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Issue Date: 10 June 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 IN PART AND DENYING IN PART DEFENDANT ORACLE AMERICA INC.'S SECOND MOTION TO COMPEL PLAINTIFF OFCCP TO PRODUCE DOCUMENTS AND FURTHER RESPOND TO INTERROGATORIES

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.[1] Hearing is set to begin on December 5, 2019. On May 3, 2019, Oracle filed its Second Motion to Compel Plaintiff OFCCP to Produce Documents and Further Respond to Interrogatories ("Oracle's Second Motion to Compel" or "DM"). OFCCP filed its Opposition to Oracle's Secord Motion to Compel ("OFCCP's Opposition" or "PO") on May 17, 2019.[2] On May 24, 2019, Oracle filed a

[1] The remaining claims in the SAC allege that from January 1, 2013, and continuing, Oracle discriminated against female, Asian, and Black employees in terms of compensation at its headquarters facility in specified job functions. SAC at ¶¶ 12-32. The SAC also included various recruitment/hiring discrimination complaints and related record-keeping/compliance complaints. That aspect of this matter was resolved via consent findings adopted in an April 30, 2019, order.

[2] OFCCP's Opposition is written in the name of the "Department" and a note indicates that OFCCP uses its own name and "Department" interchangeably. PO at 1 n.1. I do not follow this convention. OALJ, as well as the Administrative Review Board ("ARB") are also components of the Department of Labor. OFCCP has the authority to bring administrative enforcement actions at OALJ through the office of the Solicitor of Labor, 41 C.F.R. § 60-1.26(b), which leads to a recommended decision and order, *id.* at § 60-30.27, that is then presented to the ARB, which issues a final administrative order for the Department, *id.* at § 60-30.30. To avoid confusion, I refer to the Plaintiff here as it is named: OFCCP.

Reply in Support of Oracle America, Inc.'s Motion to Compel OFCCP to Produce Documents and Further Respond to Interrogatories ("Oracle's Reply" or "DR").[3]

For the reasons set forth below, Oracle's Second Motion to Compel is granted in part and denied in part.

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. The Rules of Evidence in the Rules of Practice and Procedure for Administrative Hearings Before OALJ apply to this case. 41 C.F.R. § 60-1.26(b)(2).

The pending motion concerns production of documents and interrogatories. Production of documents is governed by 41 C.F.R. § 60-30.10:

> (a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

41 C.F.R. § 60-30.10(a); *see also* Fed. R. Civ. P. 34. "Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts." 41 C.F.R. § 60-30.10(c). "An objection [to a request] must state whether any responsive materials are being withheld on the basis of that objection." Fed. R. Civ. P. 34(b)(2)(C).

Interrogatories are permitted by 41 C.F.R. § 60-30.9:

> Not later than 25 days prior to the date of the hearing, except for good cause shown, or not later than 14 days prior to such earlier date as the Administrative Law Judge may order, any party may serve upon an opposing party written interrogatories. Each interrogatory shall be answered separately and fully in writing under oath, unless objected to. Answers are to be signed by the person making them and objections by the attorney or by whoever is representing the party. Answers and objections shall be filed and served within 25 days of service of the interrogatory.

[3] On May 29, 2019, counsel for OFCCP filed a request for oral argument on this motion, broadly citing the "Secretary's ability to achieve his mission." No explanation was given as to the exact point requiring argument and why it had not been adequately addressed in the briefing. After consideration, I do not believe oral argument would help in deciding the issues presented. *Cf.* 29 C.F.R. § 18.33(g). The parties were given full and fair opportunity to address the issues in their briefing, which are extensive and detailed. The parties are already demanding an extraordinary amount of judicial resources, and an ambiguous reference to the "Secretary's ability to achieve his mission" does not explain the reason for the argument such that I can decide whether it would be helpful to deciding the issues presented. The request is denied.

41 C.F.R. § 60-30.9(a); *see also* Fed. R. Civ. P. 33(b)(3). "The grounds for objecting to an interrogatory must be stated with specificity." Fed. R. Civ. P. 33(b)(4).

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).

A party may withhold information subject to a claim of privilege.

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents communications or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed. R. Civ. P. 26(b)(5)(A). The party asserting the privilege "bear[s] the burden of showing that the privilege exists and applies." *Heathman v. United States Dist. Court for Cent. Dist.*, 503 F.2d 1032, 1033 (9th Cir. 1974). With exceptions not relevant here, privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." 29 C.F.R. § 18.501; *see also* Fed. R. Evid. 501; *Religious Technology Ctr. v. Wollersheim*, 971 F.2d 364, 367 n.10 (9th Cir. 1992). Boilerplate objections and blanket claims of privilege are insufficient. Failure to provide a proper assertion of a privilege, for instance via a privilege log, in a timely manner can in certain circumstances lead to waiver of the privilege. *See BNSF v. United States Dist. Court*, 408 F.3d 1142, 1149 (9th Cir. 2005).

If a party believes that discovery responses have been inadequate, it may, after conferring or attempting to confer in good faith, file a motion to compel discovery, including a motion to produce documents or respond to interrogatories. 41 C.F.R. §§ 60-30.09(c); 60-30.10(d); Fed R. Civ. P. 37(a)(1), 37(a)(3)(B)(iii)-(iv). 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); *see also* Fed. R. Civ. P. 26(c)(1) (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 forbidding or limiting the discovery).

II. DISCUSSION

This case is based on an Executive Order, EO 11246, as amended. In EO 11246, the President delegated authority to the Secretary of Labor to administer and enforce the aspects relevant here (§ 201). The Secretary of Labor is authorized to hold hearings to enforce the order, and *must* do so before debarment is ordered (§ 208)—as OFCCP requests here. In the regulations promulgated by the Secretary, OFCCP may pursue administrative enforcement (or referral to the Department of Justice), but administrative enforcement requires a hearing before an Administrative Law Judge ("ALJ"), with the final decision issued by the Administrative Review Board ("ARB"). *See* 41 C.F.R. §§ 60-1.26, 60-30.30. Parties in administrative adjudication are afforded procedural rights, including a right to notice of the facts and law asserted and an opportunity to present a case through argument, evidence, cross-examination, and rebuttal. *See generally* 5 U.S.C. §§554, 556. In the investigative or compliance review stage, OFCCP collects information from a contractor and the flow of information is largely one-sided. *See* 41 C.F.R. § 60-1.20. This changes when OFCCP opts to pursue enforcement through administrative litigation. In this forum, OFCCP is simply another party to a dispute that requires adjudication. It receives no special treatment. Both parties, including the contractor, have the right to pursue the equivalent of civil discovery. *See* 41 C.F.R. §§ 60-30.9, 60-30.10, 60-30.11. .

"Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Thus, the discovery rules "are to be accorded a broad and liberal treatment." *Id.* Discovery permits parties to "inquir[e] into the facts underling his opponent's case," and "may compel the other to disgorge whatever facts he has in his possession." *Id.* This may be done prior to trial in order to "reduc[e] the possibility of surprise." *Id.* "The Government as a litigant is, of course, subject to the rules of discovery." *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958). Discovery serves to "make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Id.* at 682. Nonetheless, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Hickman*, 329 U.S. at 507. This motion is about the extent of those boundaries, and the manner in which the privileges that define those boundaries interact.

Oracle contends that OFCCP's discovery responses are deficient. It challenges, in particular, OFCCP's reliance on the government informant privilege and the common interest doctrine extension of the attorney client privilege. Oracle also argues that OFCCP's responses are deficient for lack of specificity and improperly reference and incorporate other responses and material. Oracle asks that OFCCP be ordered to respond more completely to its requests for the production of documents and interrogatories. It also asks that I issue an order forbidding the introduction of documents, witnesses of information requested but not disclosed. DM at 1-3; *see also* DR at 1-2.

OFCCP replies that Oracle is confused with how OFCCP intends to prove its cases and that it will "largely" rely on statistical proof with "the majority" of evidence focused on disparities, not anecdotal evidence of discrimination. PO at 3-4. OFCCP contends that it diligently complied with its discovery obligations and that the materials/information withheld are subject to government informer privilege, attorney-client privilege/common interest doctrine, and work product protection. *Id.* at 5-7. It further contends that its interrogatory responses are detailed and sufficient. *Id.* at 7-8.

A. Production of Documents: Communication with Third Parties

Two varieties of requests for the production of documents ("RFP") are at issue: 1) documents involving communications with third parties to include interview memos; and 2) documents relating to communications with counsel for private plaintiffs in a state case, *Jewett*. I start with Oracle's request for an order compelling production of documents relating to communications for third parties. Nineteen RFPs are at issue: Nos. 104, 106, 111, 116, 121, 123, 131, 134, 137, 140, 151, 154, 157, 170, 175, 180, 185, 197, and 202. RM at 5-6. Though the requests are broadly stated, based on the papers filed, the central issue is documents relating to communications with current and former Oracle employees, including interview memos.[4] *Id.* at 6.

1. Requests and Objections[5]

Oracle RFP No. 104 asks for: "All DOCUMENTS RELATING to COMMUNICATIONS between YOU and any THIRD PARTIES, including, but not limited to, possible CLASS MEMBERS or their attorneys, that RELATE to the allegations described in Paragraph 12 of the Second Amended Complaint." Oracle RFP No. 106 makes the same request for Paragraph 13; RFP No. 111 for Paragraph 14; RFP No. 116 for Paragraph 15; RFP No. 121 for Paragraph 16; RFP No. 123 for Paragraph 17, RFP No. 131 for Paragraph 18; RFP No. 134 for Paragraph 19; RFP No. 137 for Paragraph 20; RFP No. 140 for Paragraph 21; RFP No. 151 for Paragraph 22; RFP No. 154 for Paragraph 23; RFP No. 157 for Paragraph 24; RFP No. 170 for Paragraph 25; RFP No. 175 for Paragraph 26; RFP No. 180 for Paragraph 27; RFP No. 185 for Paragraph 28; RFP No. 197 for Paragraph 29; and RFP No. 202 for Paragraph 31. Hence, these requests seek communications between OFCCP (and its attorneys, agents, etc.) and anyone or anything else (besides OFCCP and Oracle) about the various allegations of discrimination in the SAC.

OFCCP made the same response to each RFP:

> OFCCP objects to this Request to the extent it seeks information protected by the attorney-client privilege, attorney work-product doctrine, including the common interest doctrine) [sic], the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.
>
> OFCCP further objects on relevance grounds. Materials reflecting OFCCP's internal deliberations and processes in its investigation are not relevant because they will not show, one way or the other, whether Oracle violated its equal opportunity obligations, including through engaging in systemic compensation and hiring discrimination.
>
> OFCCP additionally objects to this Request to the extent it seeks documents that were created after March 11, 2016, which was the date the Notice of Violation was issued, because any such documents were created in anticipation of litigation and are

[4] Part of the argument on this point digresses into complaints about OFCCP's communications with Oracle's employees. RM at 6. That is subject to a different motion and is only tangentially relevant here.
[5] These are found in Exhibits 8 and 10 to the Declaration of Warrington Parker.

> protected by the work product doctrine, trial preparation privilege, and/or attorney-client privilege (including the common interest doctrine).
>
> OFCCP further objects to the phrase "relate to" as overbroad and unduly burdensome. This Request does not adequately define the term "relate to," making it difficult to answer with any specificity. As this Request defines "relate to" it would encompass documents as broad as OFCCP regulations or protocols for reviewing documents. OFCCP assumes "relate to" means supports and therefore reiterates that the documents requested are protected by the privileges above and irrelevant.
>
> OFCCP further objects to the entirety of this request as overbroad and unduly burdensome.
>
> OFCCP responds that it has produced the investigative file for Oracle HQCA, OFCCP Case No. R00192699. Discovery in this matter is ongoing and OFCCP will supplement its responses as appropriate.

In its opposition, OFCCP defined two types of responsive documents at issue and the privileges claimed. First, there are pre-filing interview memoranda that have been produced, but were redacted based on the government informant privilege. Second, there are post-filing communications between OFCCP's representatives and Oracle employees which have not been produced due to claims of the government informant privilege, the attorney-client privilege as extended by the common interest doctrine, and attorney work-product protection. OFCCP describes the responsive documents as including records/notes of the communications, actual communications, documents provided to OFCCP, and internal office correspondence about the communications. PO at 7. Oracle contends that neither the common interest doctrine nor the government informant privilege apply, so the responsive documents must be produced. PM at 7-10; PR at 2-4, 7-10.

2. Relevance and Waived Objections

OFCCP's opposition here only raises some of the objections made in its initial discovery response: the government informant privilege, the attorney-client privilege as extended by the common interest doctrine, and work product protections. I consider any other objections waived, but will consider the relevance of the requested materials since this is a threshold question on which Oracle bears the burden but is somewhat contested by OFCCP.

At times OFCCP suggests that the information sought is not relevant, though this is stated as what the proof will "largely" be and what the "majority" of its evidence will consist of.[6] PO at 4. But even if OFCCP only intends this sort of evidence to play a minor role, it remains relevant and subject to discovery. Oracle's Reply is convincing on this point—while OFCCP has downplayed the relevance of the information, it has made significant efforts to procure this background evidence for

[6] Later, OFCCP makes the bare statement that "It is, and was, OFCCP's position that the compliance review is largely irrelevant to the claims alleged." *Id.* 5. This is puzzling. This case only exists because there was a compliance review that produced certain results which led to certain claims. Neither the Executive Order nor the regulations give OFCCP or the Solicitor's office the authority to initiate enforcement proceedings based on nothing more than "largely irrelevant" evidence and then go in search of a claim and evidence to support it. I take this statement as a product of imprecise drafting.

its potential use. *See* PR at 4. OFCCP does not really deny that the information at stake here—anecdotal evidence of discrimination, information on Oracle's policies and practices, and any other percipient information received from third parties—meets the relevance bar. Nor could it reasonably do so. Moreover, even if OFCCP does not intend to use the evidence, Oracle may wish to do so as part of its defense. Oracle is entitled to investigate the case and OFCCP's basis for its case, regardless of what evidence OFCCP eventually decides to put on. I conclude that the request for documents seeks relevant information. The question now is whether some, all, or parts of the documents in question are privileged in the ways OFCCP argues.

3. Government Informant Privilege

a. Legal Background

I begin with the government informant privilege. "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro v. United* States, 353 U.S. 53, 59 (1957); *see also McCray v. Illinois*, 386 U.S. 300, 308-13 (1967). This privilege works "to promote effective law enforcement." It

> protects "the identity of persons who furnish information of violations of law to officers charged with enforcement of that law" from "those who would have cause to resent the communication." However, the privilege will give way "[w]here the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."

Perez v. United States Dist. Court, Tacoma, 749 F.3d 849, 855-56 (9th Cir. 2014) (quoting *Roviaro*, 353 U.S. at 59-61) (internal citations removed) (alternation in original). It encourages informants and protects them from retaliation by protecting their identities. *Id.* at 856. However, "[t]he scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." *Roviaro*, 353 U.S. at 60. Where particular contents of communications or information about the communication would compromise the identity of the informer, they may be protected as well. *See United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995).

The government informant privilege serves purposes of encouraging "persons to come forward with information that can aid effective law enforcement" as well the interest in "the safety and security of the person supplying the information." "Those interests must be balanced against a defendant's right to present his defense" and "[t]he privilege must give way to the 'fundamental requirements of fairness.'" *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985) (quoting *United States v. Pitt*, 382 F.2d 322, 325 (4th Cir. 1967)) (citing *United States v. Estrella*, 567 F.2d 1151, 1153 (1st Cir. 1977)). "For the informants [sic] privilege to give way, the party seeking disclosure has the burden of showing that its need for the information outweighs the government's interest in nondisclosure." *Perez*, 749 F.3d at 858 (citing *United States v. Prueitt*, 540 F.2d 995, 1004-04 (9th Cir. 1976)). "The proper balancing of these competing interests lies within the discretion of the district court, after taking into consideration 'the particular circumstances of each case.'" *Id.* (quoting *Roviaro*, 353 U.S. at 62). Mere speculation that the informer might be of assistance is insufficient to

carry this burden. *Prueitt*, 540 F.2d at 1003-04; *see also United States v. Kelly*, 449 F.2d 329, 330 (9th Cir. 1971).

b. OFCCP's Claim of Privilege[7] and Some Preliminary Matters

OFCCP argues that it properly withheld/redacted documents based on the government informant privilege because production would have revealed the identity of its informants, exposing them to retaliation and discouraging future informants. OFCCP also points to its "well-settled policy" to make promises of confidentiality in this situation. PO at 8-9. OFCCP avers that there is a "concrete threat of retaliation" in this case, pointing to declarations from several of its attorneys. It then accuses Oracle of additional violations of the regulations and coercive acts, breaches of attorney ethical duties, and improper interference with OFCCP's communications with Oracle employees. *Id.* at 9-12. OFCCP asserts that based on its confidential interviews, there is a "culture of fear" at Oracle in which "complaints about [] compensation and other working conditions" are met with "clear retaliation, including termination." *Id.* at 6.

The declaration in question contains statements from an attorney claiming that in conversations with Oracle employees, and as related to her by other attorneys who have done the same, they almost always "expressed fear of retaliation." The declaration then gives examples of fears expressed in the interviews. *See* Declaration of M. Ana Hermosillo in Support of OFCCP's Opposition to Oracle America Inc.'s Motion to Compel ("Hermosillo Declaration"). Another declaration, with attached exhibits, chronicles various alleged bad acts of Oracle and its attorneys. *See* Declaration of Abigail Daquiz in Support of OFCCP's Opposition to Oracle America Inc.'s Motion to Compel OFCCP to Produce Documents and Further Respond to Interrogatories ("Daquiz Declaration"). This declaration also provides some information about the redactions to documents from OFCCP's investigatory file, claiming only identifying information was removed. *Id.* at ¶¶ 10-13.

It is necessary to address several of OFCCP's arguments and allegations at the outset. First, OFCCP's promises of confidentiality has no independent force. *See* DR at 7-8; PO at 1. A party may not promise secrecy and then defeat discovery based on that promise. The question is whether or not such promises can be lawfully kept. These promises remain relevant in that they indicate that there was an expectation of confidentiality when a current or former employee provided information—an important point. But they do no more.

Second, much of OFCCP's opposition addresses points that are not really at issue in *this* motion. OFCCP's papers generally rely on attributing improper motives to Oracle and its counsel, implying that the aim is to intimidate witness or exact retribution, accusing counsel of ethical violations, etc. This leads to broad characterizations of an alleged history of retaliation and discouraging employees, *in general*, of talking about working conditions or speaking to law enforcement. *E.g.* PO at 1. Oracle disputes these accusations, both as to relevance and veracity. It argues that OFCCP has misrepresented the history in this case and in the somewhat related state

[7] To invoke a governmental privilege, it "must be formally asserted and delineated." *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 511 F.3d 192, 198 (9th Cir. 1975), *aff'd* 426 U.S. 394 (1976). A formal claim of privilege must be made by an official to invoke the privilege on the government's behalf, and its invocation must be based on "actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Oracle has not challenged this point and OFCCP has submitted the Declaration of Director Craig E. Leen in Support of Formal Claims of Privilege, which indicates that the privilege has been invoked by an officer with the requisite authority.

court litigation and has failed to offer concrete evidence of the alleged coercion, retaliation, and assorted bad acts. Oracle further accuses OFCCP of resorting to "mudslinging." DR at 4-7.

The parties have devoted significant briefing and evidentiary submissions to these issues. Some of the complaints here seem to involve miscues between counsel about communications with Oracle managers—a difficult subject in cases in which managers, depending on the capacity in which they are viewed, could be agents capable of binding Oracle, agents perpetrating the discrimination, and/or the victims of discrimination. Based on the full panoply of papers filled, it appears that the parties worked this difficulty out. The same appears to hold for some of the other disputes that developed at various point, including an old dispute about language Oracle had used in a severance agreement that was promptly corrected.[8] Other issues may be the subject of other motions or issues for hearing. But many of the accusations being leveled have little to do with the questions to be adjudicated now—whether OFCCP must produce the documents in question.

Whether or not discovery is allowed, and regardless of potential other motives, it is plain that Oracle has a legitimate discovery interest in the information requested. It is accused of serious wrongdoing, with alleged damages in the hundreds of millions of dollars compounded by the potential loss of *all* government contracts and debarment from future contracts. OFCCP made a series of allegations in a complaint, representing that it had a basis for those allegations. In this proceeding, accusations alone do not justify enforcement and Oracle must have a fair opportunity to defend itself. Any entity accused of this sort of wrongdoing would legitimately want to explore the evidence related to the allegations, including requesting documents reflecting communications about them. Understanding the accusations and their basis is essential to both preparing a defense and evaluating any settlement options. The mere fact that Oracle wants to know what the evidence against it consists of does not imply that it intends to retaliate against anyone—it implies that it intends to defend itself, as it is entitled to do.

c. Does the Government Informant Privilege Apply?

The substantial argument concerning alleged bad acts was meant to show that the government informant privilege should be applied. This is peculiar because Oracle's Motion hardly argued *that* point. *See* DM at 9. Oracle's Reply is similar in that it focuses its discussion on the degree of redactions and the question of whether the privilege must yield in this case. DR at 2-4. While Oracle does argue for disclosure of individuals with knowledge relevant to this matter, *e.g. id.* at 2, it does so on the grounds that it would *not* involve revealing government informants. The chronicle of misdeeds was unnecessary for this motion—OFCCP led with a recent case from an ALJ holding that there was no need to establish a particularized threat of retaliation. PO at 9 (citing *OFCCP v. JBS USA Holdings, Inc.*, 2015-OFC-1, slip op. at 22 (ALJ July 5, 2016)).[9]

That point is well-reasoned and supported by authority. *See, Perez v. United States Dist. Court, Tacoma*, 749 F.3d 849, 856-57 (9th Cir. 2014); *Dole v. Local 1942, Int'l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989); *In re United States*, 565 F.2d 19, 22-23 (2d Cir. 1977); *Wirtz v. Continental*

[8] Some of the correspondence produced by OFCCP indicates that when the attorneys in this matter approach their disputes without viewing difference of opinion as evidence of villainy, workable solutions can be arranged. That is promising. Going forward, I encourage all of the myriad attorneys now involved in this case to refrain from unnecessary invective. It is not rhetorically effective and does nothing to lead to agreeable resolutions of disputes.

[9] In the brief it appears that OFCCP is citing to the April 7, 2016, order in the case, though given the pin-cite and content, it is clearly the July 5, 2016, order that it is relying on (the April 7, 2016, order is only 15 pages long).

Finance & Loan Co., 326 F.2d 561, 563-64 (5th Cir. 1964); *Wirtz v. B.A.C. Steel Products, Ins.*, 312 F.2d 14, 16 (4th Cir. 1962). Even where a company may express a commitment to not retaliating against employees for speaking with the government, individual managers may still take adverse actions. This holds for former employees as well, since they may rely on references from Oracle managers or be subjected to retaliation by other employers who identify them as informants. *See Hodgson v. Charles Marin Inspectors of Petroleum, Inc.*, 459 F.2d 303306 (5th Cir. 1972). Even if individual managers are all well intentioned and committed to not retaliating, a putative informant may nonetheless reasonably fear that possibility. The privilege works to encourage informants by assuaging those fears and thus does not depend on actual instances of retaliation. The Declaration of Director Craig E. Leen In Support of Formal Claims of Privilege also sets out the institutional concerns and value of the privilege as applied to this case and the importance of confidentiality in achieving the mission of OFCCP.

OFCCP has made out an initial case to apply the government informant privilege to the identities of the Oracle employees that it has spoken with. Oracle argues that it only protects the identity of an informant and so cannot be used to justify the redactions at issue. It avers that even if it applies, OFCCP must redact only identifying information and provide the rest of the documents. DM at 9; DR at 3. Though Oracle represents that it contends that the privilege doesn't apply, it does not seriously argue that point—the *argument* here is that the redactions on the documents provided are too broad. That's an important issue—but it would not need lead me to the conclusion that the government informant privilege does not apply or that the documents must be produced in unredacted form. I find that the government informant privilege applies in this case. The current and former Oracle employees who communicated with OFCCP under an expectation of confidentiality were government informants and regardless of any corporate-level commitment, there is a cognizable risk that exposure of their identities might create a risk of retaliation as well as a risk that other informants would not speak with the government if their identities could not be protected.

d. Does the Government Informant's Privilege Yield to Compelling Need?

The government informant privilege is not absolute and will give way to compelling need, i.e. when the need to prepare a defense outweighs the interest in efficient enforcement by incentivizing informants and the interest of the informants of being protected from potential retaliation. *E.g. Hodgson*, 459 F.2d at 305. Oracle argues that it has a need for the information in these documents and that the government informant privilege should yield to that need. While OFCCP has indicated that it will produce documents related to the witnesses it will call at the hearing when it discloses its witnesses in November 2019, Oracle argues that this is "not tenable" because it deprives Oracle of discovery and the ability to defend or brings a meaningful summary judgment motion. Oracle also suggests that discovery when witnesses are disclosed in November 2019 will require a delay of the hearing. DM at 10.

OFCCP sees things differently. It argues that there is "no way" the privilege can give way in this case. It avers that Oracle already knows the total universe of people with information—all of its current and former employees. While Oracle will be informed of the witnesses who will testify shortly before the hearing, OFCCP sees no need for Oracle to know who else provided information. It deems their identities irrelevant. As to those who will testify, OFCCP says that there is no need at this stage to identify the witnesses and that it will instead do so per the agreed schedule, with unredacted interview statements/notes provided at that time. OFCCP also indicates that this sort of

evidence will not be very important. PO at 12-16. Oracle responds by pointing out that OFCCP has not been consistent about the importance of the evidence and arguing that regardless of the ultimate importance of the evidence, it is entitled to investigate the case and prepare a defense. Oracle contends that it would violate due process to withhold the identities of witnesses until the eve of hearing and that if the government informant's privilege requires withholding the amount of information redacted by OFCCP, it must give way in this case to allow Oracle to prepare a defense. PR at 3-4.

The evidence may play a role in the case and Oracle has a right to defend itself against this enforcement action. It also has a right to investigate its defenses to the claims the government asserts and a chance to ascertain facts that may be relevant to the issues presented. Even if the information isn't important to OFCCP, it might strongly support Oracle's defense. In most litigation, the individuals would be identified as part of initial disclosures or in discovery, and Oracle could pursue its own investigation by interviewing individuals with knowledge or taking their depositions. The government informant privilege inhibits that, because Oracle is not apprised of who may have the evidence in question. The argument that the privilege must give way is based on this dilemma—there are individuals with relevant knowledge of the alleged discrimination, OFCCP knows who they are, but it will not share that with Oracle, leaving Oracle in the dark, defending against the unknown.

I do not accept the claim that Oracle can simply investigate or procure information from *all* of its current and former employees, at least in this case. Based on papers filed, these number in the many thousands. Most are likely to have no relevant evidence. OFCCP suggests on the one hand that Oracle procure statements from or depose all of these individuals—but it also threatens that doing so will be viewed as additional violations. PO at 10-11. In many cases the government informant privilege would not give way because the contractor would be able to reasonably gather the information on its own without knowing who amongst its current and former employees spoke with the government. This case is different given the sheer size of the classes and number of employees, current and former, who *might* have information about discrimination at Oracle's headquarters. The rules are to be construed "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1; *see also* 29 C.F.R. § 18.10(a). A proposal that Oracle investigate or take discovery on thousands upon thousands of current and former employees is not realistic and wholly out of accord with the way discovery is supposed to proceed under the rules. Nor does OFCCP actually support this option—it was Oracle's gestures in this direction that precipitated some of the objections to coercive investigation. OFCCP's proposal appears to be that Oracle not be able to investigate the case, but if the implications of this point are taken seriously, Oracle has a fair point—due process and its basic ability to prepare a defense for hearing are called into question, suggesting that the government informant privilege may need to give way.

This would be unnecessary if Oracle was given a smaller group of individuals who do have potentially relevant information, whether or not those individuals were informants. That has not been done. This is in stark contrast for cases in which appellate courts have found no need for discovery into the names of informants. For instance, in *Wirtz v. Continental Finance & Loan Co.*, the defendant was provided with a discrete list of 45 individuals who may have knowledge of relevant facts. In that context, the Fifth Circuit agreed that it was not relevant who among those individuals actually provided information to the Department. 326 F.2d 561, 563 (5th Cir. 1964). In *Brock v. R.J. Auto Parts & Service, Inc.*, the Tenth Circuit saw no need for disclosure of the informants in a case

where only 12 current and former employees were at issue. 864 F.2d 677, 678-80 (10th Cir. 1988). The Seventh Circuit found the identities of the informants unimportant in *Dole v. Local 1942, Int'l Bhd. of Elec. Workers*, in an instance where the Department had provided the names of 25 individuals likely to have relevant information. 879 F.2d 368, 370 (7th Cir. 1989). And in *Wirtz v. B.A.C. Steel Products, Inc.*, the Fourth Circuit found no need for the identity of the informants/witnesses in a case where the Department had furnished a list of people known to have relevant information *and* a summary of the information known to them. 312 F.2d 14, 15-16 (4th Cir. 1962).

In each of these cases there was a legitimate need for some information—a defendant has a right to be able to develop a defense by investigating the evidence against it. But in each, that need could not compel identification of informants because of other information that was already provided. A discrete, manageable list of individuals likely to have relevant information about the case enabled the defendant to conduct its own investigation into the underlying facts. Here that is not the case. OFCCP has not identified a manageable list of people who are known to have, or likely to have, relevant information about the alleged endemic discrimination at Oracle. OFCCP likely could not do so without revealing informants. That is a serious impediment to Oracle's ability to engage in a basic investigation and defense of its claim without incurring unreasonable costs and requiring indefinite delay while *every* current and former employee is subjected to discovery.

The government informant privilege serves important purposes, but it must yield when necessary to enable a defendant to mount a defense. The absence of any reasonable identification of individuals who might have relevant knowledge leads in that direction, suggesting that the identity of the informants might be necessary. But the identity of the informants would also be unnecessary if Oracle could be otherwise apprised of the evidence it is facing. If Oracle is made aware of the factual substance of the evidence of discrimination, the need for the identity of the source of the evidence is substantially reduced, at least at this point in the case. As hearing approaches, the calculus may change. *See Sec'y of Labor v. Kazu Constr., LLC*, No. 16-00077 ACK-KSC, 2017 U.S. Dist. LEXIS 21600, at *17 (D. Haw. Fed. 15, 2017) (citing *Brennan v. Engineered Prod., Inc.*, 506 F.2d 299, 303-04 (8th Cir. 1974); *Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651, 661(D. Or. 2009)). For now, Oracle's legitimate need and interest in preparing a defense can be served if it is given a manageable list of people who are likely to have relevant information *or* if it is otherwise made aware of the factual content of the evidence and on that basis can investigate and prepare a defense. The sheer size of this case makes the former impossible without compromising the government informant privilege. But the latter is possible—if OFCCP produces *its* records of communications with current and former Oracle employees, with *only* the identifying information redacted.

Perez v. United States Dist. Court, Tacoma, 749 F.3d 849 (9th Cir. 2014) is persuasive as to the appropriate balancing of interests on this point. There the Wage and Hour Division litigated a case on behalf of a class of roughly 2,000 individuals. Based on its investigation and responses to a questionnaire, statements were procured from about 400 individuals. *Id.* at 851-52. The defendant sought identification of the 400 individuals who had provided statements. The Department of Labor claimed the government informant's privilege. But during discovery, counsel for the Wage and Hour Division procured agreements from 150 of the individuals who gave statements to disclose their identities. Those statements were produced in full, with identifying information revealed. As to the other 250, counsel disclosed the content of the statements with only the identifying information redacted. *Id.* at 852. The Ninth Circuit had no difficulty permitting the privilege to cover the identities of these other 250 individuals, stressing that the defendant already

had the content of the statements and while the identity of the informants' was relevant, given what had been providing the "weak showing" could not overcome the privilege. *Id.* at 858-59.

Production of the content of the statements without identifying information would fully serve the purposes of the government informant privilege without comprising Oracle's legitimate need to prepare a defense. Oracle would be given the *sort* of anecdotal evidence that may be offered and would have the ability to prepare defenses to that sort of evidence. It would also be able to ascertain aspects of OFCCP's evidence that are more favorable to its case and further pursue that evidence. What Oracle would not be able to do is probe OFCCP's evidence via depositions of the potential witnesses. That is a handicap, but not one that overcomes the government informant privilege at this stage of the litigation.[10] I therefore find that the government informant's privilege protects the identities of those current and former Oracle employees who spoke with OFCCP and has not been overcome by Oracle's right to develop and present a defense.

e. Redactions and the Scope of the Government Informant Privilege

The last issue is Oracle's complaint that OFCCP's redactions are too extensive. DM at 9. A large part of Oracle's argument concerns the amount of redactions made in the name of the government informant privilege, not the application of the privilege. *See id.*; DR at 3. Oracle has provided a sampling of interview notes produced from the investigative file.[11] The notes contain multiple redactions coded only "GI." The amount of redaction varies. In some instances almost the entirety of the document is redacted, leaving little to no discernable information. None of the redactions indicate the type of information redacted or why it would identify the informant. Though in some instances it is fairly obvious (i.e. the name is obscured), usually it is not because of the sheer volume of information deemed privileged. The redactions do not appear consistent. It seems that in some instances gendered pronouns were redacted—though it is unclear how this alone could identify an informant—while in others they were not. Some pages have facially sensible levels of redaction. Others have facially incredible levels with nearly everything deemed disclosure of an informant's identity; there was no consistency and the redactions did not appear to follow any uniform directive.[12] The Daquiz Declaration provides only general statements of the processes and assurances that proper redactions were made. At ¶¶ 10-13. But it is not enlightening about the process or at all explanatory about how it could be that entire pages of notes needed to be redacted in full.

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[10] Oracle points to a later need to conduct discovery on witnesses and potential delays that may be required, as well as unacceptable hurdles to bringing or defending summary decision motions. *See* DM at 10; DR at 3-4. Given the additional production that will be ordered here, it is not evident that there will be any need for further discovery of the witnesses identified for hearing. Insofar as there is such a need later in the case, I see no good reason to think that it would require any delay in the hearing. Given the volume of papers filed and the number of lawyers appearing in one form or another, the parties should have no difficulty arranging for and conducting short depositions of witnesses after they are disclosed, insofar as this turns out to actually be necessary. As to motions for summary decision, Oracle is not entitled to disclosure of witnesses prior to bringing a motion for summary decision. Summary decision is not a right. If Oracle wanted earlier disclosure of witnesses, it should have negotiated a different schedule. Response to a motion for summary decision from OFCCP is a different matter—insofar as OFCCP offers declarations or evidence from previously undisclosed witnesses in a motion for summary decision, that motion may fail due to the need for discovery. *See* Fed. R. Civ. P. 56(d).

[11] These are contained in Exhibit 13 to the Declaration of Warrington Parker.

[12] The Declaration of Director Craig E. Leen In Support of Formal Claims of Privilege represents that he reviewed "relevant parts" of the file and came to the conclusion that the privilege was properly invoked. The Declaration does not provide any specificity as to the process or volume of (and specific) information he reviewed. Absent more detail, I understand Director Leen to have generally reviewed the redactions and accepted the advice of his attorneys.

I find that OFCCP's redactions in the name of the government informant privilege are facially unacceptable.

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) described the nature of the documents, communications, or tangible things nor produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Fed R. Civ. P. 26(b)(5)(A). Here, OFCCP expressly made the claim, but it in no way described the nature of the redacted information in a way that would enable anyone to assess the claim. OFCCP's "say-so" is insufficient to establish a claim for privilege. My understanding of OFCCP's redactions and claimed privileges is based on Oracle's submissions here—but OFCCP has not contested Oracle's submissions or made any submissions of its own. Although the redactions have been at issue for a significant amount of time, it seems the OFCCP never prepared a privilege log or its equivalent. If it did, the log was not submitted here.

It might be proper in this situation to deem the privilege waived and order production of the unredacted documents. *See Burlington N. & Santa Fe Ry.*, 408 F.3d at 1149. However, this would be a harsh sanction and recognizing the importance of the government informant privilege, I will not do so at this time. Nor will I order *in camera* review of the unredacted documents. Rather, I will give OFCCP a short period of time in which to re-do *all* of its redactions and provide Oracle with copies of communications with current and former Oracle employees, or the records of such communications in which *only* identifying information is redacted. Factual content that will not specifically identify the informant may not be obscured in these redactions.

OFCCP must adopt a consistent policy for making redactions according to the government informant privilege. For each redaction that is made, OFCCP must provide some indication of *why* the type of information redacted could identify the informant in question. I will not dictate the exact form it should take. It could be a traditional privilege log, but also could be a functional equivalent, for instance a coding that informs a third party of the underlying nature of the redacted information (e.g. "name" or "address" or "email"). In most instances this should be simple. But in cases where OFCCP continues to redact significant portions of the factual content, it must provide some indication of why all of the information redacted would identify the informant. OFCCP's redactions and accompanying explanations must enable other parties, and me, to understand and assess the privilege, as required by the rules. It should be the rare or non-existent case that the content of an entire memo/note is redacted based on the government informant privilege—it protects only identifying information, not content.

OFCCP must re-do its redactions with an accompanying privilege log/coding on the redactions that satisfies the rule within 25 days of this order. If OFCCP fails to make redactions in good faith and limited only to identifying information, it may be subject to evidentiary and other sanctions, including potential waiver of the privilege or an order barring use of evidence from any informants. The government informant privilege serves important interests and legitimately identifying information need not be disclosed, but any harm associated necessary remedies for an insufficient disclosure of the substance of the information by OFCCP will fall squarely on its shoulders.

Finally, the government informant privilege, as claimed and discussed above, applies only to communications with current and former Oracle employees. And it applies only to communications that might identify those employees as informants. OFCCP has not established its application to any other third party it may have communicated with about its allegations in this case, unless those third parties were communicating on behalf of informants. It thus cannot be used to withhold these other communications. In addition, Oracle is correct that not all of OFCCP's communications with current and former Oracle employees are subject to the privilege. *See* DR at 3 n.2. Communications *from* OFCCP that were *unsolicited* will not tend in any way to divulge the identity of informants since it reveals nothing about who may have provided information to OFCCP. Thus, insofar as such communications are responsive to the request for documents, they cannot be withheld or redacted on the basis of the government informant privilege.

4. Attorney Client Privilege and Common Interest Doctrine

The above resolves the disputes over the "investigative stage" documents—OFCCP has established that identifying information is protected by the government informant privilege; that privilege does not yield at this stage; but OFCCP's redactions must be re-done to obscure only identifying information and comply with the applicable rules for claiming privilege. This, however, does not resolve the disputes relating to the "enforcement stage" responsive documents. Those documents have not been produced in any form. Based on the findings above, the government informant privilege applies to these documents as well and permits OFCCP to redact identifying information, and only identifying information, along the lines just ordered from responsive documents involving current and former Oracle employees. But that privilege cannot justify withholding the responsive documents entirely. To justify that refusal, OFCCP first relies on the attorney-client privilege as extended by the common interest doctrine.

a. <u>Legal Background: Attorney Client Privilege</u>

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. But it only protects communications with a lawyer in his or her capacity as a legal advisor. *See United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996). The client is the holder of the privilege. *See, e.g., United States v. Amodeo*, 71 F.3d 1044, 1052 (2d Cir. 1995).

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)). 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). When privileged material is inextricably intertwined with the rest of a document, the privilege may extend to cover the whole document, but when privileged material is distinct from the rest of a document, the protected material should be redacted with the remaining material produced. *United States v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2016).

The attorney-client privilege only protects communications involving a party that is or is seeking to become a client. *See United States v. Layton*, 855 F.2d 1388, 1406 (9th Cir. 1988). The nature of the relationship for the purposes of the privilege is determined with reference to the client's intent and reasonable beliefs. *See Barton v. United States Dist. Ct. for Cent. Dist. of California*, 410 F.3d 1104, 1110-12 (9th Cir. 2005); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311, 1317-18 (7th Cir. 1978). The basic facts underlying the relationship (e.g. the identity of the client and nature of the relationship) are not privileged. *Dole v. Milonas*, 889 F.3d 885, 889 (9th Cir. 1989). Communications must be confidential to be protected. *E.g. United States v. Gray*, 876 F.3d 1411, 1415-16 (9th Cir. 1989); *see also United States v. Bey*, 772 F.3d 1099, 1101-02 (7th Cir. 2014); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 110 (6th Cir. 1995); *see also United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990). Disclosure to or the inclusion of third parties in the communication undermines the claim of privilege. *United States v. Palmer*, 536 F.2d 1278, 1281 (9th Cir. 1976); *see also XYZ Corp. v. United States*, 348 F.3d 16, 23 (1st Cir. 2003). When privilege is claimed, a party must identify the specific communications subject to the privilege and the grounds supporting the claimed privilege as to each communication/piece of evidence not being disclosed. *See United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002) (citing *United States v. Osborn*, 561 F.2d at 1334, 1339 (9th Cir. 1977)); *see also* Fed R. Civ. P. 26(b)(5)(A).

b. Legal Background: Common Interest Doctrine

The Office of Solicitor of Labor represents OFCCP. It does not, and could not, represent any of Oracle's current and former employees. These individuals are witnesses, not clients. OFCCP, like the EEOC, may litigate "at the behest of and for the benefit of specific individuals" but it is a distinct entity that "acts also to vindicate the public interest in preventing employment discrimination." *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980). What is really at issue in this motion is the common interest doctrine, which can extend the attorney client privilege in potentially important ways.

"[T]he 'common interest' or 'joint defense' rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other." *Pac. Pictures*, 679 F.3d at 1129 (citing *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1954); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)). The common interest doctrine or privilege functions as an extension of the attorney-client privilege. *See United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000).

> [I]t [is] not limited to criminal defense situations or even situations in which litigation has commenced: "Whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in

> litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute of defend their claims."

Gonzalez, 669 F.3d at 978 (quoting *In re Grand Judy Subpoenas*, 902 F.2d at 249). A common interest agreement can be written or oral, and can be implied or inferred based on the context and behavior of the parties in question. *Id.* at 979, 981.

"[A] shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement—whether written or unwritten." *Pac. Pictures*, 679 F.3d at 1129 (internal citation omitted) (citing *Hunydee*, 355 F.2d at 185; *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964)). It is not necessary that the parties be involved in the same litigation or even any litigation at all. *Gonzalez*, 669 F.3d at 980 (citing *Cont'l Oil*, 330 F.2d at 350; *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996)). The interests need not be identical and could have some adverse motives. *Id.* (citing *Hunydee*, 355 F.2d at 185). But "the attorneys do, at a minimum, need to be 'engaged in maintaining substantially the same cause on behalf of the other parties…'" *Id.* (quoting *Cont'l Oil*, 330 F.2d at 350). And the parties must share legal interests, not merely economic interests. *See Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 8 (N.D. Ill. 1980); *see also S. Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 548 (D. Ariz. 2002).

The requirement that the parties have a "congruence-of-legal-interests [] ensures that the privilege is not misused to permit unnecessary information sharing." *Teleglobe Communc. Corp. v. BCE, Inc. (In re Teleglobe Communs. Corp.)*, 493 F.3d 345, 365 (3d Cir. 2007).

> "A community of interests exists among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice . . . The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial."

Id. (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 387 F. Supp. 1146, 1172 (D.S.C. 1974)). Some courts, however, do not require a strict identity of interests. *Id.* The Ninth Circuit has applied the doctrine in cases even where the interests of the two parties diverge in some ways. *See, e.g., Hunydee*, 355 F.2d at 185. The important point is that the parties share an interest in the particular matter and that the communication be designed to further a joint effort. *See Kazu Constr., LLC*, 2017 U.S. Dist. LEXIS 21600 at * 22 (citing *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003).

c. <u>OFCCP's Claim of Privilege and Oracle's Objection</u>

OFCCP recognizes that neither it nor its attorneys represent any of the individuals who may have been injured by the alleged violations, it claims that OFCCP "represent[s]" their interest and that the class members and OFCCP "clearly share a common interest." To extend attorney-client privilege to cover communications between OFCCP's attorneys and *all* current and former Oracle employees it and its attorneys have spoken to, OFCCP points to a series of cases where the common interest doctrine was applied to the alleged victims of discrimination in a case where the government was the prosecuting party, even where the alleged victim was not represented by independent counsel and even where litigation had not yet commenced. OFCCP asserts that it

represents both the public interest and seeks relief for potential class members, creating a common interest between it and Oracle employees. DO at 16-17.

As to the common interest doctrine, Oracle contends that a "threshold requirement" is that the communication be for the purposes of securing legal advice, whereas here OFCCP and the Solicitor do not represent any of the individuals in question and the purpose of the communication was OFCCP's investigation of its case and search for evidence. DM at 7-8. Oracle also argues that for the doctrine to apply, the third-party must be represented by counsel. In this case, at least as to the interview memorandums, that was not true. Oracle concludes that OFCCP has not carried its burden in asserting the privilege. DM at 8. Next Oracle argues that there is not a sufficient common interest between OFCCP and the Oracle employees and they are not working to pursue a common legal strategy. DM at 9. In its Reply, Oracle argues that OFCCP has not provided sufficient evidence to evaluate the alleged commonality of interests. It contends that the cases relied upon by OFCCP all deal with situations where the agency litigates on behalf of an individual or discrete group of individuals, while this case involves an agency acting on its own behalf and claiming an extended privilege over large, unspecified groups of people. DR at 8-10.

d. Has Any Privilege Been Waived?

In its reply to OFCCP's arguments that it was retaliating or would retaliate against informants, Oracle complains that the evidence offered was subject to multiple levels of hearsay and only vaguely described. It further contends that OFCCP is using the claimed privileges as both a sword and shield—submitting evidence from its attorneys disclosing favorable portions of communications, while withholding all other portions, and the identity of the actual source of the evidence, on a claim of privilege. DR at 6-8. The declaration—the Hermosillo Declaration—was not particularly important in the analysis of the government interest privilege above. It also did not waive that privilege. But it raises a serious question as to whether *other* claimed privileges were waived.

The attorney-client privilege can be waived. *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010). Voluntary disclosure to third parties generally waives the 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). 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.

The Hermosillo Declaration generalizes over some of the contents of "almost all" of the interviews that Ms. Hermosillo and other OFCCP attorneys have conducted. It then provides particular information about some of those interviews. It was submitted as evidence to establish that the government informant privilege should apply because of potential retaliation. This was unremarkable. What is puzzling is that per OFCCP's argument as a whole, all of the conversations Ms. Hermosillo mentioned and generalized over were privileged via the common interest doctrine extension of the attorney client privilege. Yet at the same time, OFCCP submitted evidence about the content of those confidential communications to support its instant litigation interests. This is just the sort of situation the waiver doctrine is meant to prevent—if OFCCP is going to submit evidence based on the content of the conversations, it cannot retain its claim of privilege over aspects of those conversations on the same subject matter. As it presently stands, Oracle has no possible way to defend itself against the accusations leveled—it cannot know what was said, who said it, or any of the surrounding context.

OFCCP cannot selectively waive the privilege for its own ends while simultaneously preventing party opponents from access to any other information that OFCCP would rather not disclose, or at least wishes to disclose at a later time. "Disclosing a communication to a third party unquestionably waives the privilege" and requires further disclosure of related communications necessary to remedy the unfairness of one side selectively disclosing material to gain strategic advantage. *Teleglobe Commns. Corp.*, 493 F.3d at 361. So here, OFCCP cannot be permitted to gain an unfair advantage by selectively disclosing information about the conversations between its attorneys and current and former Oracle employees. To fairly consider the claims being made based on the secret evidence, the privilege would be waived as to the context of those communications, i.e. the communications touching on confidentiality and retaliation. This is not a punitive measure but a point about basic fairness. *See id.*; *Hernandez*, 604 F.3d at 1100-01.

At this point I do not find that there has been waiver—rather, it serves as an indication that the common interest doctrine may not apply in the manner OFCCP claims. The Hermosillo Declaration and its use in this motion is a window on how OFCCP sees the communications in question: they are evidence to support claims, not communications provided for the purposes of legal advice or developing litigation strategy. Beyond the various levels of unattributed hearsay involved, there is nothing unnatural about the Hermosillo Declaration. But it is not the sort of declaration that any attorney would offer after receiving communications meant for the purposes of securing legal advice or developing legal strategy. If there were a common interest agreement, all of the people Ms. Hermosillo gathered evidence from would be "as if" clients and the confidences would be protected—but then Ms. Hermosillo would also no doubt protect them herself. The disclosure of information to third parties in this manner is an indication that it is not confidential and privileged. *See Teleglobe Commns. Corp.*, 493 F.3d at 361.

e. Does the Common Interest Doctrine Apply as to All Third Parties?

OFCCP's claimed common interest doctrine extension of the attorney-client privilege is both very quickly argued and extraordinarily broad. It comes down to the claim that because OFCCP seeks some relief that will flow to "class" members, its communications with all prospective class members are privileged. PO at 16-17. This claimed privilege is *not* limited to the named *Jewett* plaintiff's and counsel. It isn't even limited to all government informants or all class members in this case. Instead, it would extend to anyone that OFCCP's attorneys and their agents talk to among current and former Oracle employees.

This broad claim cannot stand. If a non-class member contacts OFCCP and offers information favorable to Oracle, OFCCP has no cognizable claim to even have a common interest with the individual, let alone an extension of the attorney client privilege on that basis. Even limiting the claim solely to class members, the interests do not so easily align. Class members have a theoretical economic interest in OFCCP prevailing in this action, but I cannot assume that class members are one dimensional in this way. They might share OFCCP's interest, but they might not. They could share interests with their employer. All aggrieved employees have separate causes of action for the alleged violations that do not depend on OFCCP and would provide them the same individual relief as they could receive here, so the interests of some might favor pursuing those actions without the additional elements and relief OFCCP's action could bring. Things are even more difficult when considering managers who are also members of one or more of the classes. They theoretically share a limited interest with OFCCP, but they also share interests with Oracle and could, in their managerial capacity, bind Oracle. Moreover, a finding that managers intentionally discriminated against one or more of the classes could lead to disciplinary action against managers—including those in the classes.[13]

In this case, the Solicitor of Labor's office does not represent any of the class members of other people its attorneys have talked to. It represents OFCCP. And contrary to the implication of OFCCP's brief at times, *see* PO at 12, neither does OFCCP properly represent the interest of class members. OFCCP does not stand in the shoes of Oracle employees or act on their behalf. OFCCP stands in its own shoes. Oracle signed contracts that contained various terms, including terms requiring Oracle to refrain from discrimination. These contractual terms are required by the President. OFCCP is charged with enforcing the terms of those contracts. At bottom, this is a breach of contract action—it just takes on the form of an employment discrimination action because of the contractual terms at issue.[14] That is one of the facets that makes this case distinct from a case between private litigants or a case in which the EEOC might pursue interests of private individuals. The class members would be beneficiaries of *part* of OFCCP's successful enforcement action—the backpay, but not cancellation of Oracle's contracts and debarment. What it means to "represent" can vary in context and there may be a loose sense in which OFCCP does "represent" some of the interests of class members. But in the context of a motion discussing the applicability of things like attorney-client privilege, it is important to not use "represent" loosely in this manner.

In the ordinary case where the common interest doctrine is relevant, there is little question that the interests align in salient ways because it is extended only to a well-defined, identified group of individuals who can be said to be pursuing a legal strategy manifesting certain interest. But the remarkable breadth of OFCCP's claim makes the claim unprecedented: OFCCP is asserting an extension of attorney client privilege over seemingly *all* potential witnesses it may talk to among the current and former Oracle employees, and on that basis refusing to answer discover about the evidence supporting its case. And since this is combined with the government informant privilege, OFCCP won't reveal *who* exactly it is sharing common interest agreements with—or rather, it is

[13] Any assurances by OFCCP that *it* is not accusing class-members of wrong-doing does not resolve this problem. If *Oracle* is made aware that a manager or group of managers intentionally discriminated against employees in terms of compensation, *it* is likely to take disciplinary action against them. OFCCP may believe that these eventualities are unlikely, but they need to be considered when discussion potential interests of large groups of employees in the abstract.

[14] Accordingly, if Oracle wished to free itself of OFCCP scrutiny, it could simply refrain from signing contracts with the federal government. It would be subject to the same anti-discrimination requirements, but via other state and Federal law, like Title VII that are enforced by private plaintiffs and other agencies, like the EEOC. If there is no contract, EO 11246 doesn't come into play and OFCCP has no basis to engage in investigation or enforcement.

simply *everyone*, leaving Oracle blind to the evidence it may face until close to hearing and unable to realistically develop anecdotal evidence that might be more beneficial to its case.

Neither party has pointed me to a case where the common interest doctrine functioned (or failed to function) to extend attorney-client privilege over such a large class of individuals in the manner suggested here.[15] Two Ninth Circuit cases, *Gonzalez* and *Pac. Pictures*, however, provide some insight on the necessary degree and *sort* of commonality required. *Pac. Pictures* squarely rejected application of the common interest doctrine where the parties merely wanted the same outcome and one party provided information to the other to help achieve that outcome. 679 F.3d at 1129. *Gonzalez* extended the privilege, even in the absence of an explicit agreement and strict identity of interests, where two parties were, in actual fact, pursuing a joint strategy. 669 F.3d at 979-80. In both cases there was a commonality in interests. What *Gonzalez* involved that *Pac. Pictures* lacked was the existence of a common strategy. Evidence in *Gonzalez* showed that the two parties engaged counsel in a common legal strategy, at least to a point. Nothing of the sort existed in *Pac. Pictures*. And tellingly, the common interest doctrine extension of the attorney client privilege in *Gonzalez* was limited and ceased where the strategy of the two clients diverged. *Id.* at 980-81.

This case is much more like *Pac. Pictures* than *Gonzalez*. No concrete evidence of a common interest has been presented. Rather, the common interest in question is limited to the abstract theoretical interest of the class members to see OFCCP prevail, and thereby reap pecuniary benefit. Theoretically, this is why information might be provided. But there is no evidence that this is what is actually desired—in ways this case involves significantly less commonality than *Pac. Pictures* because at least there the interest of the parties was clear and manifestly overlapped. Here I am not even sure what the "all things considered" interests of the potential witnesses and class members might be.

There is no evidence that OFCCP and the witnesses have in any way developed a joint legal strategy, the important component in the common interest doctrine. As *Pac. Pictures* defined the doctrine, it is "an exception to ordinary waiver rules designed to allow attorneys for different clients *pursuing a common legal strategy* to communicate with each other." 679 F.3d at 1129 (emphasis added). And to be covered, "the parties must make the communication *in pursuit of a joint strategy* in accordance with some form of agreement—whether written or unwritten." *Id.* (emphasis added). When OFCCP talks to current and former Oracle employees, they are witnesses and likely have no legal strategy. Most have no litigation pending against Oracle and there is no indication that they plan to initiate any in the future. Their ability to bring claims for discrimination of just the sort at issue here is entirely independent of OFCCP—they have separate and complete federal and state law remedies and in no way depend on OFCCP to pursue their interests. What is decidedly missing in this case is any indication that OFCCP and all of the witnesses/potential class members are pursuing a *joint legal strategy* and have reached some sort of agreement (written, oral, or implicit in conduct) to do so.

OFCCP cites a number of cases in support of this claim of privilege, but none are convincing. It relies most heavily on *U.S. v. Gumbaytay*, 276 F.R.D. 671, 674 (M.D. Ala. 2011). But *Gumbaytay* was clear that for the doctrine to apply, the communicating individuals must be engaged

[15] And I am aware of no prior case in which a party has simultaneously 1) claimed that the identity of the witnesses are privileged; 2) claimed an extended attorney-client privilege over its communications with all potential witnesses; and 3) opposed efforts of an opposing party to interview potential witnesses.

in a "joint effort with respect to a common legal interest." *Id.* at 674 (quoting *Hope For Families & Community Service, Inc. v. Warren*, 2009 WL 1066525, 8 (M.D. Ala. 2009)). That showing was easier in that case because under the Fair Housing Act the agency was acting "on behalf of" the aggrieved persons. *Id.* (quoting 42 U.S.C. § 3612(o)). That point was a recurring theme in the reasoning leading to the extension of the common interest privilege to the very limited number of aggrieved persons the government sought to extend the privilege to cover. *Id.* at 674-76. Here, by contrast, OFCCP seeks to extend the privilege to all of the witnesses who might provide anecdotal evidence of discrimination or information about Oracle's policies and practices without any demonstration that they are actually aggrieved, share an interest, or have any shared legal undertaking or strategy with the agency. Moreover, though some of these witnesses might benefit if OFCCP prevails, OFCCP is not deputized to act on their behalf—it acts on its own behalf enforcing a contractual provision required by the President's Executive Order. If anything, OFCCP acts on behalf of the President and the various other agencies who have contracts with Oracle—contracts Oracle may have breached.

OFCCP also points to *EEOC v. Int'l Profit Associates, Inc.*, 206 F.R.D. 215 (N.D. Ill. 2002), but that case involved a class of 120 employees who were identified to the Employer and who had each affirmed that they wished EEOC to act on their behalf in the lawsuit. *Id.* at 218-19. Here, privilege is claimed as to an unknown number of unidentified individuals and there is no indication that the individuals in question agreed to coordinate with OFCCP in any way. *EEOC v. v. DiMare Ruskin, Inc.*, involved *two* plaintiff-intervenors who were actively litigating alongside EEOC. 2012 WL 12067868, at *6 (M.D. Fla. Feb. 15, 2012). *Perez v. Clearwater Paper Corp.*, involved *one* whistleblower jointly cooperating in the Department's litigation of his whistleblower complaint. 2015 WL 685331, at *2 (D. Idaho Feb. 17, 2015). Finally, *Donovan v. Teamsters Union Local 25*, involved *one* aggrieved union member who filed the complaint precipitating the Department's litigation and who was cooperating in that litigation. 103 F.R.D. 550, 552 (D. Mass. 1984).

It is notable that in all of these cases, the party opponent and the court knew exactly who the individuals sharing common interest were and were presented with facts indicating not just a coincidence of interest but an agreement to pursue some joint legal strategy. This is all missing in this case. Neither Oracle nor I know who exactly is alleged to have a common interest with OFCCP or even how many individuals are now allegedly covered by the agreement. There is no practical way for Oracle to take discovery on the point or investigate, since it does not know who has the relevant information. The coincidence of the interests here is largely speculative, limited to inferences about what class members might economically prefer or what OFCCP has decided that they really ought to prefer. Most importantly, there is no compelling evidence that the individuals in question are engaged in any joint legal strategy with OFCCP or came to any agreement to pursue such a joint legal strategy, which is the core of the common interest doctrine extension. I therefore find that the common interest doctrine does not apply to this case in the way alleged and the attorney-client privilege does not extend to OFCCP's communications with current or former Oracle employees.[16]

[16] The attorney-client privilege is absolute while the government informant privilege is qualified. Hence, if the common interest doctrine did extend attorney-client privilege to all of the individuals OFCCP has spoken with to gather evidence, I would find that the government informant privilege would have to give way, as it would be outweighed by the importance of providing Oracle with a fair hearing. If OFCCP is engaged in a joint strategy with some unnamed individuals, Oracle has a right to know who those individuals are so that it may seek discovery from them.

Although a narrower "common interest" and "common interest agreement" between OFFCP and the *Jewett* Plaintiffs are mentioned briefly in OFCCP's opposition, PO at 18, this much narrower claim of privilege is not its main line of argument and is not pursued sufficiently to sustain any claim. Oracle argues that this narrower common interest doctrine extension is inappropriate as well. PR at 9-10. Since no privilege log was provided, it is unclear what the claim of privilege might cover as to these particular requests for production. Importantly, the referenced "common interest agreement" involving *Jewett* plaintiffs was not submitted or incorporated by reference.[17] Nor were other documents that might establish *both* the commonality of interests *and* the joint strategic undertaking submitted or incorporated. No appropriate declarations from individuals appropriately authorized to enter into such an agreement (or ratifications of any agreement by appropriately authorized individuals) were provided. I am tasked with deciding the disputes presented based on the submissions made. OFCCP has the burden of establishing its claims of privilege. It has not done so as to the potential narrower common interest doctrine extension related to the *Jewett* plaintiffs.

5. Work Product Protection

OFCCP also argues that all interview notes produced by attorneys during the enforcement phase of this matter are protected work product. OFCCP claims that "Oracle has not articulated *any* need for the witness interview notes to overcome the ordinary work-product protection, let alone a showing that could overcome the nearly absolute protection of the mental impression of OFCCP attorneys." PO at 19. Oracle's Motion expressed uncertainty over whether work product protection was being claimed. DM at 7 n.6. Insofar as it was being claimed, Oracle argued that it could not protect the underlying facts from the interviews. *Id.* Oracle does not engage the issue in its Reply.

The 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).

Hence, "opinion" or "core" work product receives nearly absolute legal protection while other "fact" or "ordinary" work product protection yields to substantial need. *S. Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 549 (D. Ariz. 2002). A party claiming work-product protection bears the burden of establishing its application to the documents in question. *See, e.g., Holmes v.*

[17] The record in this matter is now voluminous. Parties may rely upon prior filings to support an argument in a new filing. However, if a party wishes to rely on prior materials, it must explicitly incorporate those materials and state exactly where in the voluminous record they can be found. Neither I nor the opposing party can be fairly expected to comb through every previous filing in search of materials that might support a claim being made.

Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 138, (3d Cir. 2000). "[I]t must be specifically raised and demonstrated rather than asserted in a blanket fashion." *S. Union Co.*, 205 F.R.D. at 549. In determining whether the document was prepared for the purposes of litigation, courts look to the context surrounding the creation and ask if its preparation was "because of" the litigation or its prospect. *Torf*, 357 F.3d at 907. The protection applies to material prepared by attorneys as well as agents of attorneys, such as investigators. *Id.* (citing *United States v. Nobles*, 422 U.S. 225, 239 (1975)). Once the protection is established, the party seeking production has the burden of showing substantial need and the inability to procure the information in question without undue hardship. Fed. R. Civ. P. 26(b)(3)(A).

The documents chronicling communications with third parties in the enforcement phase of this case, to include the interview notes relating to Oracle's current and former employees, were prepared in the anticipation of litigation—this enforcement action. Insofar as they were prepared by attorneys for OFCCP or their agents, they would qualify for work product protection. Oracle challenges this point on the grounds that work product protection does not cover facts. DM at 7 n.6. But this misses an important distinction. While facts alone are not subject to work product protection, *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). Facts can then be procured via interrogatories or depositions. *See* Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 2024 (3d ed.). The *facts* gathered via the communications are not protected, but the attorney (or attorney-agent) *documents* created that chronicle those communications of facts are protected.

Like the attorney client privilege, the work product privilege may be waived. *E.g. Hernandez*, 604 F.3d at 1100; *see also Untied States v. Nobles*, 422 U.S. 225, 239 (1975). When selective disclosure of part of a portion of the privileged 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. Hence, insofar as the interview notes and communications that formed the basis for the factual claims made in the Hermosillo Declaration are protected work product, that protection was waived as to the factual content regarding the same subject manner of the declaration—confidentiality and fear of retaliation.

The real issue is this motion is whether Oracle is entitled to the documents *despite* work product protection. Work product is discoverable in certain cases. The Supreme Court explained in *Hickman*:

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were product of written statements and documents to be precluded under such circumstances, the liberal ideals of Civil Procedure would be stripped of much of their meaning.

329 U.S. at 511-12. This rule has been codified in Fed. R. Civ. P. 26(b)(3)(A): work product is discoverable where it is otherwise discoverable and where there is "substantial need" for the materials and their substantial equivalent cannot be obtained without "undue hardship."

Here, OFCCP has been engaged in extended efforts to gather evidence about discrimination at Oracle, including statements from current and former employees as witnesses. Oracle has a right to defend against the allegations leveled, and to engage in discovery and investigation in preparation of its defense. The majority of the witnesses here are most likely available. But in the current circumstances, they cannot be reached without great difficulty. Since the government informant privilege shields the identity of the witnesses, Oracle can only reach them be engaging in the difficult task of systematically procuring evidence from all of its current and former employees. That effort is now the subject of further motion practice. In the ordinary case, this issue never arises. Facts are not protected, even if documents recounting facts are, and opposing parties name individuals likely to have information and then each party can go about gathering evidence. If Oracle knew who had the information in question, it could interview or depose those people. Here, however, it does not and, as discussed above, the sheer size of the number of potential witnesses differentiates this case from others involving the government informant privilege.

Perez, 749 F.3d 849, also discussed above, is the closet analog in terms of the size of the class and the discovery difficulties created by the government informant privilege. However, in *Perez* the Wage and Hour Division had already disclosed the contents of *all* of the communications with the identifying information reacted for those witnesses who were not willing to reveal their identities. Work product (let alone attorney client privilege/common interest doctrine) was not at issue. Hence the defendant had the materials from which it could prepare its defense and conduct additional investigation. Here, Oracle is much more inhibited—if OFCCP prevails in this motion, Oracle will never know who amongst its employees has relevant evidence and will only come to know the nature of the evidence gathered 30 days before hearing. And more importantly, that disclosure will be limited to the evidence OFCCP sees fit to present, preventing Oracle from pursing lines of inquiry suggested by the interviews that might produce evidence in its favor.

This combination of simultaneous government informant privilege and work produce protection is unacceptable and inhibits Oracle from preparing an adequate defense. Both the government informant privilege and work product protection are qualified. Above I determined that the government informant privilege did not give way in this case—but that determination was premised on seeing this case as similar to *Perez* where the content of the evidence, stripped of identifying information, was made available to the defendant. If work product protection prevents disclosure of the evidence, Oracle has a strong case for overcoming the government informant privilege. To be given a fair opportunity to prepare a defense, Oracle must either know who among its current and former employees have relevant information *or* the factual content of the evidence they have provided and could be called on to provide at hearing.

Weighing the policy interests in question, it is far more important to protect the government informant privilege in this case. The work product protection must therefore give way. There has been no suggestion that the material in the documentation of communications with third parties about the allegations in this case is not otherwise discoverable (outside of privileges already considered). Fed. R. Civ. P. 26(b)(3)(A)(i). Oracle has shown it has "substantial need" for the factual information reflected in these documents because it must prepare for hearing with some understanding of the evidence it may face and the ability to investigate and present a defense to that

evidence. *Id.* at 26(b)(3)(A)(ii). As things stand, it also cannot gain the "substantial equivalent" of the documents without "undue hardship" because it is not aware of who possesses the information in question. *Id.*

OFCCP's interview notes and other documentation of communications with Oracle's current and former employees about this case, regardless of who prepared them and when they were prepared, are therefore discoverable, subject to two limitations. First, identifying information may be redacted consistent with the government informant privilege. Second, all opinion work product, including impressions, opinions, and strategy, may be redacted. *See* Fed. R. Civ. P. 26(b)(3)(B). Oracle is entitled to the factual content of the interviews. OFCCP is directed to make redactions strictly limited to those two circumstances and do so in a manner that permits Oracle (and me) to understand the basis for the redaction and evaluate its merit. *See* Fed. R. Civ. P. 26(b)(5)(A). Failure to make redactions in good faith could subject OFCCP to sanctions, including waiver of privileges and protections and/or evidentiary bars.

The above considerations pertain to documents relating to communications with Oracle's current and former employees where the identity of the current or former employee is redacted based on the government informant's privilege. They do not apply to other responsive documents. There is no work product protection for outgoing communications sent to third parties or to incoming communications from third parties. For the former, it is waived since it was shared with a third party. For the latter, it never applied since it was prepared by a third party. Those responsive documents, if any, may not be withheld on a claim of work-product protection. On the other hand, documents internal to OFCCP and the Solicitor that "relate" to the communications in question but do not recount the factual content of an interview or other communication may be withheld based on work-product protection. In addition, work-product related to Oracle's current and former employees who have been identified to Oracle as possessing relevant evidence (if there are any such individuals) may also be withheld because Oracle could procure the substantial equivalent without undue hardship. If any responsive documents are withheld, OFCCP must comply with Fed. R. Civ. P. 26(b)(5)(A) and provide a privilege log or a functional equivalent.

6. Conclusion

The requests for production in question seek documents relating to communications with third parties, to include Oracle's current and former employees, that relate to the various allegations made in the Second Amended Complaint. This information is relevant. The requests cover all third parties, but based on the briefing, the documents predominantly in dispute in some way chronicle OFCCP's communications with Oracle's current and former employees—outgoing communications, incoming communications, and interview notes or other records of communications. OFCCP claimed a number of privileges related to these documents, and I considered each in turn.

I accept OFCCP's claim of the government informant privilege in this case and find that it has not been overcome by Oracle's need at this stage in the litigation. The government informant privilege protects *only* identifying information and OFCCP may only redact information on that basis. I find that the sample redactions produced are unacceptable. They tend to obscure far more factual content than could even liberally be expected to divulge identifying information. They also do not provide proper claims of privilege that would allow evaluation of why the privilege applies to

the content obscured. OFCCP must re-do the redactions made to date and redact only identifying information. OFCCP must provide some privilege log or its equivalent.

I do not accept OFCCP's claim of attorney-client privilege extended by the common interest doctrine over the documentation of communications with current and former Oracle employees. This was implausibly claimed over most if not all factual witnesses in this case, none of whom are identified. OFCCP has not shown that it shares a sufficiently common interest with all of these individuals and made no showing that each of them has somehow formed an agreement with OFCCP to pursue a joint litigation strategy. Nor did OFCCP establish a narrower common interest doctrine extension.

Work product protection does extend to documents chronicling communications that were prepared by OFCCP's attorneys (and attorneys' agents) during the enforcement phase of this matter. In the peculiar contours of this case and the interplay with the government informant privilege, the work product protection must yield to Oracle's substantial need for the documents related the facts/evidence provided in communications with third parties and the undue burden of procuring those facts given that the third parties are not identified. OFCCP must therefore produce documents chronicling the factual content of communications with third parties. In doing so, OFCCP may redact any identifying information on the basis of the government informant privilege and any reflections of attorney opinions or impressions consistent with Fed. R. Civ. P. 26(b)(3)(B). All redactions must be made based on one of these claims of privilege and must be limited to only material subject to the two privileges at issue. Consistent with Fed. R. Civ. P. 26(b)(5)(A), OFCCP must make redactions in a manner, such as a privilege log, that permits a third-party to understand the claim.

Work product protection also extends to any internal documents prepared in anticipation of litigation that relate to communications to third parties but do not recount the factual content of interviews of other communications. In addition, it extends to documents prepared in anticipation of litigation that relate only to communications with current or former Employees who have already been identified to Oracle as possessing relevant information. If any responsive documents are withheld on either basis, OFCCP must comply with Fed. R. Civ. P. 26(b)(5)(A) when it withholds the documents. Work product protection does not apply to outgoing communications sent to third parties or to incoming communications from third parties. Those responsive documents must be produced.

OFCCP's time for production, subject to the limits based on the government informant privilege and work produce protection allowed for above, shall be 25 days from the date of this order. *Cf.* 41 C.F.R. § 60-30.10(d).

B. Production of Documents: Communications with Jewett *Counsel*[18]

Oracle next seeks to compel production of documents related to its communications with "*Jewett* plaintiffs' counsel," as requested in RFPs Nos. 232-35. DM at 10. RFP No. 232 seeks:

> All DOCUMENTS reflecting any COMMUNICATIONS YOU had with JEWETT'S COUNSEL prior to the commencement of YOUR ORAL COMMON

[18] RFPs and responses are again take from Exhibits 8 and 10 of the Declaration of Warrington Parker.

> INTEREST AGREEMENT with JEWETT RELATING to the above captioned OALJ case, including any DOCUMENTS exchanged.

RFP No. 233 asks for the same material as to "the state court action Rong Jewett, et al. v. Oracle America, Inc., originally filed on June 16, 2017 in the Superior Court of California, San Mateo County as case no. 17-CIV-02669." RFP No. 234 seeks: "All DOCUMENTS (including COMMUNICATIONS) RELATING to YOUR ORAL COMMON INTEREST AGREEMENT with JEWETT." RFP No. 235 seeks the same as to the "WRITTEN COMMON INTEREST AGREEMENT with JEWETT."

OFCCP responded as follows to RFPs Nos. 232, 233, 234, and 235:

> OFCCP objects to this Request on the grounds that it seeks information protected by attorney-client privilege (including the common interest doctrine), attorney work-product doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.
>
> OFCCP further objects on relevance grounds. Materials reflecting OFCCP's internal deliberations and processes in its investigation are not relevant because they will not show, one way or the other, whether Oracle violated its equal opportunity obligations, including through engaging in systemic compensation and hiring discrimination.
>
> OFCCP additionally objects to this Request to the extent it seeks documents that were created after March 11, 2016, which was the date the Notice of Violation was issued, because any such documents were created in anticipation of litigation and are protected by the work product doctrine, trial preparation privilege, and/or attorney-client privilege (including the common interest doctrine).
>
> OFCCP further objects to the entirety of this request as overbroad and unduly burdensome.
>
> To the extent that Oracle is requesting that OFCCP produce the Common Interest Agreement that OFCCP entered into with Jewett's counsel, OFCCP contends that this document is already in Oracle's possession or control and is reproduced here as DOL000039939.

In its opposition here, OFCCP deems the request for communications "improper," regardless of the time that they occurred. OFCCP argues that the *Jewett* plaintiffs have overlapping claims with the same factual allegations and that the interests do not need to be identical for a common interest agreement to arise. PO at 18. Moreover, OFCCP contends that the common interest agreement also protects any documents and communications regarding the common interest agreement, insofar as those documents have not been produced. OFCCP previously produced the actual agreement to Oracle, but avers that the remainder is privileged. It adds that the materials are

also protected by the work product doctrine since they were prepared in anticipation of litigation. *Id.*

Oracle contends that the asserted common interest agreement is invalid because OFCCP and the *Jewett* plaintiffs do not share a common interest. They both have suits against Oracle, but Oracle avers that "the two cases involve different legal theories, different parties, and are being litigated pursuant to different mandates." It notes that private plaintiffs have an interest in maximizing recovery while OFCCP have an interest only in determining whether there is any discrimination and, if so, remedying that discrimination. Oracle asserts that this fundamental difference defeats any application of the common interest doctrine since the legal interests are not identical.[19] Moreover, Oracle argues that OFCCP cannot show that its communications with *Jewett* plaintiffs were made to advance a shared interest in procuring legal advice on a common matter. DM at 10-11; DR at 9-10.

Though the parties raise a number of issues, these requests can be dealt with without too much difficulty. RFP No. 232 seeks documents pre-dating the oral common interest agreement related to *this* case. Above I determined that OFFCP did not establish its claimed common interest agreement with all class members. While a narrower agreement would be at issue here, I also found that OFCCP did submit sufficient argument and evidence to establish that only generally made claim of privilege. That issue is actually not relevant to RFP No. 232. It was crafted to target documents relating communications predating any alleged oral common interest agreement. As such, even if there is a valid common interest agreement that would protect documents once the joint strategy was established, it would not reach back to the period covered by this interrogatory.

The real question is whether the documents in question are relevant. Since RFP No. 232 focuses on *this* case, they *might* be, but only insofar as they pertain, in some ways, to the issues presented for adjudication in the claims and defenses asserted in this case. RFP No. 232 as written is too broad. Documents relating to communications in which the case is mentioned, but no mention is made of the substantive factual issues in the claims and defenses presented for adjudication, are not relevant. Documents relating to communications in which the substantive issues, i.e. the claims about discrimination at Oracle or other aspects of the claims and defenses at issue, are mentioned are relevant, at least for discovery purposes. Hence, insofar as there are responsive documents in this category, OFCCP shall produce documents in response to RFP No. 232.

RFP No. 233 mimics RFP No. 232 except that it concerns documents relating to communications involving the *Jewett* case, not this case. This produces a different result. This case and the *Jewett* case share some of the same evidentiary basis, but—as Oracle stresses—they are also different cases in entirely different forums involving different claims. This RFP does not seem to

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[19] Oracle contends that because the common interest doctrine could not prevent disclosure of the documents pursuant to the Freedom of Information Act ("FOIA"), those documents cannot be confidential. DM at 11. OFCCP argues that the communications might be otherwise exempt under FOIA and that FOIA cannot be used to undermine the government's litigation privileges. Oracle's basis for this claim is a case concerning the application of Exemption 5 of FOIA to communications that were subject to a litigation privilege but were not confined to inter or intra-agency memoranda or letters. *See Lucaj v. FBI*, 852 F.3d 541 (6th Cir. 2017); *see also Rojas v. Federal Aviation Admin.*, 922 F.3d 907 (2019).
The arguments raise a number of difficult issues that are not adequately briefed. Given the other determinations, it is not necessary to address the FOIA-related disputes to decide the pending motion.

aim at factual content or evidence that the two claims might share—or rather any documents of *that* sort are already subject to RFPs. The documents in No. 232 were relevant because they pertained to this case in particular. The documents in RFP No. 233 are not relevant because they pertain to the *Jewett* case, which will not be adjudicated at OALJ. OFCCP thus does not need to produce documents that respond to RFP No. 233, except that if those documents also respond to RFP No. 232.[20]

RFP No. 234 and RFP No. 235 seek documents relating to the formation of the alleged common interest agreements, oral and written, respectively. One can understand why Oracle might be interested in these documents as a general matter. But I am only empowered to adjudicate this case and discovery here must be relevant to the claims and defenses in this case. The circumstances surrounding the formation of the alleged common interest agreements in this case are not relevant to any of the claims and defenses at issue—or at least Oracle has not made that showing. As such, OFCCP does not need to respond to either request.

C. Interrogatories[21]

Next, Oracle argues that OFCCP's response to its 25 new interrogatories are deficient for four reasons: 1) improper incorporation by reference; 2) refusal to disclose identities of persons with facts; 3) refusal to provide complete answers to anecdotal evidence queries; and 4) refusal to provide a complete answer identifying policies, practices, procedures, and tests that OFCCP contends have a disparate impact. DM at 12. While OFCCP makes general claims to have provided sufficient responses, PO at 7-8, it does not address the particular alleged deficiencies in detail.

1. Incorporation By Reference

Oracle first objects to OFCCP's practice of responding to its interrogatories by incorporating other responses, i.e. from interrogatories earlier in this case, by reference. Oracle contends that this violates 41 C.F.R. § 60-30.9(a) and Fed. R. Civ. P. 33(b)(3)[22] since the interrogatories in question do not seek identical information and thus an independent response is needed. In addition, Oracle avers that interrogatory responses must be complete in themselves without referring to other pleadings and documents. Further, Oracle argues that OFCCP's practice here is substantively deficient because it fails to provide necessary facts underlying the SAC in that the responses simply refer back to the SAC or prior interrogatories, which did not relate to the SAC and its new/refined allegations.[23] DM at 12-14; DR at 10.

Along the same lines, Oracle objects to interrogatory responses that simply refer to thousands of pages of documents, much of which cannot be responsive to the request at issue. Oracle also complains that these broad references are made to redacted documents. It contends that the result of this practice is that OFCCP has failed to genuinely answer the interrogatories in question at all because instead of providing facts it "asks Oracle to go on a scavenger hunt in hopes

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[20] In a concurrently issued order, the same result follows for communications between Oracle's counsel and *Jewett* counsel in the *Jewett* litigation.

[21] The text of the interrogatories is found in Exhibit 9 to the Declaration of Warrington Parker. The responses are in Exhibit 11 to the Declaration of Warrington Parker.

[22] Oracle's Motion points for Fed. R. Civ. P. 33(b)(1), DM at 12-13, but the language referenced is in subsection (b)(3).

[23] Oracle also points out that Judge Larsen already ordered OFCCP to set forth facts supporting allegation instead of pointing Oracle back to the allegation itself. DM at 15.

of finding something relevant buried in hundreds of pages of documents." DM at 14-15; *see also* DR at 10. Oracle points to several examples of documents OFCCP has directed to in search of relevant materials: an EEOC press release about a suit being filed against a farm in Georgia, a profile of an Oracle executive discussing his Indian heritage, and Oracle's 10-K filed with the SEC for fiscal year 2014.[24]

Oracle points to two interrogatories in particular, No. 32 and No. 49, though it contends the deficiency is endemic. Interrogatory No. 32 asked:

> State the facts that support the allegation in Paragraph 18 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 ANY statistical data, analyses, methodologies, and computations, and the identity of the women, Asians and "other employees in the same or comparable job" referenced in Paragraph 18.

OFCCP responded:

> OFCCP incorporates the general objections stated above, and further objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the common interest doctrine, attorney work-product doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.
>
> OFCCP notes that this interrogatory is compound in that it contains three subparts: (1) facts supporting the allegations in Paragraph 18 of the SAC; (2) analysis and methodologies; and (3) the identity of women, Asians and "other employees in the same or comparable job" affected. Subject to and without waiving the foregoing objections, OFCCP incorporates its statements in the Second Amended Complaint wherein OFCCP outlines its methodology in detail (see Para. 18).
>
> Further, pursuant to Fed. R. Civ. P. 33(d) refers Oracle to the responsive documents that it produced in response to its Second Set of Requests for Production, that constitute the facts supporting the allegations, supply sufficient information to identify the affected individuals, including:
>
> ORACLE_HQCA_0000042098
> ORACLE_HQCA_0000042101
> ORACLE_HQCA_0000056234
> ORACLE_HQCA_0000062858
> ORACLE_HQCA_0000062859
> ORACLE_HQCA_0000070721
> ORACLE_HQCA_0000070738

[24] These documents are found in Exhibits 15, 16, and 17 of the Declaration of Warrington Parker.

ORACLE_HQCA_0000070741
ORACLE_HQCA_0000128176
ORACLE_HQCA_0000364272
DOL000039928

OFCCP reviewed the data provided in the documents listed above and evaluated the likelihood that a given employee would be assigned to a higher level of within Oracle's global career ladder framework (where lower levels correspond to less responsibility and pay), controlling for the year and previous experience.

OFCCP further responds that it conducted a compliance review of Oracle's headquarters in Redwood Shores, California consisting of a comprehensive analysis and evaluation of Oracle's hiring and employment practices. OFCCP has produced its investigative file for Oracle HQCA, OFCCP Case No. R00192699 and has described with specificity which documents from that file support OFCCP's argument that Oracle discriminated against female or Asian employees at Oracle Redwood Shores in its initial and supplemental response to Oracle's First Set of Interrogatories (as amended), Interr. No. 2-6; 12-16.

OFCCP will provide supplemental responses in the event any further responsive material comes within its knowledge, possession, custody or control. Further, OFCCP will disclose its expert witness or witnesses and will supplement these responses according to the schedule agreed upon by the parties and adopted by Judge Clark in his order dated March 6, 2019. OFCCP is still (1) waiting for updated databases from Oracle covering the whole period of this suit, (2) reviewing documents produced by Oracle and (3) developing the statistical model it will rely on at hearing in this matter. OFCCP does not regard its models during the investigation and conciliation phase or underlying the Second Amended Complaint as determinative of the statistical evidence it will use to support its allegations at hearing in this case. The model used at the hearing may rely on different factors, different mathematics and different data than the model used during the investigation and conciliation process or underlying the Second Amended Complaint.

Interrogatories No. 26 and 28-48 follow the same format, asking OFCCP to provide factual support for Paragraphs 11, 13-16, 18-31, 36-38. OFCCP's response is the substantially similar for each. Paragraphs 36-38 relate to claims that were subsequently settled, so Interrogatories No. 46-48 are no longer relevant. Interrogatory No. 27 seeks information of persons with knowledge of the alleged discrimination. Interrogatory No. 49 asks about anecdotal evidence of discrimination. Interrogatory 50 queries the "policies, practices, procedures, and tests" that might figure in a disparate impact theory. Interrogatories No. 27, 49, and 50 will be addressed in the next three sub-sections, though the alleged deficiencies discussed in this sub-section apply, in part, to those responses as well. Here, I am primarily concerned with the "factual support" interrogatories that are still relevant: Nos. 26 and 28-45.

41 C.F.R. § 60-30.9(a) requires that each interrogatory be answered "separately and under oath." Similarly, Fed. R. Civ. P. 33(b)(3) requires answered each interrogatory "separately and fully in writing under oath." Interrogatories must be answered directly and in a non-evasive manner. The responding party must provide all information it possesses after due inquiry. Referring back to

the pleadings is generally insufficient. If a party cannot furnish an answer, it is required to say so under oath. If a party is unable to complete an answer, it must still provide any relevant information that is available. *See* Wright and Miller, 8B Fed. Prac. & Proc. Civ. § 2177 (3d ed.). An evasive or incomplete answer is equivalent to a failure to respond. Fed. R. Civ. P. 37(a)(4).

Measured against these general principles, OFCCP's response to Interrogatory No. 32 is inadequate. Oracle sought the *facts* supporting a particular allegation that OFCCP made in its Second Amended Complaint. In filing that complaint, OFCCP's attorneys represented that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11. OFCCP has been investigating Oracle for over four and a half years and has been engaged in an enforcement action against Oracle since January 2017. It has made and publicized a series of serious allegations. Those allegations presumably have factual support. Oracle is entitled to know what facts support the allegations so that it can prepare a defense (or decide to pursue settlement). It is also entitled to know if there are no such facts. Inquiring into the facts that support, or fail to support, a party-opponent's case is one of the central purposes of civil discovery. *See Hickman*, 329 U.S. at 507.

The factual support for the allegations in this case are not protected by attorney-client or work product privileges. The interrogatories do not probe communications with a client or tangible or intangible work product—they ask the client to state facts. Putting facts into work product or relating them to an attorney do not shield those facts from discovery propounded to the client. *See* Wright and Miller, 8 Fed. Prac. & Proc. Civ. § 2024 (3d ed.); *see also Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995). In addition, the deliberative process as to the subject of these interrogatories is over. "[D]eliberative process covers 'documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). The privilege covers documents that are both pre-decisional and that would expose the agency's decision-making process in a way that would undermine its ability to perform its functions. *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1135 (9th Cir. 2014) (citing *Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1093 (9th Cir. 1997)). OFCCP made the allegations in question in a disseminated public filing. The deliberative process as to those claims concluded and stating the facts that support the outcome of that process would not compromise OFCCP's ability to perform its functions.

Incorporation of the allegations in the Second Amended Complaint in response to interrogatories querying facts underlying the Second Amended Complaint is insufficient. Contrary to OFCCP's assertion, it described no methodology or basis in detail. It presented only general conclusions. Oracle reasonable seeks the facts behind those allegations. OFCCP must provide those facts or indicate that it currently lacks further factual support. Reference to prior interrogatory responses is also insufficient. OFCCP filed a new complaint. It must provide the facts supporting its allegations in that complaint. If the responses have not changed from the earlier responses, OFCCP may simply copy those responses over and provide them to Oracle here, stating that in the interim it has ascertained no additional facts to support the allegation in question. Vague reference to the investigative file are also insufficient. OFCCP has represented in signed filings with this tribunal "that the compliance review is largely irrelevant to the claims alleged." PO at 5. It thus cannot claim that its basis for the "claims alleged" is simply the investigative file from the compliance review.

OFCCP's response did make reference to facts by pointing to a broad array of documents in the case that, in some manner, contains the facts supporting the allegations. Oracle complains that this is improper incorporation of thousands of pages of documents, much of which has no discernable connection to the particular allegation in question. DM at 14-15. OFCCP did not dispute that it pointed Oracle to thousands of pages of documents and passed the burden to Oracle to find out what facts might support the allegations. Nor could it do so. All but three (Nos. 27, 49, and 50) of Oracle's interrogatories seeks facts supporting allegations. OFCCP's references to the factual support is largely the same in all of the responses. In all but one, No. 26, of the "factual support" interrogatories still relevant, OFCCP provided the *same* list of documents to review in order to find the answer to the specific interrogatory. The response to No. 26 included the same list of documents plus more.

OFCCP does provide justification for this practice. It argues that this incorporation by reference is entirely proper and in accord with Fed. R. Civ. P. 33(d). PO at 8. That rule provides that:

> If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

Fed. R. Civ. P. 33(d). Oracle complains that this invocation of Rule 33(d) is inadequate. DM at 15.

I agree. Fed. R. Civ. P. 33(d) requires that the burden of answering "be substantially the same" given the specification of the records that will provide the interrogatory response. The interrogatories seek the facts that support OFCCP's allegations. OFCCP made the allegations and it presumably did so on the basis of facts that support those allegations. OFCCP knows what those facts are; Oracle does not. The burden in discerning from the documents *which* facts OFCCP believes support *which* allegations is thus very different for the two parties. Given thousands of pages of documents, some of which are relevant and some of which are not, Oracle must attempt to divine what OFCCP believed supported the allegations it made. This is an exercise in mind-reading. OFCCP has a much easier task since it already knows which documents contain the facts that *it* contends support which allegations. It made the allegations based on the facts in the documents. The burden of making explicit which particular documents contain the relevant facts is thus light for OFCCP.

To rely on Fed. R. Civ. P. 33(d), OFCCP must take the necessary steps to specify the *particular* records that must be reviewed in reference to each separate interrogatory in a manner sufficient to make the burden of understanding which facts OFCCP contends support each individual allegation substantially similar for the parties. Concretely, this means that if OFCCP is to respond to these interrogatories by pointing Oracle to documents—which it may do—it must isolate and cite to the particular documents and parts thereof that support each particular allegation.

In sum, OFCCP must re-do interrogatory responses for those interrogatories that are still relevant to the case and answer the questions. It may not simply incorporate its pleadings by reference or incorporate prior answers by reference. If OFCCP's support for an allegation is only the allegation itself, it should make that explicit. If the facts supporting an allegation in the Second Amended Complaint have not changed in any way from previous disclosures, OFCCP may copy those previous disclosures into its response here and certify that to this point in time no additional facts have been discovered which support the allegation. OFCCP may also not rely on general reference to the investigative file from the compliance review. If OFCCP is relying on facts from the compliance review, it must state those facts with specificity in response to each individual interrogatory.

OFCCP may point Oracle to documents that provide the factual support for its allegations in lieu of re-stating the facts in those documents, consistent with Fed. R. Civ. P. 33(d). But in so doing OFCCP must specify the documents in question with particularity, including citations to all documents that are relevant to each individual interrogatory. That is, to properly invoke Fed. R. Cir. P. 33(d), OFCCP must provide the information that will enable Oracle to identify the facts as readily as OFCCP could. That means telling Oracle which particular documents contain the facts that OFCCP views as support for each particular allegation.

Discovery is ongoing and OFCCP may leave the door open for finding additional facts to support its allegations. But this does not alleviate OFCCP of its duty to provide complete answers to each interrogatory as of the date that the interrogatory response is signed. As additional responses are identified, OFCCP must supplement its discovery responses.

Interrogatories No. 46-48 are no longer relevant. The above applies directly to the responses to interrogatories No. 26 and 28-45. It also applies as general guidance for interrogatories No. 27, 49, and 50, discussed further below.

2. Interrogatory No. 27, Disclosure of Persons with Facts

Next, Oracle objects to OFCCP's response to Interrogatory No. 27. It asked: "With regard to OFCCP's allegations of discrimination in the Second Amended Complaint, identify by name and last known contact information each PERSON with knowledge of the facts regarding the alleged discrimination, including the nature of the facts of which the PERSON identified has knowledge."

OFCCP responded:

> OFCCP incorporates the general objections stated above, and further objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the common interest doctrine, attorney work-product doctrine, the common interest doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.
>
> OFCCP objects to the Interrogatory on the basis that it is compound, vague and ambiguous as to "nature of the facts," and "knowledge of the facts." "Nature of

> facts" is vague and ambiguous in that it could include the date the person acquired the facts, how he acquired the facts, who he acquired the facts from, the contents of the facts, when the facts occurred, who observed or witnessed the facts, etc. In terms of "knowledge of the facts" it is vague and ambiguous as to whether Oracle is referring to personal knowledge, constructive knowledge, third-hand knowledge, hearsay knowledge, etc.
>
> OFCCP objects to the Interrogatory as being unduly burdensome, overly broad, not relevant, oppressive and not proportional to the case because it could encompass thousands of Oracle employees in the United States and in its international locations, including employees in supervisory and management positions, to ascertain everyone who has knowledge of the discrimination.
>
> Subject to and without waiving the foregoing objections, OFCCP responds as follows: Excluding OFCCP attorneys at the Office of the Solicitor, and any non-testifying consulting experts, the following individuals may have knowledge of the facts giving rise to the allegations made in the Second Amended Complaint include Oracle employees, supervisors and managers employed by Oracle during the review period, former employees, supervisors and managers of Oracle; and OFCCP personnel listed in response to Interrogatory No. 1. In further response, OFCCP identifies the following persons: [None identified]
>
> OFCCP will disclose its testifying expert witness or witnesses and will supplement these responses according to the schedule agreed upon by the parties and adopted by Judge Clark in his order dated March 6, 2019.

Oracle contends that the response is deficient because it incorporates a prior response by reference and otherwise points to wide groups of people, such as everyone at Oracle, and includes an "etc." that leaves the response open-ended.[25] DM at 16-17. Part of this particular criticism misreads the response. The "etc." was not used to leave the individuals identified open-ended, it was used as part of an objection. It is thus not problematic in the manner suggested by Oracle. The real complaint here is that OFCCP has essentially pointed to "everyone at Oracle" rather than particular individuals with knowledge. *Id.* at 16; *see also* DR at 10. In large part, this dispute harkens back to the application of the government informant privilege.

Oracle argues that the government informant privilege does not apply in this instance because it protects only informants, not witnesses. DM at 17. This is a bad argument at this point in the case. Informants are witnesses and the authority cited by Oracle, *Sec'y of Labor, United States Dep't of Labor v. Kazu Constr., LLC*, 2017 WL 628455, at *5 (D. Haw. Feb. 15, 2017), can only establish that disclosure of witnesses is not automatically a disclosure of informants. Here, however, disclosure of individuals at Oracle who OFCCP can identify as individuals with facts would tell Oracle which employees are informants because it would tell Oracle which employees talked to OFCCP. If OFCCP simply listed *all* current and former employees (or class-members) this would not be a problem—but it already effectively did that in its response to the interrogatory. Narrowing

[25] Oracle notes that Judge Larsen ordered OFCCP to make a fuller response to a similar interrogatory. DM at 17 n.11. It allows that Judge Larsen permitted OFCCP to list persons broadly, but argues that the case has proceeded to the stage at which OFCCP must identify witnesses. DM at 17 n.10.

of the sort requested by Oracle would divulge the identity of informants and thus need not be done at this stage.

So, for the most part, Oracle's motion to compel further specificity in response to this interrogatory is denied. I do agree with Oracle that OFCCP's response is insufficient in several ways and must be supplemented. First, OFCCP may not incorporate prior lists by reference. If the response to this interrogatory is in large part the same as some previous response, OFCCP can simply copy its prior response and paste it here, indicating that there is no update. But it should give Oracle a complete response to this interrogatory without requiring it to do the cross-referencing. In addition, OFCCP appears to have omitted an additional list of individuals. Its response indicates that it is about to enumerate individuals, but no list follows. OFCCP must correct this omission or explicitly state that there are no other individuals. It must list all persons known likely to have knowledge of the facts individually. There is, again, one major exception—it need not identify individuals at Oracle with particularity but can instead rely on general descriptions in order to protect the identity of government informants. Individuals who do not wish to remain confidential, or whose identity as informants has been revealed already, should be listed individually. The list, with the exception of those withheld due to privilege, must be complete as of the date of production. OFCCP may indicate that the list may be supplemented as discovery is completed, but it must still make a complete current response and supplement its response as additional individuals are identified.

3. Interrogatory No. 49, Answers Regarding Anecdotal Evidence

Oracle seeks to compel further responses to Interrogatory No. 49 on the grounds that OFCCP's response "is arbitrarily limited and incomplete on its face." DM at 17. Interrogatory No. 49 asked: "Describe in detail ANY anecdotal evidence of discrimination YOU contend supports ANY allegation in the Second Amended Complaint." OFCCP responded:

> OFCCP incorporates the general objections stated above, and further objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the common interest doctrine, attorney work-product doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.
>
> OFCCP objects to this interrogatory because by Interr. No. 34, Oracle had already asked the equivalent of 25 interrogatories in that its previous interrogatories (Interr. 26-33) contained three subparts each. As such, Oracle exceeded the number of interrogatories that it can make without a court order.
>
> Subject to and without waiving the foregoing objections, OFCCP answers as follows:
>
> OFCCP responds that it conducted a compliance review of Oracle's headquarters in Redwood Shores, California consisting of a comprehensive analysis and evaluation of Oracle's hiring and employment practices. OFCCP has produced its investigative file for Oracle HQCA, OFCCP Case No. R00192699 and has described with specificity

which documents from that file contain anecdotal evidence of discrimination in its initial and supplemental response to Oracle's First Set of Interrogatories (as amended), Interr. No. 24. Specifically, anecdotal evidence of discrimination can be found in the following documents:

> ● Wage determination memos contained in the Labor Condition Applications ("LCAs") that Oracle provided for employees working under H-1B status at BSN DOL 6523-6620, 6689-6715, 7261-8040, 8100-12674, 33204-35301.
>
> ● Information contained in personnel files at BSN DOL 30664-31981.
>
> ● Interviews of Oracle personnel at BSN DOL 507-904, 36573-806, 39030-37, 39151-73.
>
> ● Oracle's correspondence, including e-mails, providing or explaining its policies or submissions at BSN DOL 926-31, 943-54, 987-1006, 1027-30, 1031-34, 1053-58, 1087-91, 1093-97, 1128-34, 1143, 1174-76, 1180-84, 1193-1204, 1212-13, 1233-34, 1237-40, 1243-46, 1322-23, 1327-45, 1350-58, 1362-66, 1395-1406, 37175-78, 37528-33, 38548-57, 38673-77, 38764-67, 38876-95, 38898-906, 39128-29.
>
> ● Oracle's AAP at BSN DOL 4377-4710, 32150-52, 31982-98, 31999-32132.
>
> ● Information in complaints against Oracle BSN DOL 37732-42.
>
> ● Facts in the articles and filing at BSN DOL 37746-47, 37792, 37795-99, 37803-04, 37809-10, 37818-25, 37827-34, 38754-55, 39442-43, 39446-39790, 39832-74 and at the following URLs:
>
> [List of websites omitted]

The evidence used at the hearing may rely on different facts and different anecdotal evidence than which is identified in response to this interrogatory. Discovery is ongoing and OFCCP will supplement this response as appropriate.

Oracle contends that OFCCP improperly and arbitrarily limited its response to documents in the investigative file, pointing out that OFCCP has been actively seeking evidence subsequent to the completion of the investigatory file and so has more evidence available that it may use at trial but is withholding from Oracle. DM at 17-18. Oracle also argues that the response is deficient because it simply references external documents. *Id.* at 18. Initially, the responsive list of documents here differs from those in the other answers in that it provides more specificity. In supplementing its responses, OFCCP may continue to make reference to documents containing the facts or anecdotal evidence, but it must point to all responsive documents with particularity so that Oracle knows exactly which documents contain what OFCCP believes is anecdotal evidence of discrimination. On its face, I cannot tell if this response adheres to that guidance. If it does not, OFCCP must correct the deficiency. In addition, in supplementing the response, OFCCP should remove references to other responses and provide a clear answer to this interrogatory in one place. Insofar as the response has not changed, OFCCP may simply copy it and then add that the response has not

changed. This is unlikely, however, since OFCCP appears to have collected anecdotal evidence of discrimination, or at least attempted to do so. If those attempts have been fruitless, OFCCP should report that to Oracle in the response here.

Regarding the production of documents, OFCCP must specify in more detail all anecdotal evidence that it has gathered, including evidence not protected by the government informant privilege that has been gathered in the "enforcement" phase of this matter. It may not withhold anecdotal evidence based on claims of attorney-client privilege. Work product protection of the documentation of anecdotal evidence has been overcome on the facts of this case and that evidence must be produced, with identifying information and attorney opinions/impressions redacted. If the interview notes and other documents produced under the terms of this order contain what OFCCP believes to be anecdotal evidence of discrimination, OFCCP should indicate as much in its response to this interrogatory. In pointing to documents containing anecdotal evidence under Rule 33(d), OFCCP must specify only the responsive documents, not larger collections in which the documents containing the information may be found. OFCCP may indicate that discovery remains ongoing, but it must provide a complete response as of the date that the interrogatories are signed and must supplement its response as it discovers additional evidence.

4. Interrogatory No. 50, Answers Regarding Polices, Practices, Procedures, and Tests

Last, Oracle challenges OFCCP's response to Interrogatory No. 50. DM at 18-19. It asked, "If YOU contend that ANY of the discrimination alleged in the Second Amended Complaint is based upon a theory of disparate impact, identify the policies, practices, procedures, and tests that YOU contend operate to have a disparate impact." OFCCP answered:

> OFCCP incorporates the general objections stated above, and further objects to this Interrogatory to the extent it seeks information protected by the attorney-client privilege, the common interest doctrine, attorney work-product doctrine, the government's deliberative process privilege, the governmental privilege for investigative files and techniques, the government's informant privilege, the trial preparation privilege described in Rule 26(b)(3) of the Federal Rules of Civil Procedure, or exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law.
>
> OFCCP objects to this interrogatory because by Interr. No. 34, Oracle had already asked the equivalent of 25 interrogatories in that its previous interrogatories (Interr Nos. 26-33) contained three subparts each. As such, Oracle exceeded the number of interrogatories that it can make without a court order.
>
> OFCCP objects to this Interrogatory as compound, vague, and ambiguous with respect to the terms "identify," "policies," "practices," "procedures," "tests," and "operate." It is not clear what information Oracle is seeking to identify and what will constitute a sufficient identification. Is it the title of the policy or other terms referenced; is it the date they became effective, etc. It is not clear what Oracle considers a governing policy, practice, procedure to be, what constitutes an official or formal policy, practice or procedure of Oracle as opposed to an individual practice of an Oracle supervisor, etc. Is it referring to a validity test or some other

kind of test? Operate is also vague and ambiguous. There are multiple ways that operate can be interpreted to include the manner of functioning or managing, etc.

Subject to and without waiving the foregoing objections and notwithstanding the forgoing, please see OFCCP's response to Interrogatory No. 25. OFCCP further responds that it conducted a compliance review of Oracle's headquarters in Redwood Shores, California consisting of a comprehensive analysis and evaluation of Oracle's hiring and employment practices. OFCCP has produced its investigative file for Oracle HQCA, OFCCP Case No. R00192699 and has described with specificity which documents from that file contain information about policies, procedures and practices in its initial and supplemental response to Oracle's First Set of Interrogatories (as amended), Interr. No. 2 and 17. The evidence used at the hearing may rely on different facts and different policies, practices, procedures and tests than which is identified in response to this interrogatory. Discovery is ongoing and OFCCP will supplement this response as appropriate.

OFCCP does contend that discriminations alleged in the SAC are also based upon a theory of disparate impact. As noted above, while discovery remains ongoing, OFCCP identifies, at this time, the following Oracle policies, practices, procedures, and tests that may have a disparate impact:

● Oracle's recruiting and hiring practices to include: absence of objective criteria; subjective decision making; centralized recruiting; centralized hiring; resume screening; interview screening; employee referral practices; use of internal recruiters; selective school recruiting; recruiting from Oracle India;

● Oracle's pay practices to include: absence of objective criteria in setting pay, pay increases, performance, and raises; looking to prior salary to set pay; subjective decision making in setting pay, pay increases, performance, and raises; changing compa-ratios of employees that affect compensation for intra-company transfers; assignment of employees to lower paying positions and/or to lower global career levels; pay secrecy culture; limited, inconsistent use of performance evaluations, promotions and raises; centralized budgeting; pay setting practices for starting pay, increases, and interns.

Oracle avers that this response is insufficient because it evades giving a complete answer by use of the term "include" to expand the response into the unknown. In addition, "the response is not specific in what the actual policies and practices are. It provides categories of things that may be a policy or practice but is devoid of specifics."[26] DM at 18-19; *see also* DR at 10.

I agree the answer is insufficient, though the remedy may be minor. At this time, I will not explore what might or might not count as a "policy" etc., as this is unnecessary to decide and not appropriate to decide in a discovery dispute. The interrogatory probes what OFCCP identifies as the policies etc. in question. However, I agree with Oracle that the response as given is incomplete. OFCCP may not use "include" or similar language to leave the response open-ended. It must

[26] Oracle also points out that Judge Larsen ordered a complete response to an earlier interrogatory of this sort. DM at 18.

provide an exhaustive list of its contentions—it must list *all* policies, practices, procedures, and tests that it now contends may have a disparate impact on one of the classes in question. As above, OFCCP may state that discovery is ongoing and it has not yet identified all policies, practices, procedures, and tests. But it must provide a complete answer as of the date that the interrogatory response is signed. The potential need for future supplementation is no excuse for not providing a complete response as of the time of the response. It is only a license to make supplemental responses later. If OFCCP identifies any additional policies, practice, procedures, and tests that it believes have a disparate impact, it must make timely supplementary disclosures and give Oracle fair notice of its claims in this case.

5. Conclusion

OFCCP must supplement each of its interrogatory responses as specified above. It must provide complete responses as of the date the interrogatory is answered. It may not incorporate its pleadings or prior responses. If there are no changes/additions from prior responses or pleadings, it should copy those responses into its responses here and state that the response remains complete. If the only "facts" to support an allegation are the allegation itself, OFCCP should say so. In supplementing its responses, OFCCP may make reference to the documents that contain the supporting facts or the anecdotal evidence. But it must do so with particularity, pointing with adequate precision to the exact documents that contain the responsive information in the particular interrogatory at issue. Oracle is not positioned to divine how OFCCP means to support its allegations and OFCCP must provide sufficient precision to put Oracle in a position to understand the allegations, appreciate their basis, and have a fair opportunity to develop a defense.

OFCCP must identify individuals it believes has knowledge of facts regarding the alleged discrimination and it must do so in one answer that is complete as of the date the interrogatory is answered. However, OFCCP may decline to identify current and former Oracle employees individually on the basis of the government informant privilege. OFCCP must also specify the anecdotal evidence of discrimination it has procured and the policies, practices, procedures, and tests it now contends has a disparate impact.

OFCCP must provide complete, unequivocal answers to each interrogatory. It may indicate that discovery is ongoing and further supplement may be necessary. But this is only a grounds for not providing responses that OFCCP is not yet aware of—not to offer incomplete responses as of the date of the interrogatory is signed. It must timely supplement responses as additional information becomes available. OFCCP must complete proper responses to each interrogatory in accordance with the guidance above within 25 days of the date of this order. *Cf.* 41 C.F.R. § 60-30.9(a).

Oracle asks that I enter an order of prospective evidentiary sanctions in the event that OFCCP fails to supplement and complete its responses. *E.g.* DR at 10. This is premature because there are currently no grounds for sanctions and formulating hypothetical evidentiary sanctions would serve no useful purpose. The request is denied.

ORDER

Oracle's Second Motion to Compel Plaintiff OFCCP to Produce Documents and Further Respond to Interrogatories is granted in part and denied in part, as set forth below.

1. Oracle's Motion to Compel Production as to documents relating to communications with third parties (found in Requests for Production Nos. 104, 106, 111, 116, 121, 123, 131, 134, 137, 140, 151, 154, 157, 170, 175, 180, 185, 197, and 202) is granted in part and denied in part.

    a. OFCCP's claim of the government informant privilege is granted in part and denied in part. OFCCP may redact names and other identifying information for current and former Oracle employees who are government informants from the documents produced. However, only identifying information may be redacted on these grounds and OFCCP must re-do prior redactions subject to that limitation, revealing factual content that would not specifically identify the informant. All redactions based on a claim of privilege must comply with Fed. R. Civ. P. 26(b)(5)(A).

    b. OFCCP's claim of the attorney-client privilege as extended by the common interest doctrine is denied.

    c. OFCCP's claim of attorney work product protection is granted in part and denied in part. Interview notes, memoranda, and other internal documents relating to communications with current and former Oracle employees are protected work product. However, the factual content of those documents is discoverable under Fed. R. Civ. P. 26(b)(3)(A) and must be produced. Any mental impressions, conclusions, opinions, or legal theories may be redacted consistent with Fed. R. Civ. P. 26(b)(3)(B). Identifying informant for government informants may be redacted as well. All redactions based on a claim of privilege must comply with Fed. R. Civ. P. 26(b)(5)(A). Internal documents that do not catalogue interviews or other communications with third parties, as well as internal documents relating to communications with third parties who have been explicitly identified to Oracle may be withheld, though the claim of privilege must comply with Fed. R. Civ. P. 26(b)(5)(A). Documents that are outgoing communications to third parties or incoming communications from third parties are not protected work-product. Identifying information may be redacted consistent with the limited government informant privilege, but OFFCP must comply with Fed. R. Civ. P. 26(b)(5)(A).

    d. Consistent with the limitations above, OFCCP must produce responsive documents for Requests for Production Nos. 104, 106, 111, 116, 121, 123, 131, 134, 137, 140, 151, 154, 157, 170, 175, 180, 185, 197, and 202.

2. Oracle's Motion to Compel Production as to documents relating to communications with *Jewett* counsel (found in Requests for Production Nos. 232-235 is granted in part and denied in part.

    a. Oracle's Motion to Compel Production as to Request for Production No. 232 is granted in part. OFCCP must produce any response documents insofar as the documents relate communications regarding the substantive subject-matter of the claims and defenses in this case.

    b. Oracle's Motion to Compel Production as to Requests for Production Nos. 233, 234, and 235 is denied on the grounds of relevance.

3. Oracle's Motion to Compel Further Response to Interrogatories is granted in part and denied in part.

   a. Oracle's Motion to Compel Further Response Eliminating Incorporation by Reference, specifically as to Interrogatories No. 26 and 28-45 is granted. OFCCP must answer these interrogatories without incorporating by reference the allegations of the Second Amended Complaint, prior responses, or the investigative file as a whole. If no further facts support the allegations in the Second Amended Complaint, OFCCP must say so. If responses have not changed from previous responses, OFCCP may copy its prior response and indicate that there are no additions. OFCCP may refer Oracle to documents consistent with Fed. R. Civ. P. 33(d), but must identify, with specificity, the particular documents containing the facts supporting the allegation subject to the particular interrogatory in question.

   b. Oracle's Motion to Compel Further Response as to Interrogatories No. 46-48 is denied on the grounds that the issues in question are now moot.

   c. Oracle's Motion to Compel Further Response Disclosing Persons with Facts in Interrogatory No. 27 is granted in part and denied in part. OFCCP must provide an exhaustive list of people now known to have knowledge of facts as to the alleged discrimination, except that Oracle's current and former employees may be identified generally, with the names of government informants withheld. Any informants who have agreed to be identified should be listed in the supplemental response.

   d. Oracle's Motion to Compel Further Response as to anecdotal evidence of discrimination in Interrogatory No. 49 is granted in part and denied in part. OFCCP must provide all anecdotal evidence of discrimination except that it may redact or withhold identifying information for current and former Oracle employees. If OFCCP relies on Fed. R. Civ. P. 33(d) to make its response to this interrogatory, it must specifically identify the records that contain the anecdotal evidence of discrimination.

   e. Oracle's Motion to Compel Further Response as to policies, practices, procedures, and tests OFCCP contends operate to have a disparate impact in Interrogatory 50 is granted in part and denied in part. OFCCP must provide a complete and exhaustive list of all policies, practices, procedures, and tests that it contends operate to have a disparate impact and may not provide open-ended responses. OFCCP's answer may be based on what it contends are policies, practices, procedures, and tests.

   f. OFCCP's further responses to all of the interrogatories must be complete as of the date they are signed, regardless of whether or not discovery is ongoing. If and when additional responsive information is identified, OFCCP must make timely supplemental responses to the interrogatories.

4. OFCCP's time for production of additional documents and further response to the interrogatories shall be 25 days from the date of this order.

SO ORDERED.

RICHARD M. CLARK
Administrative Law Judge