & Proc. Civ. § 2024 n.2 (3d ed.). Oracle is not seeking any documents or other “tangible” things—it is seeking a deposition. But although the plain language of Fed R. Civ. P. 26(b)(3)(A) is inapplicable, the rule in *Hickman v. Taylor* continues to protect “intangible” work-product, such as attorney’s mental impressions and theories that might be queried in a deposition.

United States v. Deloitte LLP, 610 F.3d 129, 134-35 (D.C. Cir. 2010); *In re Seagate Tech., LLC*, 497 F.3d 1360, 1376 (Fed. Cir. 2007) (en banc), cert denied, 128 S. Ct. 1446 (2008), overruled on other grounds *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D. W. Va. 1995); see also Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 2024 n.3 (3d ed.). The rationale here is simple: “[o]therwise, attorneys’ files would be protected from discovery, but attorneys themselves would have no work product objection to depositions.” *In re Seagate Tech.*, 497 F.3d at 1376.

Oracle’s basic argument is that it is entitled to explore facts and these deposition topics do just that. See DM at 12-13; DR at 3. OFCCP argues that it has already provided the factual material and that any further inquiry would necessarily delve into attorney work product by asking for the decisions that attorneys made in giving directions to statistical experts and the ways the attorneys believed that the facts supported the allegations. PO at 4-8, 11. The topics at issue are “factual support” topics—they pick out a particular claim in the complaint (or answer) and ask the party-opponent to designate someone who can state the factual support for that claim. The parties do not point me to any binding appellate authority addressing the propriety of these sorts of Rule 30(b)(6) topics—which is largely a context specific question—and I am not aware of any. Trial courts have split in their treatment of these sort of topics. See *Landry v. Swire Oilfield Servs., LLC*, 323 F.R.D. 360, 384-85 (D.N.M. 2018) (collecting cases); *United States EEOC v. Caesars Entm’t, Inc.*, 237 F.R.D. 428, 433-34 (D. Nev. 2006) (same). As a result, each party is able to marshal a line of cases to support its position.

Oracle points to a series of cases where it contends courts have permitted depositions of just the sort proposed here. See DM at 5-6, 11-13. In *EEOC v. Kaplan Higher Educ. Corp.*, the court ordered EEOC to produce a witness to answer questions on similar “factual support” topics, finding that the topics were directed at factual information and privilege objections were properly made during questioning, not as a way to prevent any questioning. No. 1:10 CV 2882, 2011 U.S. Dist. LEXIS 57829, at *6-10 (N.D. Ohio May 27, 2011). *Serrano v. Cintas Corp.* involved a similar request to depose EEOC that was permitted over objection. No. 04-40132, 2007 U.S. Dist. LEXIS 66553, at *9-10 (E.D. Mich. Sept. 10, 2007). The court in *EEOC v. Reed Pierce’s Sportmans’s Grille LLC* rejected a claim of privilege in opposition to a 30(b)(6) deposition after the court found that the information sought was “all factual in nature.” No. 3:10CX541-WHB-LRA, 2012 U.S. Dist. LEXIS 107235, at *4 (S.D. Miss. Aug. 1, 2012). Where the 30(b)(6) deposition topics examined the “factual basis” of the investigation and was “unquestionably relevant” to the claim brought by the agency, the court in *EEOC v. Greater Metroplex Interiors, Inc.* refused to quash the deposition, instead instructing the agency to produce a witness and make any objection “on a question-by-question basis.” No. 3-08-CV-1362-P, 2009 U.S. Dist. LEXIS 11968, at *4-5 (N.D. Tex. Feb. 17, 2009).

EEOC v. Luibn Food Sys. produced a similar result. The court rejected claims that the deposition would probe privileged information and there were no additional facts to divulge, finding that the defendant had the right to probe the factual basis for the claim and assertions of privilege could be addressed by objections at the deposition. No. 5:09-CV-387-D, 2011 U.S. Dist. LEXIS 13911, at *9-12 (E.D.N.C. Feb. 11, 2011). In *EEOC v. LifeCare Mgmt. Servs., LLC*, the court denied a motion to quash a 30(b)(6) deposition where the topics identified “are seeking facts obtained by the EEOC during its underlying investigation, not any information related to the EEOC’s opinions, analysis, or legal theories.” It rejected arguments that provision of the investigative file rendered the deposition unnecessary and found that EEOC could not avoid the deposition “by unilaterally declaring all information known to the EEOC as privileged.” Rather, EEOC needed to assert its privileges during the deposition, just like any other litigant. No. 02: 08-cv-1358, 2009 U.S. Dist. LEXIS 21224, at *4-6 (W.D. Pa. Mar. 17, 2009).

In *EEOC v. Albertson's LLC*, the court considered Rule 30(b)(6) topics that probed “[f]actual information that supports or rebuts” particular claims by EEOC. It found the topics “obviously relevant” and rejected the assertion that the investigative file provided all relevant information:

Nor must Albertson’s be content with the EEOC’s investigation file. For example, Albertson’s may ask what documents were reviewed in the course of the EEOC investigation and what documents evidence that there is discrimination at the distribution center; or Albertson’s might ask the identity of persons the EEOC believes have knowledge about the claimed discrimination. The answers to these questions may or may not be in the investigation file, or the information in the investigation file may not be complete.

No. 06-cv-01273-WYD-BNB, 2007 U.S. Dist. LEXIS 32003, at *2-4 (D. Colo. May 1, 2007). The court then rejected the proposition that the attorney work-product doctrine and deliberative process privilege barred the inquiry, finding that a pre-emptive blanket assertion of privilege was improper, there were lines of inquiry related to the topics that would not probe privileged material, and that if privilege material was sought during the deposition, those objections could be raised on a question by question basis. *Id.* at *5-7.

In *EEOC v. Corr. Corp. of Am.*, the judge summarily rejected a blanket claim of privilege in relation to a Rule 30(b)(6) deposition, finding that the topics were reasonably calculated to lead to the discovery of admissible evidence and that the privilege claims were premature. No. 06-cv-01956-EWN-MJW, 2007 U.S. Dist. LEXIS 94951, at *2-3 (D. Colo. Dec. 13, 2007). The judge in *United States EEOC v. Bank of Am.* strongly rejected the claim that since an attorney had drafted the complaint, inquiry into the facts supporting allegations in it in the context of a Rule 30(b)(6) deposition was barred by work product protection on the grounds that “[f]acts are never privileged” and “the work-product doctrine protects an attorney’s thought processes and legal recommendations, not facts.” “The Commission’s argument that facts are undiscoverable because they support allegations in a complaint, which was drafted by an attorney, is wrong. If facts support a complaint’s allegations they are discoverable as a matter of law.” No. 2:13-cv-1754-GMN-VCF, 2014 U.S. Dist. LEXIS 175704, at *10-11 (D. Nev. Dec. 18, 2014) (internal citations omitted). *Caesars Entm’t*, found that Rule 30(b)(6) depositions were proper into the facts underlying a party’s claims and defenses. 237 F.R.D. at 434.

OFCCP responds with its own series of cases where Rule 30(b)(6) depositions were not allowed. PO at 6-8. In *EEOC v. HBE Corp.*, the court granted EEOC a protective order where only trial counsel could serve as a responsive witness, EEOC had fully complied with other discovery and produced a list of witnesses, and the examination would go to how facts were selected and compiled, which the court found to be protected work product. 157 F.R.D. 465, 466 (E.D. Mo. 1994). The court in *SEC v. Nacchio* found that a deposition probing allegations would produce an inquiry into how facts were marshalled and assembled the facts to make allegations and thus “would almost certainly cross into territory protected by the work product privilege.” 514 F. Supp. 2d 1164, 1177 (D. Colo. 2009). Similarly, in *EEOC v. McCormick & Schmick’s Seafood Rests., Inc.*, the court granted a protective order preventing a Rule 30(b)(6) deposition where other means of discovery were available and had provided the relevant information. In that circumstance, the deposition topics were aimed not at the underlying facts but at counsel’s “interpretation of the facts and how they have chosen to proceed in preparing their cases.” No. WMN-08-CV-984, 2010 U.S. Dist. LEXIS 61603, at *13-17 (D. Md. June 22, 2010). *EEOC v. Texas Roadhouse, Inc.*, did the same, granting a protective order as to “support or rebut” topics because the material had already been produced or was available by other means and deposition inquiry would require interpretation of the facts and discussion of hearing preparation. No. 11-11732-DJC, 2014 U.S. Dist. LEXIS 125867, *7-10 (D. Mass. July 24, 2012).

The court in *SEC v. Buntrock*, found a 30(b)(6) deposition with topics probing allegations improper when it was found to be an attempt to depose opposing counsel in the case and probe their theories and opinions. 217 F.R.D. 441, 444-45 (N.D. Ill. 2003). And the judge in *American Nat'l Red Cross v. Travelers Indem. Co.*, found the invocation of work product production proper in response to questions that probed the “facts and documents” that supported various affirmative defenses. That case involved extensive prior discovery of hundreds of thousands of pages of documents and hundreds of interrogatories such that the questions really sought “insight into [the defendant’s] defense plan.” 896 F. Supp. 8, 13-14 (D.D.C. 1995). The defendant in *EEOC v. JBS, LLC*, sought a Rule 30(b)(6) deposition of “[f]actual information that supports or rebuts” various claims in the complaint. The court found these inquiries improper on the grounds that “the Notice does not simply ask for underlying facts, but rather, asks for an interpretation or evaluation of how particular facts support or refute allegations,” and “[q]uestions seeking an evaluation of facts would unavoidably lead to an invasion of attorney work product.” No. 8:10CV319, 2012 U.S. Dist. LEXIS 5836, at *4-6, 15 (D. Neb. Jan. 19, 2012).

In *United States Equal Empl. Opportunity Comm’n v. Source One Staffing, Inc.*, the court observed that it was “not intrinsically improper” to depose the EEOC but deferred final determination on the 30(b)(6) topics until additional discovery was completed. No. 11 C 6754, 2013 U.S. Dist. LEXIS 361, at *9-10 (N.D. Ill. Jan. 2, 2013). However, it commented at length on the “information that supports or rebuts” topics, noting that the factual information requested was already the subject of early or ongoing productions and it was not clear what else the defendant would seek in a Rule 30(b)(6) deposition other than work product, since testimony about “supporting or rebutting” topics “necessarily would be filtered through an attorney’s mental impressions.” The court left open the possibility that a Rule 30(b)(6) deposition could proceed after interrogatory responses were completed and encouraged the crafting of narrower topics. *Id.* at *16-21. Last, in *SEC v. Rosenfeld*, the court found deposition inquiry, before attempting other forms of discovery, into information relating to aspects of the complaint improper on the grounds that it was an attempt to depose opposing counsel and probe mental impressions and theories. No. 97 Civ. 1467 (RPP), 1997 U.S. Dist. LEXIS 13996, at *7-9 (S.D.N.Y. Sept. 16, 1997).

What is to be made of these cases? Facts are not protected by work-product protections or other privileges, including facts that underlie claims made in a complaint. Inquiry along those lines is proper. Inquiry into the legal theories behind the facts, the way facts are marshalled into a complaint stating a cause or action, and the arrangement and choice of facts in presenting a case are matters subject to work product protection. *Cf. Better Gov’t Bureau v. McGraw*, 106 F.3d 582, 608 (4th Cir. 1997). Courts have also quashed 30(b)(6) depositions where the topics sought privileged information or sought to probe the organizations legal contentions. *See La. Pac. Corp. v. Money Mkt. 1 Institutional Inv. Dealer*, 285 F.R.D. 481, 488 (N.D. Cal. 2012) (collecting cases). The stated topics, however, do not probe legal contentions or theories, they probe the facts behind the claims made in the complaint.

One of the cases relied upon in *Albertson’s* makes a helpful distinction. In *EEOC v. Am. Int’l Group*, the Southern District of New York was presented with the appropriateness of privilege objections to various lines of questioning. It found that the defendant had already been provided the complete investigative file and on that basis sustained claims of privilege with respect to allegations in the complaint since it would probe the “attorney’s intended lines of proof and his ordering of facts.” No. 93 CIV. 6390, 1994 U.S. Dist. LEXIS 9814, at *6 (S.D.N.Y. July 18, 1994) (citing *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992)). These topics were better probed by contention interrogatories. *Id.* at *6-7. However, inquiry into who was interviewed and what the deponent reviewed was proper since they would not reveal or intrude onto attorney thought processes. “There is a distinct difference between asking what was reviewed as opposed to why it was reviewed.” *Id.* at *7.

How does this case fit into this distinction and array of precedents? Facial review of the topics suggests that Oracle is not attempting to depose opposing counsel or ascertain the legal theories or analysis of OFCCP's attorneys. All of the topics concern facts and all of them concern a particular statistical or computational conclusion in the complaint. OFCCP gets to choose who it will designate to testify on these topics, but it does not appear to require an attorney—it may require a statistician who can explain the factual basis for the statistical analysis OFCCP relies on in the SAC. An attorney would likely not even be well-suited to testify in response to these topics.

OFCCP claims otherwise, based on Mr. Miller's declaration. He states that the parties had "extensive, substantive discussions about the nature of the case and the allegations involved" while the case was in mediation. MD at ¶ 2. He further declares that he helped draft the SAC and personally made decisions based on information available to the parties in drafting the allegations in the SAC. *Id.* at ¶¶ 3-4. In addition, he states that he personally determined that a statistical analysis was needed and "directed a staff labor economist at OFCCP to make certain econometric models supporting those allegations." *Id.* at ¶ 5. In so doing, Mr. Miller determined "what data to use, how to arrange the data, what time period was relevant, which elements of Oracle's employment systems to review, and which factors should serve as controls. I also asked the staff labor economist to make damages estimates for those econometric models." *Id.* So OFCCP contends that individuals at OFCCP have little knowledge of the topics at issue and OFCCP would be forced to produce one of its attorneys for the deposition. PO at 4, 11.

Initially these are peculiar claims. Mr. Miller is one of OFCCP's attorneys, not its statistics expert. The claims here are supposed to be based on OFCCP's investigation and allegations. OFCCP is not a nominal party, but the briefing and declarations here suggest that no one at OFCCP has much knowledge of the case, and that its attorneys are acting as attorneys, investigators, and statistics experts. That would indeed create difficulties, and make deposition of "OFCCP" a touchy issue, but it would be a problem of OFCCP's (or its attorney's) own making. Oracle's topics do not call for an attorney to testify or even suggest that as a natural possibility. They call for someone who can relate the factual basis for the analysis—i.e. explain what facts OFCCP considered—and someone who can testify about the statistical analysis itself. This could be the same person, but different individuals might be involved, say an investigator and statistician.

An attorney can be a fact witness and offer evidence without breaching any privileges. *See In re Pioneer Hi-Bred Int'l*, 238 F.3d 1370, 1376 (Fed. Cir. 2001). In a Rule 30(b)(6) deposition an attorney would be testifying not as an attorney, but as an organization. That would be very unfortunate here, but it is also completely unnecessary. Rule 30(b)(6) contemplates that the organization will either designate multiple individuals to speak on different topics and/or prepare a witness to speak on the topics. *See, e.g., Wultz v. Bank of China*, 298 F.R.D. 91, 98 (S.D.N.Y. 2014); *see also* Wright and Miller, 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed.). OFCCP may need to educate its statisticians and/or investigators so they are able to provide the basic factual information about what OFCCP considered and answer questions about the statistical model it relied on in the SAC. That an attorney will need to prepare OFCCP's designated witness for the deposition is no reason to countenance a pre-emptive claim of privilege—this is almost always the case for a Rule 30(b)(6) deposition. *See Merkin*, 283 F.R.D. at 696 (citing *Radian Asset Assurance, Inc. v. College of the Christian Bros. of N.M.*, 273 F.R.D. 689, 692 (D.N.M. 2011)). If an attorney is the most natural choice, that is a difficulty of OFCCP's making. The way out of that difficulty lies squarely with OFCCP—don't designate an attorney to testify on behalf of the agency. *See A.R. ex. Re. Root v. Dudek*, 304 F.R.D. 668, 670 (S.D. Fla. 2015).

In making sense of the ways courts have split, I find *Caesars Entm't* instructive. It started with the basic point that attorney-client privilege and the work-product doctrine do not protect facts. From

that point, it observed that courts have split over whether Rule 30(b)(6) depositions could be used to inquire into the factual basis of claims and defenses. Considering the reasoning of cases on either side of this split, the court concluded that some inquiry was proper. It noted that it was uncontroversial that interrogatories could be used to probe the facts underlying allegations and on that basis found a blanket assertion of privilege to present depositions improper. 237 F.R.D. at 434-35. The same court in *Bank of Am., N.A. v. SFR Imvs. Pool 1 LLC* walked back the point that since contention interrogatories could probe underlying facts and so Rule 30(b)(6) depositions could as well, noting proportionality concerns in discovery and the line of cases preventing these sorts of depositions. No. 2:15-cv-01042-APG-GWF, 2016 U.S. Dist. LEXIS 64534, at *11-12 (D. Nev. May 12, 2016).

But this point narrows the inquiry somewhat. Authority is split, though the split does not really concern the application of the work product doctrine. Even cases where depositions are compelled acknowledge that objections based on various privileges may be proper—depending on what happens in the deposition. Asking a party to state the facts in its possession related to a claim in a filed complaint is entirely proper. That is what discovery is for—to discover the facts surrounding the claims in the complaint. But if a party goes further and probes how and why those facts support the legal claims at issue or establish the conclusions pled, work product protection likely applies, since at that point it is the theories and analysis standing behind the complaint that are issue.

Where the cases split, then, is not about the doctrine but about what the court understands the party to be seeking in the deposition topics. In cases where discovery has been extensive, the facts are known to the parties, and the “supporting facts” topics appear to only be an attempt to have one party put the case together for the other, courts see the deposition as intruding on work-product because it would inevitably probe the legal theories and strategies of the party opponent, or be unnecessarily duplicative. However, when courts come to the conclusion that the factual basis is not already set forth through other discovery or there is need for some clarification, they are likely to find these topics legitimate in that facts are not protected and a party is entitled to probe the facts underlying the claims and contentions of the opposing party. In those cases, the deposition topics still *could* lead into area protected by the work product doctrine or other privileges, but there is a legitimate reason to conduct the deposition outside of that possibility. Courts then generally allow the deposition to proceed, with objections being left to the deposition itself, should it stray into impermissible areas.

Combining some of these points provides a path forward. “Factual support” topics in Rule 30(b)(6) depositions create difficulties because they *could* probe and clarify highly relevant non-privileged material—the facts underlying the complaint—but also *could* probe material protected by work product—how (and why) the attorneys have analyzed and combined those facts to support the legal theories in the complaint. Courts split what they determine to be the actual underlying purpose of the deposition topics. To decide whether to compel or permit these topics, judgment is required about what the deposition will seek. This judgment is based on the prior discovery and the particular history and context of the case.

OFCCP’s basic claim is that it has already provided all of the responsive factual material and so all that is left is an attempt to probe protected work product. *E.g.* PO at 1. It stresses that it has provided the instructions for its statistical analysis. PO at 2-3. In support of that claim OFCCP offers Ms. Daquiz’s declaration, which catalogues some of the discovery OFCCP has produced, delineating materials that it relies upon and providing information on its statistical analysis. DD at ¶¶ 2-4. The attached exhibits indicate that some discovery responses have been provided. *See* PX 1.

But as Oracle points out in response, DR at 1, OFCCP has not been forthcoming in discovery as to the facts underlying its complaint. This was, in part, the subject of the June 10, 2019, order

compelling further production of documents and responses to interrogatories. It found that OFCCP's response to each of the "factual basis" interrogatories was deficient. OFCCP's opposition made a general claim to have provided sufficient responses, but did not even argue the point.⁶ The briefing here represents that OFCCP would comply with that order. PO at 8 n.7. However, subsequent filings indicate that this may have changed. Though OFCCP may believe that it has produced all responsive non-privileged relevant material, I am mindful the OFCCP has also maintained that the facts it has gathered from Oracle employees, any *potential* "class" member, may be withheld.⁷ The data OFCCP has relied upon is available to Oracle, but other facts OFCCP may have uncovered and considered, if any, appear to be in part withheld. Even after OFCCP complies with the June 10, 2019, order, some of the documents containing factual material may continue to be protected work product. Facts are not protected, so interrogatories and depositions are the appropriate avenues of discovery of facts recorded in documents that might otherwise be protected. *See* Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 2024 (3d ed.). OFCCP's interrogatory responses failed to provide the requested information.

It is also notable that by OFCCP's own account, the witnesses it has identified as possessing relevant information "have very limited knowledge of the facts supporting the allegations in the SAC." PO at 4. Oracle is entitled to inquire into what underlying facts OFCCP discovered and considered as the basis for its complaint. In sharp contrast to cases where Rule 30(b)(6) depositions are not permitted on these sorts of topics, this case does not involve an agency investigation and then litigation based on the investigative file. Here the complaint appears to in large part float free of the OFCCP's investigation such that the witnesses identified as having relevant information cannot provide much useful testimony, leaving only recourse to a deposition of the agency.⁸ Given the particular history here, I find that a Rule 30(b)(6) deposition seeking information about the facts considered is entirely appropriate. If OFCCP wanted to avail itself of the line of reasoning in the cases that have prevented these sorts of depositions, it needed to make full disclosure and discovery responses to obviate the legitimate rationale for these depositions.

Further, the "factual support" topics here differ from those in many cases in that they probe that statistical model or calculations that led to and was given as the basis for the particular claims in the SAC. Production of the statistical model and instructions alone, or some calculation of estimates, does not obviate the appropriateness of a Rule 30(b)(6) deposition. Even with the instructions, a deposition is an important tool to fill in gaps, clarify points, and come to understand the statistical model. Econometric models are not self-explanatory in the way that an investigative file might be in some cases. It appears that OFCCP thinks that it should be self-evident to Oracle, given the parties' history, but Oracle feels otherwise and in any event it would be appropriate for Oracle to get answers from OFCCP on the record under oath regarding its econometric model, rather than having to make assumptions to fill in gaps or unclear points. OFCCP indicates that it is "not opposed" to informally answering questions Oracle may have about the econometric model, so long as those questions do not intrude on what it takes to be protected areas. PO at 2. But that is not a reason to bar Oracle from taking a Rule 30(b)(6)

⁶ OFCCP's Opposition to Oracle America Inc.'s Motion to Compel OFCCP to Produce Documents and Further Respond to Interrogatories (May 17, 2019) at 7-8.

⁷ OFCCP's Opposition to Oracle America Inc.'s Motion to Compel OFCCP to Produce Documents and Further Respond to Interrogatories (May 17, 2019) at 16-17.

⁸ It is worth noting that historically Rule 30(b)(6) was added as part of the 1970 amendments to the Federal Rules in order to deal with the problem of organizations evading meaningful discovery by "bandying" party opponents with deponents who disclaimed knowledge of the topics that party wished to explore, leaving the party to pursue an (unsuccessful) string of depositions to find the individual who had the relevant knowledge possessed by the organization as a whole. *See* Fed. R. Civ. P. 30 Advisory Committee Note to the 1970 Amendment to Subdivision (b)(6); Wright and Miller, 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed.).

deposition and asking questions in that context. Oracle is entitled to use the ordinary tools of discovery and OFCCP does not have an exemption.

Oracle is not entitled to inquire into *why* certain facts were found significant or *how* OFCCP's legal theories work or *why* certain decisions about the econometric model were made. But it is proper to inquire into *what* factual basis was considered, *what* instructions were given as to the econometric model, and *how* that model is supposed to work. Even if it turns out that the indications from the motion practice in this case are wrong and there are no further facts to disclose, that is an answer OFCCP can provide at a Rule 30(b)(6) deposition under oath. Moreover, much of evidence and facts sought by these topics involve statistical claims based on an econometric model. This material is not self-explanatory and self-clarifying, rendering a deposition legitimate even if there has been disclosure.

For the reasons stated above, I conclude that claims of work product protection do not justify preventing Oracle to depose OFCCP on these topics. In the current context of this case, objections based on protected work product are more properly made, if necessary, at the deposition.

B. Attorney Client Privilege

OFCCP also objects to the deposition topics on the grounds that they “could implicate attorney client communications. At any time during investigation and beyond, OFCCP may communicate with its attorneys seeking legal advice. Both pre and post-litigation communications between OFCCP personnel and their attorneys in the Office of the Solicitor are protected by the attorney-client privilege.” PO at 10. Oracle replies the possibility that privileged communications may be implicated is not a reason to prevent the deposition entirely. DR at 5. It also argues that OFCCP must designate someone to state the facts about the statistical analysis. *Id.*

The purpose of the attorney-client privilege “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (internal citation omitted); *see also Fisher v. United States*, 435 U.S. 391, 403 (1976). The privilege protects both communications by the client providing information to the lawyer for the purpose of receiving professional advice and the giving of professional advice by the lawyer that would reflect on those confidences. *Upjohn*, 559 U.S. at 390. It “exists where: ‘(1) [] legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.’” *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (quoting *United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)); *see also United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980) (collecting cases). “The claim of privilege must be made and sustained on a question-by-question or document-by-document basis” and “[t]he scope of the privilege should be ‘strictly confined within the narrowest possible limits.’” *United States v. Lawless*, 709 F.2d 485, 487 (9th Cir. 1983) (quoting 8 Wigmore, Evidence § 2291); *see also Pac Pictures Corp. v. United States Dist. Court*, 679 F.3d 1121, 1126 (9th Cir. 2012). The party asserting privilege “has the burden of establishing the relationship and the privileged nature of the communication.” *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997) (citing *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995)).

The substantive issues here have already been discussed in reference to work product protection. OFCCP is correct that the “factual support” deposition topics could lead into appropriately confidential attorney-client communications. But Oracle is correct that this cannot support that conclusion that OFCCP wishes to draw—that the deposition should not proceed at all. In addition, the attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying

facts by those who communicated with the attorney.” *Upjohn*, 449 U.S. at 395. A client cannot render a fact undiscoverable by telling it to an attorney and an attorney cannot create privilege over facts by communicating them to a client. For the reasons stated above, in the context of this case, these topics probe discoverable material that is not subject to the attorney-client privilege, so preventing the deposition entirely would be improper. OFCCP may make appropriate objections to attorney-client privileged materials during the deposition(s).

C. Waiver

The deposition(s) will in large part concern OFCCP’s statistical model. At one point, OFCCP indicates that it considers “its statistical or regression analysis or methodology” to be protected work product. PO at 6. Oracle responds that it is entitled to ask questions about the statistical analysis, including probing the factual basis for why certain controls were used, because OFCCP decided to put that statistical analysis at issue by asserting conclusions from that analysis in its SAC and disclosing it as a basis to support this action and further discovery in this action. DR at 4. Oracle further argues that any involvement of counsel does not change the conclusion since OFCCP chose to disclose its statistical analysis and cannot now refuse to offer testimony about how it works. *Id.* at 5-6.

The attorney-client privilege and attorney work product protection can be waived. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010); *see also United States v. Nobles*, 422 U.S. 225, 239 (1975). Voluntary disclosure to third parties generally waives a privilege. *Pac. Pictures*, 679 F.3d at 1126-27. “Disclosing a privileged communication or raising a claim that requires disclosure of a protected communication results in waiver as to all other communications on the same subject.” *Hernandez*, 604 F.3d at 1100 (citing *United States v. Nobles*, 422 U.S. 225, 239-40 (1975); *Weil v. Inv./Indicators, Research & Mgmt.*, 647 F.2d 18, 24 (9th Cir. 1981); *Chevron Corp v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)); *see also Williams & Connolly v. S.E.C.*, 662 F.3d 1240 (D.C. Cir. 2011).

The purpose of the doctrine of waiver “is to protect against the unfairness that would result from a privilege holder selectively disclosing privileged communications to an adversary, revealing those that support the cause while claiming the shelter of the privilege to avoid disclosing those that are less favorable.” *Tennenbaum v. Deloitte & Toche*, 77 F.3d 337, 340-41 (9th Cir. 1996); *see also Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003); *Home Indemnity Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1326 (9th Cir. 1995); *Sedco Int’l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir. 1982). Hence, when selective disclosure of protected material is made, fairness requires that the protection be waived as to the rest of the material on the same subject. *Hernandez*, 604 F.2d at 1100. Privileges cannot be used as both a sword and a shield—a litigant may not assert claims, defenses, and arguments that are founded on the communications but then prevent an opposing party from litigating the issue by preventing anything more than selective, advantageous disclosures. *See Bittaker*, 331 F.3d at 719; *United States v. Amlani*, 169 F.3d 1189, 1194-95 (9th Cir. 1999); *Chevron*, 974 F.2d at 1162.

OFCCP’s exact position here is not entirely clear. It represents that it has provided Oracle with the underlying mathematical instructions for the statistical model and is willing to answer further questions about the mathematical operations.⁹ PO at 2. But OFCCP also contends that the work product doctrine protects the “statistical or regression analysis or methodology” behind the factual assertions in the SAC because that would reveal its counsels’ analysis of the facts. *Id.* at 6. These statements are somewhat hard to square. In any event, insofar as the underlying basis for the model and the methodology in the model would be protected or privileged, the protection has been waived as to the

⁹ As discussed above, OFCCP simply wishes to answer any questions informally, off the record. PO at 2. Whether the information is divulged on or off the record does not matter to the privilege/waiver analysis.

facts about the methodology and analysis in the statistical models OFCCP used to assert the factual claims in the SAC. Those claims were made public and the statistical analysis was produced. OFCCP cannot claim of privilege to prevent inquiry into and understanding of the basis for its claims.

Though OFCCP waived some claims of privilege surrounding its statistical analysis in the SAC, that waiver is significantly limited. In the context of attorney mental impressions, the scope of waiver is limited to prevent unnecessary inquiry into less directly related work product. *See In re Seagate*, 497 F.3d at 1375-76 (discussing *Nobles*, 422 U.S. 225). Here, OFCCP has asserted factual conclusions publically that purportedly follow from its statistical model. That model is at issue. OFCCP may not withhold information about either 1) the factual basis for the statistical model, including the decisions about what factors to deem relevant or to control for; or 2) information about how that statistical model works. It has waived claims of privilege as to the mechanics of the statistical model including instructions that were given to the statisticians, even if those instructions were given by an attorney. However, OFCCP has *not* waived claims of privilege surrounding *why* those instructions were issued—that is, the analysis, legal theories, and thought processes of its attorneys that bridged the gap between the factual basis and the instructions/mechanics of the model have not been put at issue. OFCCP does not need to answer questions along those lines and the deposition(s) should not devolve into a debate over the inferences that can be drawn from the evidence or the legal theories of the parties.

That said, OFCCP may not use a privilege on this narrow point to obscure the factual basis for or the content of the instructions/mechanics of the model. It may not withhold answers to what facts its attorneys and statisticians considered when they made choices about the statistical model. And it may not withhold the choices that were made. What it may continue to withhold is the internal reasoning between the factual basis and the choice. In so doing, it may not expand the privilege to prevent disclosure of facts and instructions that would allow Oracle's counsel to make inferences about what the internal processes and reasoning might have been, or to make informed guesses about the theories that OFCCP might pursue. That is part of discovery—divulging facts considered will often allow a party-opponent, with the help of a clever attorney, to make predictions about the theories and strategies underlying the case. But privilege cannot bar a party-opponent from knowing facts that might allow it to make inferences about the case. Oracle cannot force OFCCP to do its legal work and analysis, but OFCCP cannot prevent Oracle from doing its own.

D. Proportionality / "Waste of Time"

OFCCP argues that the depositions should not proceed because they will waste resources in that parties will have to prepare for, travel to, and attend the depositions even though OFCCP intends to assert claims of privilege and work product protection. PO at 10-11. Oracle responds that this would be frivolous in response to the questions it plans to ask regarding the factual basis for the claim as well as clarifying questions about interrogatory responses. DR at 7.

I understand OFCCP's argument as grounded in proportionality. Rule 26 does not end with a determination of relevance. The scope of discovery must also be

proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed R. Civ. P. 26(b)(1). If this portion of the brief is meant as a distinct line of argument, the contention would be that the burdens on the resources of the parties outweigh the benefits of the discovery because OFCCP will not cooperate, rendering the depositions of no benefit at all.

If this is OFCCP's line of reasoning, it is cynical. Oracle has not yet asked any questions, yet OFCCP appears to be representing that no matter what Oracle asks, it will invoke privileges to defeat any discovery. It has no legal basis to do so at this time. It may assert its privileges, but only when a question inquires into privileged material. Not all possible inquiries probe privileged material. A party cannot prevent discovery by representing that it will not cooperate. If that is OFCCP's plan, the deposition should go forward and OFCCP and its attorneys can put its non-cooperation into the record.

ORDER

1. Defendant Oracle's Motion to Compel Plaintiff OFCCP to Designate and Produce 30(b)(6) Witnesses is granted. Plaintiff OFCCP shall designate and produce a witness or witnesses to testify as to topics 1-21. Plaintiff OFCCP may make any appropriate objections as to work product protection or attorney-client privilege at the depositions.
2. The parties shall meet and confer to schedule deposition dates, which shall be taken in a reasonable time but not later than 30 days after the date of this order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge