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April 4, 2017

VIA COURIER

RECEIVED

APR 04 2017

Honorable Steven B. Berlin
U.S. Department of Labor
Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

Office of Administrative Law Judges
San Francisco, Ca

Re: Office of Federal Contract Compliance Programs,
United States Department of Labor v. Google Inc.
Case No.: 2017-OFC-00004
Opposition to OFCCP's March 30, 2017 Motion to
Shorten Time and Motion in Limine to Limit Testimony

Dear Judge Berlin,

On behalf of Defendant Google Inc., we write in opposition to OFCCP's March 30, 2017 letter (the "Motion"), which in substance contains two motions. OFCCP first requests an order shortening the time in which Google must respond to OFCCP's second and third sets of requests for admissions ("RFAs"). OFCCP also moves in limine for an order "limiting the witnesses called by Google." Motion at 3. The Court should deny both motions.

In filing these motions, OFCCP seeks to subvert the very procedural process it elected to follow. OFCCP chose to pursue this case in in an expedited manner, using proceedings which contemplate a "short, streamlined process," with limited discovery and a rapid hearing timeline. OFCCP v. Google Inc., 2017-OFC-00004, Order Denying Plaintiff's Motion for Summary Judgment, at 3 (Dep't of Labor Mar. 15, 2017) (the "MSJ Order"). However, the Agency's present actions are contrary to the intent of those proceedings.

First, OFCCP more than doubled its discovery requests by serving untimely new RFAs in late March. Though OFCCP originally requested that discovery be limited in this lawsuit, the Agency now asks the Court to bend the rules, seeking an order compelling Google to respond early to OFCCP's late discovery requests. Second, OFCCP's decision to place this case in expedited hearing proceedings has meant that Google has had no opportunity to depose OFCCP witnesses.

Yet, OFCCP now asks the Court to forbid Google from even asking questions on a key topic during the upcoming hearing—whether the Agency’s document demands were relevant to its investigation. This contradicts the Court’s MSJ Order, in which the Court ruled a hearing involving witness testimony is necessary for the Court to determine whether the Agency’s demands are relevant to its investigation.

## I. MOTION TO SHORTEN TIME

### A. OFCCP’s untimely second and third sets of RFAs

By placing this case in expedited proceedings, OFCCP originally took the position that significant discovery is unnecessary. OFCCP has also argued that no discovery at all is required for the Court to resolve this matter. *See* Motion for Summary Judgment at 10-15. However, more than ten weeks after filing its lawsuit, OFCCP totally reversed course. On March 10, 2017, OFCCP served its first set of RFAs (29 requests). Ex. 3. Google served its responses today.

On March 20, 2017, OFCCP served a second set of RFAs (six new requests). Ex. 1. And, without explanation, on March 24, 2017, OFCCP served a third set of RFAs (27 new requests). Ex. 2. Google’s deadlines to respond to the 33 new RFAs—more than double the number in OFCCP’s first set—fall well after the expedited hearing begins. *See* 41 C.F.R. § 60-30.9(b). All of OFCCP’s new RFAs seek information that the Agency easily could have asked for earlier during this case. *See, e.g.*, Ex. 1 at RFA 33 (requesting revenues from 2014 to the present); Ex. 2 at RFA 54 (requesting information relating to a 2010 OFCCP compliance evaluation).

### B. OFCCP offers no good cause to support the motion to shorten time.

A party’s deadline to respond to an RFA is 25 days after service. 41 C.F.R. § 60-30.9(b). The Court may deny a request to shorten time if the requesting party had sufficient opportunity to serve the RFAs earlier. *Depew v. Hanover Ins. Co.*, 76 F.R.D. 8, 9 (E.D. Tenn. 1979) (interpreting Fed. R. Civ. P. 36).<sup>1</sup> All of OFCCP’s 33 new RFAs seek information that OFCCP could have requested much earlier than March 20 or March 24, 2017. *See, e.g.*, Ex. 1 at RFA 33 (requesting information regarding spreadsheets dated in 2015); Ex. 2 at RFA 44 (requesting information on how much Google spent on employee food in 2014). This is strong grounds on which the Court should deny OFCCP’s motion. *Depew*, 76 F.R.D. at 9.

Furthermore, in expedited hearing proceedings, a party is not required to respond to RFAs if the deadline to respond falls after the hearing. *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 96 (D.D.C. 2011) (ruling that a party was not required to respond to untimely RFAs because the response deadline was two days after the expedited hearing); Ex. 4 at 27:18-29:14 (*OFCCP v. United Space Alliance, LLC*, 2011-OFC-00002, Transcript of Proceedings (Dep’t of Labor Feb. 14, 2011)). Here, OFCCP served its second and third sets of RFAs such that Google’s deadlines fall on April 14 and April 18, 2017, respectively, well after the April 7, 2017 date that the expedited

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<sup>1</sup> OFCCP expedited hearing regulations do not address motions to shorten time. Accordingly, the Court may rely on the Federal Rules of Civil Procedure for this issue. 41 C.F.R. § 60-30.1. Rule 36 allows the Court to shorten or enlarge the time a party has to answer RFAs. Fed. R. Civ. P. 36(a)(3).

hearing begins. Accordingly, the Court should not require Google to respond to OFCCP's second and third sets of RFAs.

Even if the Court is inclined to require Google to respond to OFCCP's 33 new RFAs, the Court should not require Google respond before the April 7, 2017 hearing because doing so would prejudice Google. *See Weva Oil Corp. v. Belco Petroleum Corp.*, 68 F.R.D. 663, 666-67 (N.D. W. Va. 1975). Presently, Google is fully engaged in preparing for the hearing, which commences in just three days. Forcing Google to respond to untimely and voluminous new discovery requests would unfairly divert Google from critical hearing preparation just days before the hearing begins. Indeed, the Court noted in its MSJ Order that the parties should be "preparing for a hearing on a very short schedule" rather than engaging in motion practice. MSJ Order at 3 n.3. OFCCP's motion to shorten time is inconsistent with the Court's directive.

OFCCP also suggests the "hearing will be streamlined" if the Court grants the Agency's motion to shorten time. Motion at 2. However, the Court has stated already that the hearing will last two days, even though OFCCP has asserted repeatedly that it needs only two hours to present its case. OFCCP has failed to explain how responding early to late discovery would streamline a hearing that is scheduled for only two days. OFCCP's motion to compel a response to these late RFAs serves only to prejudice Google.

## II. MOTION IN LIMINE TO LIMIT TESTIMONY

### A. The four OFCCP witnesses at issue

OFCCP seeks to limit the testimony of four OFCCP officials: Compliance Officer ("CO") Carolyn Mcham-Menchyk, CO Farha Haq, Assistant District Director Agnes Huang, and Regional Director Janette Wipper. Though all four work on the Agency's compliance evaluation in this case (the "Compliance Evaluation"), they have different responsibilities, seniority levels, and participation in the Compliance Evaluation. Accordingly, their testimony will not be cumulative or duplicative.

For example, CO Mcham-Menchyk served as the lead compensation interviewer during OFCCP's onsite evaluation of Google's facilities in April 2016. No other witness can testify as to the onsite evaluation in the same manner as her. Assistant District Director Huang, who supervises COs Mcham-Menchyk and Haq, authored the June 1, 2016 letter to Google that requested the items in dispute in this lawsuit (the "Subject Demands"). And Regional Director Wipper, who supervises the other three witnesses, wrote the Notice to Show Cause that led to this lawsuit, and participated in a key November 29, 2016 teleconference between the parties.

**B. The MSJ Order does not limit the scope of witness testimony.**

It appears that OFCCP requests that the Court forbid Google from asking witnesses questions about whether OFCCP's Subject Demands are relevant to the Compliance Evaluation.<sup>2</sup> *See, e.g.*, Motion at 3 (“The contents of the ongoing investigation simply are not before the Court at this stage; rather it is the alleged burden on Google to comply with OFCCP's requests.”). OFCCP asserts that the Court ruled in its MSJ Order that testimony as to the Subject Demands' relevance is “outside the subject matter of this hearing.” *Id.* at 3.

OFCCP's argument is disingenuous. The MSJ Order was a complete denial, and did not grant a single part of OFCCP's motion.<sup>3</sup> Accordingly, the MSJ Order does not limit the questions Google may ask at the hearing. To the contrary, the Court ruled that a hearing involving witness testimony is necessary for the Court to determine the lawfulness of the Subject Demands. *See* MSJ Order at 6. The Court specifically explained it needed a hearing because the paper record in this case did not permit the Court to “conclude as a matter of law that OFCCP's requests in their entirety are both *relevant to the compliance review* and not unreasonably burdensome.” *Id.* (emphasis added).

OFCCP's motion to limit testimony ignores the Court's stated need for witness testimony as to relevance. OFCCP instead asks (on the basis of a paper record that has not changed since the Agency moved for summary judgment) to summarily rule that the Subject Demands are relevant to the Compliance Evaluation. In other words, OFCCP improperly seeks to achieve through the present motion in limine what it failed to obtain in its summary judgment motion—*i.e.*, a ruling that the Subject Demands are relevant as a matter of law. The Court has rejected that argument already, and should do so again.

**C. OFCCP has not established the deliberative process or investigatory files privileges apply.**

Relying on the deliberative process and investigatory files privileges, OFCCP states in hopelessly overbroad fashion that its witness will “not . . . answer questions about the investigation.” Motion at 3. Not only is this argument without merit, but it usurps this Court's authority to determine what evidence is material and to what extent, if any, a privilege should apply. As an initial matter, OFCCP's assertion of the privileges is premature. OFCCP speculates that Google will ask questions that invade its privileges, but the Agency cannot know what questions Google will ask until the hearing.

Furthermore, OFCCP fails to establish that the deliberative process or investigatory files privileges apply here. OFCCP bears the burden of establishing both privileges. *Wilderness Soc'y v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 1, 14 (D.D.C. 2004); *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). OFCCP has submitted no evidence

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<sup>2</sup> OFCCP's motion in limine is inscrutable because OFCCP does not explicitly state what testimony limits it asks the Court to impose.

<sup>3</sup> Bizarrely, OFCCP argues *Google* has “ignore[d]” the Court's MSJ Order. Motion at 2. But this is exactly backwards. The MSJ Order is entirely adverse to OFCCP, because it did not grant the Agency's motion in any part.

whatsoever to support its privilege claims. Therefore, no basis exists upon which the Court can rule that either privilege applies at this point.

At bottom, OFCCP's premature and specious privilege claims seek to prevent the Court from even hearing evidence as to the Subject Demands' relevance. Accepting this argument would contravene substantial case law stating that the Court has a role in deciding whether a federal agency's administrative subpoena seeks relevant materials, including *McLane Co., Inc. v. E.E.O.C.*, 581 U.S. -- (Apr. 3, 2017), a Supreme Court decision decided earlier this week. Ex. 5. As *McLane* noted, a court deciding whether an administrative subpoena seeks irrelevant materials "need not defer to the [Agency's] decision on that score," and is instead empowered to make its own decision based on the facts and circumstances in a given case. *Id.* at 10 (distinguishing lower court cases holding that a trial court should defer to agency relevance determinations).

### III. CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court deny OFCCP's March 30, 2017 motion to shorten time and motion in limine to limit testimony.

Very truly yours,

JACKSON LEWIS P.C.

  
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ACR/lea

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