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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, v. GOOGLE INC., Defendant.	**Case No.: 2017-OFC-00004**

GOOGLE'S PRE-HEARING STATEMENT

Pursuant to the Court's February 21, 2017 Notice of Hearing and Pre-Hearing Order, Defendant Google Inc. ("Google") hereby files its Pre-Hearing Statement.

I. STATEMENT OF THE ISSUES IN THE PROCEEDING

This case involves Plaintiff Office of Federal Contract Compliance Programs' ("OFCCP" or the "Agency") Compliance Evaluation relating to Google's Affirmative Action Plan ("AAP") for the Company's Mountain View facility. Since the evaluation began on September 30, 2015, OFCCP has requested in excess of 100 categories of information and documents from Google. In response to OFCCP's requests, Google has provided in excess of 1,310,000 data points relating to employee compensation and other requested information for over 21,000 Google employees in the Company's Mountain View AAP as of September 1,

2015. Google also complied with OFCCP's request to complete an on-site review evaluation, which occurred in April 2016.

On June 1, 2016, OFCCP sent Google voluminous requests for additional documents and information. These requests included, among other things, the following Subject Demands that are the subject of this administrative proceeding:

(1) the names and personal contact information for over 21,000 employees in the Mountain View AAP as of September 1, 2015 and over 19,500 employees as of September 1, 2014;

(2) job and salary history for all such employees from 1998 to the present; and

(3) a second snapshot database, containing compensation data for the period September 1, 2013 to August 31, 2014 for over 19,500 employees in the Mountain View AAP as of September 1, 2014.

The requests were new and massive. When Google reasonably and repeatedly asked why OFCCP asked for significantly more data after already receiving vast amounts of information from Google, OFCCP refused to provide any explanation. OFCCP continues to refuse to provide any explanation to Google to allow it to consider whether the requests were reasonable and continues to assert that it is not required to provide any such information to this Court.

On or about December 29, 2016, OFCCP filed the present lawsuit seeking to compel Google to provide information requested by the Subject Demands, or else face debarment, cancellation or suspension of government contracts, and/or other sanctions. The issues that the Court must decide in this proceeding are:

- **Do OFCCP's Subject Demands satisfy all of the *Fourth Amendment* constitutional standards?**[1] The Subject Demands are evaluated under the

[1] The Court has "reject[ed] OFCCP's argument that Google's agreement to the contract terms . . . is a complete waiver of its Fourth Amendment rights." *OFCCP v. Google Inc.*, 2017-OFC-00004, Order Denying Plaintiff's Motion for Summary Judgment, at 4 n.5 (Dep't of Labor Mar. 15, 2017). Accordingly, whether Google waived

standard for administrative subpoenas, which requires that OFCCP's requests be reasonable. *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011). Specifically, the Subject Demands must be (1) "sufficiently limited in scope," (2) "relevant in purpose," and (3) "specific in directive so that compliance will not be unreasonably burdensome." *Id.*; *OFCCP v. Google Inc.*, 2017-OFC-00004, ALJ's Order to Apply Expedited Hearing Procedures; Order Granting in Part Google's Request for Limited Discovery Deposition, at 3 (Dep't of Labor Feb. 21, 2017) ("Expedited Hearing Order") (noting that this standard "has bite."). Google argues the Subject Demands do not comply with the *Fourth Amendment* for several reasons. *First*, the requests are not sufficiently limited in scope. Indeed, they could not have been written more broadly—*e.g.*, one of the Subject Demands seeks personal contact information for all Google employees in its Mountain View AAP as of September 1, 2015 and September 1, 2014. *Second*, by refusing to provide *any* explanation for the Subject Demands, OFCCP has failed to show how the requested material is relevant to the Agency's compliance evaluation. *Third*, OFCCP has failed to formulate the Subject Demands to be specific in directive so that Google's compliance will not be unreasonably burdensome. OFCCP's failure to provide a reasonable basis for the Subject Demands evidences that the probative value that responses to the Subject Demand might have, if any, is disproportionate to the costs and burdens Google already has incurred, and/or will occur, in connection with this Compliance Evaluation.

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its *Fourth Amendment* protections is not an issue that the Court must decide at the hearing, because the Court has already ruled Google did not waive its constitutional rights.

- **Do federal regulations give OFCCP the unfettered and unreviewable power to demand any document or information from Google, regardless of the scope?** In other words, does the Court have a role to play here? OFCCP maintains that under 41 C.F.R. § 60-1.12, the Agency alone has the power to determine whether the Subject Demands are relevant, and that this Court has no power, whatsoever, to modify the Subject Demands. Google maintains that under the Constitution and binding case law, OFCCP does not and cannot have such unchecked power, and instead, the Subject Demands must comply with the *Fourth Amendment*, subject to this Court's review. Google further contends that the legal authority described in Google's March 3, 2017 Brief Regarding the Authority of this Court to Narrow OFCCP's Subject Demands clearly authorizes this Court to modify the Subject Demands so that they comport with the *Fourth Amendment*.
- **Has Google acted in good faith to comply with its obligations as a federal contractor?** As noted above, Google has provided more than 1.3 million data points in response to OFCCP's requests for information to date. With respect to the items that Google has not yet provided, Google has asked only for an explanation for why OFCCP has requested the material. Google's requests for such an explanation are based on OFCCP's own regulations, which permit the Agency to issue only reasonable requests. Also, Google has made good faith attempts to come to some compromise by attempting to negotiate some reasonable boundaries to the information sought by OFCCP. Without any explanation, OFCCP has refused to compromise. OFCCP is attempting to violate

Google's constitutional rights, while at the same time urging this Court to grant it unfettered discretion with respect to the scope and relevancy of its demands in compliance reviews generally. A ruling in favor of OFCCP would prejudice not only Google and its employees, but indeed all federal contractors by allowing the Agency unrestricted and unreviewable access to any contractor's documents or information—including all of a contractor's employee's names and personal contact information.

II. LIST OF STIPULATED FACTS

Please see Exhibit A to Google's Pre-Hearing Statement, which contains the parties' stipulated facts.

III. LIST OF DISPUTED FACTS

- The content of the Subject Demands. Google asserts and will demonstrate that the Subject Demands seek:
    - The name, home telephone number, home address, personal e-mail and all other contact information over 21,000 Google employees in its corporate headquarters AAP as of September 1, 2015, without any limitation;
    - The complete job and salary history from the founding of Google in 1998 to the present for over 21,000 Google employees in its corporate headquarters AAP as of September 1, 2015, without any limitation;
    - The name, home telephone number, home address, personal e-mail and all other personal contact information for over 19,500 Google employees in its corporate headquarters AAP as of September 1, 2014, without any limitation;
    - The complete job and salary history from the founding of Google in 1998 to the present for over 19,500 Google employees in its corporate headquarters AAP as of September 1, 2014, without any limitation; and
    - A second compensation snapshot covering the period from September 1, 2013 to August 31, 2014, including the over 65 compensation data points requested for the current year (September 1, 2015) snapshot, including OFCCP's unmoored request for "any other factors related to compensation," for over 19,500 Google

employees in Google's corporate headquarters AAP as of September 1, 2014, without any limitation.

- Whether Google refused to produce responses to the Subject Demands, or whether Google asked OFCCP to comply with its obligations under the *Fourth Amendment*, Executive 11246 and its implementing regulations and/or OFCCP's own policies and procedures, including asking for OFCCP to merely identify the particular areas (*e.g.*, job title or job groups) where OFCCP was concerned (*e.g.*, gender, race or ethnicity issues).
- Whether OFCCP failed to follow its procedures when it requested data beyond the maximum two-year investigation period.
- Whether OFCCP failed to follow its procedures when it requested a second set of compensation data as of September 1, 2014, which consists of compensation data for the period September 1, 2013 to August 31, 2014 for the employees in Google's corporate headquarters AAP as of September 1, 2014, without providing any explanation of special circumstances or exceptions.
- Whether OFCCP has any evidence that Google has or would retaliate or take any adverse action against any employee for participating in an interview with OFCCP.
- Whether OFCCP has any evidence that Google is discouraging or otherwise affecting employees' willingness to talk directly to OFCCP.
- The unduly burdensome nature and costs of the massive amount of data sought by OFCCP's Subject Demands for unlimited employee names and personal contact information, job and salary history data and the second compensation data snapshot;
- The unduly burdensome nature and costs of the massive amount of information, documentation, and data Google already has provided to OFCCP in connection with this Compliance Evaluation to date.

- The disproportion between the relevance of the Subject Demands, if any, and the costs and burdens Google already has incurred, and/or will occur, in connection with this Compliance Evaluation.
- Whether the privacy concerns of employees will be implicated by the disclosure of the information sought in the Subject Demands and whether those privacy concerns outweigh OFCCP's request for the information.
- Whether Google has made good faith efforts to comply with OFCCP's Subject Demands.

IV. STATEMENT OF LAW

A. The Subject Demands Do Not Comply with the *Fourth Amendment*'s Reasonableness Requirement.

It is well settled law that OFCCP's Subject Demands must comply with the *Fourth Amendment*. *United Space Alliance*, 824 F. Supp. 2d at 91; Expedited Hearing Order at 3. Under this standard, the Subject Demands "shall not be unreasonable." *United Space Alliance*, 824 F. Supp. 2d at 91 (internal quotation marks omitted). Specifically, the Subject Demands must be (1) "sufficiently limited in scope," (2) "relevant in purpose," and (3) "specific in directive so that compliance will not be unreasonably burdensome." *Id.*; Expedited Hearing Order at 3.

OFCCP bears the burden of proving the Subject Demands comply with the *Fourth Amendment*. *See United States v. Powell*, 379 U.S. 48, 57-58 (1964) (holding, in a case involving a challenge to the Internal Revenue Commissioner's power to issue administrative subpoenas, that the agency "must show that the investigation will be conducted pursuant to a legitimate purpose [and] that the inquiry may be relevant to the purpose . . . "). *See also, e.g.*, *OFCCP v. United Space Alliance, LLC*, 2011 ~~2017~~-OFC-00002, Pre-Hearing Order #5 (Dep't of Labor Jan. 25, 2011) ("Plaintiff [OFCCP] will have the burden of establishing that OFCCP . . . made requests which were properly initiated and reasonably limited in scope."); *OFCCP v. United Space*

Alliance, LLC, 2017-OFC-00002, Pre-Hearing Order #6 (Dep't of Labor Feb. 4, 2011) (same). The Court must analyze the reasonableness of the Subject Demands based on the circumstances existing on June 1, 2016, the time that OFCCP made the requests. *See United States v. Allard*, 634 F.2d 1182, 1187 (9th Cir. 1980) (stating that "post hoc justifications are alien to the Fourth Amendment").

The Subject Demands are unreasonable (and were unreasonable as of June 1, 2016) for numerous reasons, including the following:

- The Subject Demands are not sufficiently limited. Indeed, they are as broad as possible. For example, the Subject Demands require:
    - The name, home telephone number, home address, personal e-mail and all other contact information for all 21,144 Google employees in its corporate headquarters AAP as of September 1, 2015, without any limitation;
    - The complete job and salary history from the founding of Google in 1998 to the present for all 21,144 Google employees in its corporate headquarters AAP as of September 1, 2015, without any limitation;
    - The name, home telephone number, home address, personal e-mail and all other contact information for all 19,539 Google employees in its corporate headquarters AAP as of September 1, 2014, without any limitation;
    - The complete job and salary history from the founding of Google in 1998 to the present for all 19,539 Google employees in its corporate headquarters AAP as of September 1, 2014, without any limitation; and
    - A second compensation snapshot, which consists of compensation data for the period September 1, 2013 to August 31, 2014, for all 19,539 Google employees in Google's corporate headquarters AAP as of September 1, 2014, including the over 65 compensation data points requested for the current year (September 1, 2015) snapshot, and including OFCCP's overbroad and ill-defined request for "any other factors related to compensation," without any limitation.
- OFCCP has failed to establish that the Subject Demands are relevant to the compliance evaluation. Since issuing the Subject Demands to Google on June 1,

2016, OFCCP has refused to provide any meaningful explanation for why it has requested voluminous new data after already receiving massive amounts of data from Google. The absence of any explanation demonstrates that OFCCP has not established that the requested material is or was relevant as of June 1, 2016.

- Compliance with the Subject Demands is unreasonably burdensome, because OFCCP requests massive amounts of new data, yet at the same time refuses to provide any legitimate explanation for the relevance of the Subject Demands, thereby preventing this Court from engaging in any form of proportionality analysis.
- Even if OFCCP had proffered some legitimate basis for the relevancy of the Subject Demands, which it has not, the relevance is disproportionate to the costs and burdens Google already has incurred, and/or will occur, in connection with this Compliance Evaluation. As the Court has noted, proportionality is a key concern in this matter. *OFCCP v. Google Inc.*, 2017-OFC-00004, Order Denying Plaintiff's Motion for Summary Judgment, at 6 (Dep't of Labor Mar. 15, 2017) ("MSJ Order"). The Court's power to quash or modify the Subject Demands must be read in light of Rules 26 and 45 of the Federal Rules of Civil Procedure, because the limits on an administrative subpoena are governed by both. *See Exxon Shipping Co. v. United States Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994) (Rule 26 and Rule 45 "give ample discretion to district courts to quash or modify subpoenas . . . ."); *St. Jude Med. S.C., Inc. v. Janssen-Counotte*, 305 F.R.D. 630, 637 (D. Or. 2015) (ruling that Rule 26 limits on discovery "appl[y] to . . . Rule 45 subpoenas"); *Noble Roman's, Inc. v. Hattenhauer Distrib. Co.*,

314 F.R.D. 304, 307 (S.D. Ind. 2016) ("The limits and breadth of discovery under Rule 26 apply to Rule 45 subpoenas . . . ."); *cf.* Fed. R. Civ. P. 46(e)(1)(D) (directing courts to "consider[] the limitations of Rule 26(b)(2)(C)" when deciding whether to enforce a subpoena that calls for costly and/or burdensome production of electronically stored information).

- Rule 26 of the Federal Rules of Civil Procedure, entitled "Duty to Disclose; General Provisions Governing Discovery," codifies a rule of proportionality that generally applies in discovery. *See* Fed. R. Civ. P. 26(b)(1). Under this rule, discovery is limited to material that is "relevant" 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." *Id.*; *see also* MSJ Order at 6 n.7 (quoting Fed. R. Civ. P. 26(b)(1)).
- Accordingly, when analyzing whether to modify OFCCP's Subject Demands, the Court is empowered to consider the rule of proportionality. As the Court noted in its MSJ Order, the Subject Demands' relevance, scope, and burdensomeness are not isolated factors that the Court examines one at a time. *See* MSJ Order at 5. Instead, these are factors that the Court weighs against one another. *Id.*; *Sec'y of Labor v. Kazu Constr., LLC*, No. 16-00077 ACK-KSC, 2017 U.S. Dist. LEXIS 21600, at *7-8 (D. Haw. Feb. 15, 2017) ("[A] court determining the propriety of a subpoena balances the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena.") (internal

quotation marks omitted); Fed. R. Civ. P. 45(d)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."); As *Vaigasi v. Solow Mgmt. Corp.*, No. 11 Civ. 5088 (EMB)(HBP), 2016 U.S. Dist. LEXIS 18460 (S.D.N.Y. Feb. 16, 2016), explained, "Proportionality and relevance are 'conjoined' concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate." *Id.* at *42-44 (quoting Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, A Practical Guide to Achieving Proportionality under New Federal Rule of Procedure 26, 9 Fed. Cts. L. Rev. 20, 53 (Fall 2015) ("[T]he application of the concept of proportionality often turns on how 'central' (or relevant) the proposed discovery may be to overcome any number of objections that are associated with the discovery at issue.")).

- Since the Subject Demands seek irrelevant or marginally relevant information, then even a small burden imposed by responding to those requests is disproportional and unreasonable. *See Dao v. Liberty Life Assur. Co.*, No. 14-cv-04749-SI (EDL), 2016 U.S. Dist. LEXIS 28268, at *13-14 (N.D. Cal. Feb. 23, 2016) (refusing to order discovery under Rule 26 even though the defendant was a large company with significant resources, because the information sought was not "necessary or even especially important"); *In re Bard IVC Filters Prods. Liab. Litig.*, 317 F.R.D. 562, 565-66 (D. Ariz. 2016) (refusing to order discovery under Rule 26 of "marginally relevant" material that was burdensome for the defendant to produce). Furthermore, the burdens and costs Google has incurred and/or will

incur in this Compliance Evaluation demonstrate that the Subject Demands should be stricken in their entirety or tailored by this Court to make the burden proportional.

- OFCCP's scope of review is for two years preceding the initiation of the review. 62 Fed. Reg. 44174, 44178. The review was initiated on September 31, 2015. OFCCP's Subject Demands goes far beyond the scope of review—*e.g.*, OFCCP requests the complete job and salary history from the founding of Google in 1998 to the present for all Google employees in its corporate headquarters AAP as of September 1, 2015 and September 1, 2014. OFCCP's Lilly Ledbetter argument—set forth for the first time in a footnote on page 20 of its 28-page Reply Brief in Support of Motion for Summary Judgment ("Reply Brief")—is off the mark. Case law demonstrates that the Lilly Ledbetter Act of 2009 does not apply to any provision of law except those which the Act specifically amended—namely, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.), Title I (42 U.S.C. § 12111 et seq.), Section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12203), and Sections 501 and 504 of the Rehabilitation Act of 1973. *See Russell v. Cty. of Nassau*, 696 F. Supp. 2d 213, 230 (E.D.N.Y. 2010); *Koger v. Allegheny Intermediate Unit,* Civil Action No. 10-1466, 2012 U.S. Dist. LEXIS 24042, at *19 (W.D. Pa. Feb. 24, 2012) ("[The Ledbetter Act] applies exclusively to causes of action arising out of the statutes which it amended."). Since it is undisputed that Executive Order 11246 has not been so amended, the Lilly Ledbetter Act does not apply to any causes of action arising

out of Executive Order 11246. Consequently, any pay data and pay decisions prior to September 1, 2013 are not within the scope of OFCCP's clearly defined two-year authority of review. This is consistent with OFCCP's recordkeeping provisions, which provide that contractors must maintain personnel or employment records only for a period of not less than *two years* from the date of the making of the record or the personnel action involved, whichever is later. *See* 41 C.F.R. § 1.12 (a) (also demonstrating that the entire text of this provision, not just the title, relates solely to recordkeeping obligations).

- OFCCP's Federal Contractor Compliance Manual ("FCCM") permits a compliance officer to evaluate a contractor's performance for more than a year only when "[s]pecial circumstances or exceptions . . . exist." FCCM at Section 1C03, pgs. 19-20. Consequently, OFCCP is limited to evaluating Google's compliance only for the prior affirmative action plan year preceding the initiation of the compliance evaluation, unless it can demonstrate special circumstances or exceptions. *Id.* Google already has provided data for that prior year period—i.e., September 1, 2014 to August 31, 2015. OFCCP's Subject Demands request a second data set for compensation earned from September 1, 2013 to August 31, 2014 by employees in Google's Mountain View Facility as of September 1, 2014. Since OFCCP has provided no explanation as to the existence of any special circumstances or exceptions (indeed, the Agency has refused to provide any explanation for the Subject Demands), it cannot seek data for the period from September 1, 2013 to August 31, 2014.

- Complying with OFCCP's broad request for over 21,000 employees' names and personal contact information would compromise the privacy of Google's employees. It is not reasonable for OFCCP to demand that the personal information of tens of thousands of people be placed into OFCCP's record system, without any explanation for why such information is relevant.

B. OFCCP's Regulations Do Not Give the Agency Unreviewable and Unlimited Power to Determine Which Materials Are Relevant to a Compliance Evaluation.

OFCCP does not have unfettered power to determine which documents are relevant to a compliance evaluation, for several reasons. First, courts—including this Court—have ruled that OFCCP's Subject Demands are subject to judicial review and must comply with the *Fourth Amendment*. Expedited Hearing Order at 3; *OFCCP v. Convergys Customer Mgmt. Grp.*, 15-OFC-00002, ALJ's Recommended Decision, 2015 OFCCP LEXIS 2, at *21 (Dep't of Labor Oct. 23, 2015) (Henley, Chief ALJ); *United Space Alliance*, 824 F. Supp. 2d at 90-91. This defeats OFCCP's suggestion that its power to demand documents and information is unreviewable and unlimited.

Second, OFCCP's reading of its own regulations is flawed. OFCCP argues that 41 C.F.R. § 60-1.12, which is entitled "Record retention," gives the Agency unreviewable power to determine which of a contractor's documents or information are relevant. Not so. Both the title *and the actual text* of this provision merely require Google to preserve documents that may relate to the compliance evaluation until OFCCP ends its inquiry. 41 C.F.R. § 60-1.12(a); *cf.* Reply Brief at 25 (erroneously criticizing Defendant's citation to the title of § 60.12(a), but ignoring Google's citation to the actual language of the text itself, which relates to recordkeeping only, and failing to acknowledge the obvious fact that the word "relevant" as used alone in § 60.12(a)

for recordkeeping purposes, is different than the words and phrase "relevant to the matter under investigation and pertinent to compliance with the Order" used in § 60-1.43).

In addition, OFCCP's regulations do not grant OFCCP unreviewable power to determine what material is relevant. Nor does anything in the regulations state that Google, or any other federal contractor, waives its constitutional rights by entering into a government contract.

Moreover, other regulations and materials show that relevance is subject to limits, and is not merely an issue that OFCCP alone is permitted to decide. 41 C.F.R. § 60-1.43 requires a contractor to "permit the inspecting and copying of such books and accounts and records, including computerized records, and other material *as may be relevant* to the matter under investigation and pertinent to compliance with [Executive Order 11246]." (Emphasis added). This shows that not all records are relevant, and does not suggest in any fashion OFCCP alone is empowered to determine relevance. 41 C.F.R. § 60-1.20(f) provides that if a contractor believes that information that OFCCP seeks to take offsite is not relevant to compliance, the contractor may challenge the relevance by requesting a ruling by the OFCCP District/Area Director. This too points to the fact that there are limits on the Agency's power to determine whether a document is relevant. Any other conclusion results in a logical fallacy; if everything that is required to be maintained as a record is per se deemed relevant as OFCCP maintains, there would be no point for a contractor to ever make a challenge to any of OFCCP's requests. Also, contrary to OFCCP's erroneous assertion, 41 C.F.R. § 60-1.20(f) contains no language or even suggestion that this section of the regulations or any others "vests ultimate authority in the OFCCP Regional Director to decide whether the requested materials are relevant." *See* Reply Brief at 24-26 (failing to cite any language in § 60-1.20(f) or elsewhere supporting OFCCP's purely self-serving language drafted solely for its Reply Brief).

In any event, if OFCCP were correct that the Regional Director has the "ultimate authority" to determine the relevance of OFCCP's own requests, then this Court's only role in access disputes would be to compel production of the sought after records. OFCCP is taking the position that this Court has no authority whatsoever to challenge the Agency's decisions or modify its requests. If OFCCP were correct, which it is not, then its regulations are unconstitutional since they would give OFCCP unfettered discretion to do as it pleases without any form of judicial review. Lastly, OFCCP states in the Preamble to the 1997 Revisions to OFCCP's regulations that the ability to access employment records pursuant to this regulation did not provide for "unfettered access." 62 Fed. Reg. 44174, 44186. These regulations show the relevance of a contractor's information is not decided simply because the Agency asserts such material is relevant or because a contractor must keep certain records under 41 C.F.R. § 60-1.12(a). Instead, relevance is subject to legal limits, this Court's clear authority to review and the *Fourth Amendment.*

C. **The Deliberative Process, Investigatory Files and Work Product Privileges Cannot Relieve OFCCP of its Burden to Establish the Subject Demands Are Relevant.**

OFCCP may argue at the hearing that under the deliberative process, investigatory files or work product privileges, the Agency is not required to disclose any information relating to the relevance of the Subject Demands. This argument also is off the mark. First, none of these privileges can negate OFCCP's obligation to show that its requests satisfy the *Fourth Amendment* standards applicable to the Subject Demands. It is undisputed OFCCP bears the burden of proof on these issues, and even if the Agency were correct that these privileges protect disclosure, which as shown below it is not, OFCCP still must proffer evidence, protected or not, sufficient to meet these standards. Any other conclusion would render well-established case law—which holds that OFCCP's power to request information is limited by the *Fourth*

Amendment to relevant material—wrong. To side with OFCCP on this issue, the Court would have to rule contrary to that substantial body of law.

Furthermore, the privileges cited by OFCCP do not apply here.

Deliberative process privilege. The deliberative process privilege protects disclosure only of "pre-decisional advisory opinions, recommendations or deliberations." *Arizona ex rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 552 (D. Ariz. 2011). Purely factual material that does not reflect the Agency's deliberative process is not covered by the privilege. *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118 (9th Cir. 1988); *E.E.O.C. v. Fina Oil Chem. Co.*, 145 F.R.D. 74, 75-76 (E.D. Tex. 1992) (rejecting the EEOC's argument that the deliberative process privilege shielded disclosure of "an EEOC statistical report on . . . employment by race based on data supplied by the defendant"). OFCCP bears the burden of establishing the privilege applies. *Wilderness Soc'y v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004).

Here, Google has not asked for disclosure of OFCCP's pre-decisional advisory opinions, recommendations or deliberations. Google has asked for reasonable factual explanations as to why the Subject Demands are relevant, so that Google may attempt to continue complying with OFCCP's requests for information, as it has done since the compliance evaluation began in 2015. To date, OFCCP has not and cannot establish the deliberative process privilege applies here.

Work product privilege. "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial" by an adversary's attorney. Fed. R. Civ. P. 26(b)(3). However, the privilege is qualified, and can be overcome where a party shows it has "substantial need for the materials" and cannot obtain them "by other means." *Id.* OFCCP has the burden to show the privilege applies. *Research Inst. for Med. & Chem., Inc. v. Wisconsin Alumni Research Found.*, 114 F.R.D. 672, 680 (W.D. Wis. 1987). Furthermore,

"work product immunity is not established by the simple assertion of the claim and the recitation of some magic words." *Id.* at 679; *accord OFCCP v. Crown Zellerbach Corp.*, 87-OFC-23, Discovery Order, 1989 OFCCP LEXIS 3, at *69-70 (Dep't of Labor June 6, 1989) (rejecting OFCCP's assertion of the attorney work product doctrine). Here, Google requested reasonable factual explanations for OFCCP's Subject Demands, not documents or tangible things created by OFCCP's attorneys in anticipation of litigation. Moreover, OFCCP's reasonable factual explanations, if they exist, for why it requested the Subject Demands—to the extent an explanation can even be considered a document or tangible thing—are unavailable to Google by other means. To date, OFCCP has not and cannot establish that the attorney work product doctrine applies here.

Investigatory files privilege. OFCCP bears the burden of establishing the investigatory files privilege applies. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). The privilege is qualified, and may be overcome. *Id.* at 1342. To assess OFCCP's assertion of the privilege, the Court must consider many factors, including whether the information sought is factual data or evaluative summary, whether the requesting party's claims are made in good faith, and whether the information sought is available through other sources. *Id.* at 1342-43. Here, Google requested reasonable factual explanations for OFCCP's Subject Demands, not OFCCP's investigatory files. Moreover, OFCCP's reasonable factual explanations, if they exist, for why it requested the Subject Demands—to the extent an explanation can even be considered an investigatory file—are unavailable to Google through other sources. To date, OFCCP has not and cannot establish that the investigatory files privilege applies here.

D. Google's Good Faith Efforts Excuse the Alleged Violations.

Google timely pled a good faith defense in its Answer. (Answer at Fifth Affirmative Defense). At the hearing in this matter, "the contractor shall be given an opportunity to show that the violation complained of did not occur and/or that good cause or good faith efforts excuse the alleged violations." 41 C.F.R. § 60-30.34(a). This Court has ruled that alleged violations are excused when a contractor attempts in good faith to comply with Executive Order 11246. *OFCCP v. Acoustics & Specialties, Inc.*, 95-OFC-5, Recommended Decision, 1995 OFCCP LEXIS 62, at *16-21 (Dep't of Labor Feb. 2, 1995) (ruling that a contractor's good faith attempt to comply with a conciliation agreement, based on the contractor's reasonable interpretation of the agreement, excused the alleged violations). Google has acted in good faith to comply with its obligations as a federal contractor. For example: Google has provided more than 1.3 million data points to date, allowed OFCCP to conduct an on-site visit, and only asked OFCCP to provide reasonable factual explanations for certain items that Google has not provided in order to protect its *Fourth Amendment* rights. Accordingly, Google's good faith efforts excuse the alleged violations.

V. CONCLUSIONS TO BE DRAWN FROM THE TESTIMONY AND DOCUMENTS ON THE RECORD

The following are the conclusions to be drawn from the evidence introduced at the hearing:

- Google has submitted responses to OFCCP's requests outside of the Subject Demands and provided to OFCCP over 1.3 million items of data and hundreds of documents to assist with OFCCP's compliance evaluation.

- OFCCP's Subject Demands are subject to the *Fourth Amendment* restrictions requiring that record requests be sufficiently limited in scope, relevant in purpose and/or not unreasonably burdensome.
- OFCCP has failed to meet its burden of proving that the Subject Demands are reasonable.
- OFCCP has failed to meet its burden of proving that the Subject Demands are sufficiently limited in scope.
- OFCCP has failed to meet its burden of proving that the Subject Demands are relevant in purpose.
- OFCCP has failed to meet its burden of proving that the Subject Demands are not unreasonably burdensome.
- OFCCP has failed to meet its burden of proving that that the relevancy of the Subject Demands, if any, is proportionate to the costs and burdens Google already has incurred, and/or will occur, in connection with this Compliance Evaluation.
- The deliberative process, investigatory files and work product privileges do not apply. And, in any event, none of these privileges can relieve OFCCP of its burden to establish that the Subject Demands are sufficiently limited in scope, relevant in purpose and not unduly burdensome.
- Google's good faith efforts to comply with OFCCP's Compliance Evaluation excuse any alleged violations.
- Google is not required to comply with OFCCP's Subject Demands, or in the alternative, Google is not required to comply with OFCCP's Subject Demands unless

modified so that they are sufficiently limited in scope, relevant in purpose and not unduly burdensome.

VI. ESTIMATED TIME FOR DEFENDANT'S CASE

Two days.

VII. COMMENTS, SUGGESTIONS OR INFORMATION WHICH MIGHT ASSIST THE PARTIES OR JUDGE IN PREPARING FOR THE HEARING OR DISPOSITION OF THE PROCEEDING

OFCCP has argued that if this Court dismisses Plaintiff's denial of access claim, or modifies the Subject Demands to comply with the requirements of the Fourth Amendment, that it will open the floodgates and somehow leave the Agency helpless against federal contractors who might in the future question the Agency's requests, regardless of how reasonable or unreasonable such requests may be. Not only is such an argument misplaced, but OFCCP controls the likelihood of access disputes even occurring.

First, OFCCP's concerns are misplaced. The overwhelming number of contractors simply comply with all OFCCP demands for records during a compliance review. This is not surprising, as during most compliance evaluations, the Agency asks for clearly relevant and properly limited information. Moreover, the administrative process for challenging such requests is so onerous, costly, and (as is in this case when OFCCP issues one-sided press releases) potentially damaging from a public relations perspective, that most contractors will accede to the Agency's demands even if they find them unreasonable. Google does not advocate changing either the process by which access disputes get resolved or, for that matter, the standard under which they get reviewed. Accordingly, OFCCP's fear of all contractor suddenly challenging every request for information is quite overblown.

Second, the facts of this case are unique and extreme. Therefore, we would not expect them to occur with any frequency whatsoever. OFCCP has issued grossly overbroad demands,

then refused all of Google's good faith attempts to reach reasonable solutions to the Company's legitimate concerns without impairing OFCCP's ability to conduct a comprehensive and effective compliance evaluation. In fact, OFCCP's positions are so extreme that it unabashedly urges this Court to grant it unfettered discretion to determine the scope, relevancy and burden of the Subject Demands, going so far as to urge this Court to find that OFCCP's Regional Director, not the courts, serves as the final arbiter of relevancy. The Agency even argues that this Court lacks any discretion whatsoever to modify the Subject Demands, while at the same time citing to case law showing the exact opposite. Such extreme positions serve as examples of the very type of governmental overreach the *Fourth Amendment* was specifically designed to protect against.

Third, as for future cases, OFCCP controls its own destiny. If the Agency acts reasonably when making demands for records from contractors, then not only will employers gladly cooperate, but OFCCP will righty succeed on those rare occasions when a government contractor frivolously challenges the Agency's reasonable requests. But, in this case, OFCCP's unreasonableness is ubiquitous. Indeed, the only slippery slope that might arise from this matter would stem from a ruling that effectively grants OFCCP what it seeks – unlimited and final authority to do as it sees fit. The ramifications of such a ruling would be enormous. The Agency has exhibited its willingness to repeatedly step on government contractors' constitutional rights. A holding condoning OFCCP's actions here would only encourage the Agency to take even more extreme positions in the future, not only against Google, but against federal government contractors that may not have the resources necessary to adequately defend themselves.

Finally, even if the Agency's concern was legitimate, OFCCP premises its argument on the notion that an employer somehow *should be discouraged* from challenging government demands for records that it finds unreasonable. Not only is such a positions self-serving, but it actually advocates for the chilling of the exercise of a constitutional right. If the *Fourth Amendment* has any meaning at all in the context of federal agency audits, which it must, then Google respectfully submits that this Court must check OFCCP's extreme and unconstitutional actions.

Dated: March 28, 2017

JACKSON LEWIS P.C.

By: Lisa Barnett Sween

Lisa Barnett Sween
Matthew J. Camardella
Daniel V. Duff
Antonio C. Raimundo
Attorneys for Defendant
GOOGLE INC.
50 California Street, Floor 9
San Francisco California 94111
Phone: 415-394-9400
Fax: 415-394-9401
Email: Lisa.Sween@jacksonlewis.com
CamardeM@jacksonlewis.com
Daniel.Duff@jacksonlewis.com
Antonio.Raimundo@jacksonlewis.com

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2017, I caused a true and correct copy of the foregoing Pre-Hearing Statement to be served by sending a copy of same via courier to:

Ian Eliasoph, Esq.
Counsel for Civil Rights
Office of the Solicitor
U.S. Department of Labor
90 7th Street, Suite 3-700
San Francisco, CA 94103
Eliasoph.Ian@dol.gov

Marc A. Pilotin, Esq.
Office of the Solicitor
U.S. Department of Labor
90 7th Street, Suite 3-700
San Francisco, CA 94103
Pilotin.Marc.A@dol.gov

Antonio C. Raimundo

ANTONIO C. RAIMUNDO, ESQ.