

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

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Office of Administrative Law Judges
San Francisco, Ca

GOOGLE INC.'S POST HEARING
MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DISMISSAL OF PLAINTIFF'S DENIAL OF ACCESS CLAIM,
OR IN THE ALTERATIVE, A NARROWING OF THE SUBJECT DEMANDS

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PRELIMINARY STATEMENT

On one hand, this case involves Google Inc.'s reasonable efforts to protect its *Fourth Amendment* right under the U.S. Constitution to be free from governmental overreach in connection with an Office of Federal Compliance Programs ("OFCCP" or "the Agency") compliance evaluation. On the other, it involves OFCCP's extreme positions that Google and all other government contractors have no *Fourth Amendment* rights at all, and that this Court lacks discretion to overturn OFCCP's allegedly unfettered discretion to determine the scope, relevance and burden of its requests.

But the case law and common sense dictate that OFCCP's extreme positions are not sustainable. This Court already has held that: (1) Google did not waive its *Fourth Amendment* rights by merely entering into a government contract; and (2) the *Fourth Amendment's* administrative subpoena standard is applicable to this matter. This means that OFCCP's three demands in dispute ("the Subject Demands") must be sufficiently limited in scope, relevant in purpose, and specific in directive so as not to be unreasonably burdensome. As summarized herein, the evidence shows that OFCCP has failed to establish its burden of proof as to these elements, each of which must be satisfied in order for the Subject Demands to be deemed constitutional. Accordingly, Google respectfully requests this Court to dismiss OFCCP's denial of access claim in its entirety and not enforce the Subject Demands.

A. Subject Demand 1

Subject Demand 1 seeks the names and personal contact information, including home address, telephone number and e-mail, for all of the over 25,000 employees in Google's corporate headquarters affirmative action plan in Mountain View, California ("MTV AAP"), without limitation. In light of OFCCP's Regional Director Janette Wipper's concession that the

Agency cannot and will not interview all of these employees, Subject Demand 1 is not sufficiently limited as a matter of law. In addition, OFCCP's shifting explanations for seeking names and contact information for all employees relate solely to speculative and uncorroborated assertions regarding the protection of witnesses or the administrative convenience of the Agency, and not, as required, to relevance. Furthermore, Subject Demand 1 is not specific in directive so as not to be unreasonably burdensome. By admitting that the Agency has conducted employee interviews in cases where the employer was aware of the identity of the interviewees, failing to offer this Court a consistent explanation as to the basis for its demand, and not tying the relevance of the disclosure to anything more than an incredulous explanation related to administrative convenience, OFCCP's demand unreasonably places on Google the burden of potential inadvertent disclosure of private information of its employees to third parties. As this Court already has recognized, such breaches are not merely a hypothetical risk.

B. Subject Demand 2

Subject Demand 2 seeks the job and salary history, including pay prior to joining Google, competing offers, prior experience¹ for the over 21,000 employees on the September 1, 2015 snapshot, without limitation. OFCCP's entire basis for this demand emanates from Regional Director Janette Wipper's uncorroborated testimony regarding OFCCP's preliminary compensation analyses and the Agency's incorrect understanding of Google's compensation policies and practices. When viewed in this light, the boundless scope and complete irrelevance of significant portions of these requests becomes evident.

¹ Google has provided OFCCP with copies of appropriately redacted resumes for all employees on the September 1, 2015 snapshot. Since those resumes would contain the prior work history of each employee, the Company already has complied with the component of Subject Demand 2 related to prior experience. Accordingly, this issue is moot.

After OFCCP repeatedly informed this Court and Google that its preliminary compensation analyses and findings were “irrelevant” to the issues in this case, and “under no circumstances” would such findings be disclosed in this matter,² Ms. Wipper announced for the first time at the hearing that OFCCP allegedly had “found compensation disparities against women pretty much across the entire workforce.” On this basis, Ms. Wipper testified that OFCCP is seeking the information encompassed in Subject Demand 2 to determine if it could explain the pay disparities OFCCP claims to have existed as of September 1, 2015.

Having unsheathed its sword by suddenly reversing its earlier positions, OFCCP then disingenuously shielded the Agency from Google’s attempt to cross examine Ms. Wipper on the basis of government privilege. It is well established that when a witness offers conclusory statements regarding the results of an analysis, without providing the underlying basis for those conclusions, the witness’ testimony as to the findings should receive no weight at all. In addition, while OFCCP has the right to assert a privilege, its decision to do so cannot excuse its failure to otherwise meet its burden of proof in this case, which the Agency chose to bring against Google after steadfastly refusing any reasonable modification to the scope of its overbroad requests. Otherwise, in all future cases, the Agency could merely assert any uncorroborated and conclusory statement to circumvent the *Fourth Amendment* in all denial of access claims it brings. Surely, this denies an employer due process as it would have no means whatsoever to challenge the veracity of such a statement.

Similarly, Ms. Wipper’s testimony regarding Google’s Vice President of Compensation Frank Wagner’s interview at OFCCP’s April 2016 onsite constitutes nothing more than double hearsay and demonstrates fundamental misunderstandings as to how Google’s compensation

² Plaintiff asserted this position in its opposition to Google’s motion to remove this case from the expedited calendar and/or for additional discovery, its Motion for Summary Judgment, and in its Prehearing Statement.

policies and practices work. Ms. Wipper was not present at the onsite and solely relied on purported information provided to her by Jane Suhr and other OFCCP officials who actually interviewed Mr. Wagner to formulate her testimony. Ms. Suhr was present at Mr. Wagner's onsite interview and her testimony reveals that she did not have a correct understanding of what Mr. Wagner said at the onsite interview. Furthermore, the testimony of both Ms. Wipper and Ms. Suhr clearly demonstrate that OFCCP does not understand how Google's compensation policies and practice work. Accordingly, no weight should be afforded that testimony.

Even if Ms. Wipper's belated, self-serving, and contradictory testimony were somehow credited, OFCCP still has not met its burden of proof that Subject Demand 2 is sufficiently limited in scope and relevant in purpose. Frank Wagner's unrefuted testimony shows that an employee's job history could not have impacted an employee's salary, bonus or stock grant as reported on the September 1, 2015 snapshot. Accordingly, OFCCP's request for job history is by definition overly broad and irrelevant to any disparities OFCCP claims to have identified in compensation as of September 1, 2015.

Mr. Wagner further testified that between 18 and 20% of Google's MTV AAP workforce consists of employees who were Campus Hires – *i.e.*, individuals hired prior to or soon after graduation from an institution of post-secondary education. Since all Campus Hires receive the same starting salary for the position they are hired into at Google, their prior salary before Google and any competing offer by definition cannot be the cause of any discrepancies in pay OFCCP allegedly identified as of September 1, 2015. Accordingly, by failing to exclude Campus Hires from its Subject Demands, and by demanding prior salary and competing offers for everyone on

the September 1, 2015 snapshot, Subject Demand 2 is not sufficiently limited in scope or relevant in purpose.³

As for Industry Hires, defined as anyone who is not a Campus Hire, Mr. Wagner testified that such employees' prior salary before Google or a competing offer impacts starting salary only about half the time. So, for approximately 50% of the Industry Hires on the September 1, 2015 snapshot, prior salary and competing offers could not have impacted their salary and, therefore, is by definition irrelevant.

Mr. Wagner further testified that Google's policies require every employee's post-promotion salary be modeled at 85% of the Market Reference Point for the position to which he or she is promoted. The only exceptions to this policy occur when the modeled amount would result in an increase of less than 5% or more than 20%. In those cases, the modeled promotional increase would be increased to 5% or reduced to 20%, respectively. Accordingly, the salary history at Google could only have impacted the salary of employees on the September 1, 2015 snapshot whose most recent promotional increases were modeled at 5% or 20%. Even for those individuals, only their salary *immediately prior* to their most recent promotion could have impacted their September 1, 2015 compensation. Accordingly, by including employees outside of this population, OFCCP's Subject Demand 2 is, by definition, insufficiently limited in scope and/or not relevant in purpose.

Similarly, OFCCP has not satisfied its burden of showing that Subject Demand 2 is specific in directive so as not to be unreasonably burdensome. In light of the complete lack of relevance of significant portions of this demand, as described herein, any burden imposed on

³ The fact that Ms. Wagner testified that sign-on bonuses and new hire stock awards can be influenced by a Campus Hire's prior salary does not impact this conclusion. As the Court recognized, and as Mr. Wagner testified, these are both one time payments that have no impact on an employee's compensation as of September 1, 2015.

Google with respect to them is unreasonably burdensome. Google Discovery Program Manager Kristin Zmrhal's unrebutted testimony confirms that Google already has incurred approximately \$500,000 in costs to comply with OFCCP's requests for information and documentation to date, and is likely to incur up to an additional \$100,000 to comply with the three Subject Demands as currently written.

C. Subject Demand 3

Subject Demand 3 seeks a new snapshot of all employees in Google's MTV AAP as of September 1, 2014. According to OFCCP, this snapshot should include all of the same information contained in the September 1, 2015 snapshot, as well as the job and salary history, including pay prior to joining Google, competing offers, and prior experience, for each of the over 19,000 employees on that report, without limitation.

Once again, OFCCP's entire basis for this demand stems from Ms. Wipper's unsupported allegation of disparities in the compensation of men and women across the entire workforce. Specifically, Ms. Wipper testified that OFCCP needed the additional snapshot to see if those alleged disparities also existed in 2014. Even if the Court were to credit Ms. Wipper's testimony, the request remains overbroad, since the only information OFCCP could possibly use to ascertain if the disparities existed in 2014 is the same data contained on the September 1, 2015 snapshot. The historical information (*i.e.*, prior salary, salary history, etc.) sought by OFCCP is wholly irrelevant to determining whether disparities existed. Moreover, even if the Court somehow found the notion that historical information could be relevant, as described above and, in more detail below, only some of that information is relevant to an employee's compensation as of September 1, 2014.

* * *

Google respectfully submits that the record evidence summarized herein overwhelmingly establishes that OFCCP's Subject Demands do not comply with the *Fourth Amendment* standards for the enforcement of an administrative subpoena. Accordingly, OFCCP's complaint alleging denial of access should be dismissed in its entirety and OFCCP's Subject Demands should be quashed. Alternatively, Google reasonably requests that the Subject Demands be modified consistent with each of the elements of the administrative subpoena standard, as described in detail in Point II below.

SUMMARY OF EVIDENCE

A. The Subject Demands

OFCCP sent a scheduling letter to Google on September 30, 2015, initiating a compliance evaluation of Google's policy and practices at its Mountain View, California campus (the "Compliance Evaluation"). Transcript of the Administrative Hearing, April 7, 2017 and May 26, 2017 ("Hrg. Tr.") Ex. 5. In response, Google has provided numerous submissions, including a compensation database for all employees in Google's Mountain View AAP as of September 1, 2015 (the "2015 Snapshot"). Stip. Facts 10, 11, 12, 13, 18.

On June 1, 2016, OFCCP sent a letter requesting additional categories of information, including the three Subject Demands at issue here. Hrg. Tr. Ex. 6. These are:

- *Subject Demand 1*: The names and personal contact information for all 25,000-plus employees in the 2015 Snapshot and 2014 Snapshot. Hrg. Tr. 7:23-8:3; Hrg. Tr. Ex. 6 at 2-3; Stip. Fact 14; OFCCP Prehearing Statement at 5. Hrg. Tr. 7:23-8:3.⁴
- *Subject Demand 2*: Complete "job history" and "salary history" at Google back to 1998 for all 25,000-plus employees included in Google's Mountain View AAP, as well as the prior salary an individual held prior to joining Google as well as their prior experience. Hrg. Tr. Ex. 6 at 2; Stip. Fact 14; OFCCP Prehearing Statement at 4. Hrg. Tr. 42:15-43:11, 76:2-5; OFCCP Prehearing Statement at 4 n.3. "Job History" includes each employee's "starting job code, starting job family, starting level, starting organization, [and] starting position/title." OFCCP Prehearing Statement at 4 n.3.
- *Subject Demand 3*: An additional compensation snapshot database dated as of September 1, 2014 (the "2014 Snapshot"). Hrg. Tr. Ex. 6 at 2-3; Stip. Fact 14; OFCCP Prehearing Statement at 4.

⁴ The 2015 Snapshot contains 21,114 employees. Stip. Fact 10. The 2014 Snapshot, if produced, would contain a similarly large number of employees. The total number of people in the two Snapshots, accounting for overlap, exceeds 25,000.

B. Frank Wagner Testimony

Frank Wagner is Google's Vice President of Compensation. Hrg. Tr. 166:7-12. Mr. Wagner testified that Google sets employee salary compensation by using a market reference point ("MRP"). *Id.* at 169:17-170:15. The MRP is based on "market data for that role, which Google "gather[s] . . . for [each] role and we review that market data every single year." *Id.* at 169:17-25. When it sets MRPs, Google "target[s] the 90th percentile . . . the top ten percent of the market." *Id.* Google does this "to attract and retain the world's best talent." *Id.* at 167:19-168:2. After the establishment of a MRP for a position, Google then sets a "standard offer baseline" target compensation for that position at 80% of the MRP. *Id.* at 171:4-8. "[T]he philosophy behind bringing people in at 80 percent is that we want to bring them in below anyone who is already in the job, so that they can earn incremental compensation and salary increase based on performance." *Id.* at 171:4-8.

Approximately 20% of Google's employees on the September 2015 snapshot were Campus Hires—*i.e.*, employees hired directly from university. *Id.* at 197:25-198:7. Mr. Wagner testified that the prior salary history for a new hire coming straight from a post-secondary educational institution (*i.e.*, the person's salary just before joining Google) plays no role in setting that person's compensation. *Id.* at 171:9-172:1; 197:1-10. "[P]rior salary is not relevant to setting starting salary" for Campus Hires because Google wants to "pay those new graduates for the job into which we're hiring them for Google." *Id.* at 197:1-18. Campus Hires cannot even negotiate their salary. *Id.* at 197:19-21. For Campus Hires, "neither prior salary nor the ability to negotiate impacted their starting salary" and "there was no negotiation and prior salary was not considered." *Id.* at 198:4-9. Furthermore, Google "do[es] not look at their compensation in any prior job for a new grad, period, ever." *Id.* at 216:2-14; *see also id.* at 171:9-19.

Industry Hires are employees who join Google from another company or from the industry, rather than from a university. *Id.* at 198:19-199:1. Certain types of Industry Hires, such as IT help desk staff, all receive the exact same salary. *Id.* at 198:11-18. Approximately 50% of industry hires receive the “minimum salary” of 80% of MRP when they join Google. *Id.* at 199:6-12. For these employees, “the actual amount of their prior salary” has no effect on their compensation at Google when they join the Company. *Id.* at 199:2-16.

Google provides annual merit increases to employees based upon performance. *Id.* at 177:17-18. Mr. Wagner testified that “job history” at Google and “prior job history” (i.e., jobs before Google) have no bearing at all on an employee’s merit increase. *Id.* at 179:8-12. Instead, Google gives employees merit increases in salary based on the person’s performance in the current year. *Id.* at 177:17-179:12. Google’s merit increase system is prospective and never “look[s] backwards.” *Id.* at 180:17-25. Good performance in a prior year does not affect a merit increase in the present; only current performance affects the merit increase. *Id.*

Generally, when employees are promoted, Google models their new salary at 85% of the MRP of their new job. *Id.* at 200:13-22. There are exceptions. First, if moving the employee to 85% of the modeled salary for their new job would result in a pay increase of less than 5%, Google will increase their pay at least 5%. *Id.* at 200:23-201:11. Second, in some situations, moving the employee to 85% of the modeled salary for their new job would result in a pay increase of more than 20%. Google will only increase that employee’s pay by 20%. *Id.* at 200:12-20. These exceptions do not apply to the overwhelming majority of promotional increases. Indeed, for approximately 80% of promotions, compensation is “not affected by prior salary” because the 5% minimum/20% maximum rules are not triggered. *Id.* at 203:13-22. And in 90% of the cases, employee compensation post-promotion is within 1% of Google’s model.

Id. at 202:9-13. An employee's "job history at Google is not taken into consideration when setting compensation" for the post-promotion job. *Id.* at 182:1-13. Neither is their salary history (the "salaries associated with each of the jobs they've previously held at Google") taken into consideration when setting compensation for the post-promotion job. *Id.* at 182:14-25. Instead, the only salary history that becomes relevant is the "immediate salary prior to the promotion for the people subject to the 5 percent minimum and 20 percent maximum." *Id.* at 204:14-23.

C. Kristin Zmrhal Testimony

Kristin Zmrhal is Google's Senior Legal Operations Manager. Hrg. Tr. 261:7-10. Ms. Zmrhal is "responsible for managing a team of project managers and technologists that collects data, documents from Google employees and Google internal repositories." *Id.* at 262:20-25. Ms. Zmrhal's testimony showed Google's response to OFCCP's demands to date in the Compliance Evaluation has been burdensome to the Company. In total, Google employees, consultants, inside attorneys, and outside counsel have spent 2,300 hours responding to OFCCP requests. *Id.* at 269:8-270:19. Google's "low and conservative" estimate of the costs associated with work performed by Google employees and outside consultants is \$250,000. *Id.* at 272:15-274:23. Outside counsel fees relating to responding to OFCCP's requests to date have totaled \$210,000. *Id.* at 275:3-13. In all, Google's expense in responding to OFCCP's document demands has "just under been \$500,000" to date. *Id.* at 275:14-17. Though Google has not yet complied with the Subject Demands, Google has "evaluated about how much time it would take to collect [the] information" in the Subject Demands. *Id.* at 276:18-25, 278:10-13. Ms. Zmrhal testified it would take "400 to 500 hours" for Google to collect the information requested. *Id.* at 277:1-12. The cost associated with that collection would be "as much as \$100,000." *Id.* at

277:1-14. That estimate, however, does not include the cost of reviewing or redacting information, which cannot be ascertained until the data is collected. *Id.* at 277:15-24.⁵

D. Janette Wipper Testimony

OFCCP Regional Director Janette Wipper testified that OFCCP's review period is "two years from when the scheduling letter is issued to the contractor." Hrg. Tr. at 35:2-7. She specifically testified that the compliance evaluation "two-year scope" in the instant matter would start in "September 2015" when OFCCP sent its scheduling letter to Google, and "would go back to September 2013." *Id.* at 35:15-19; *see also id.* at 40:6-8. However, Ms. Wipper also testified that OFCCP is looking back beyond the Agency's review period. *Id.* at 46:25-47:17.

OFCCP's counsel asked Ms. Wipper to explain why OFCCP's Subject Demands (specifically the 2014 snapshot demanded) were relevant to the compliance evaluation. Ms. Wipper testified, "[W]e reviewed and analyzed the [2015] snapshot and ran regressions on that And because we found systemic compensation disparities against women pretty much across the entire workforce, we wanted to look to see what happened the year before." *Id.* at 47:24-48:10. Her choice of words is notable; she directly expressed a finding—*i.e.*, a conclusion or opinion regarding Google's compensation practices.

When asked by her counsel to explain why OFCCP's Subject Demand for salary history was relevant, Ms. Wipper said, "[I]f we're finding a pay disparity, we want to find out if the cause is happening from starting salary. So that's why we would ask for the initial salary" and

⁵ During this case, OFCCP has suggested Google produce applicant interview notes, and then OFCCP would undertake the work of reviewing them, on the theory that this would resolve any burden concerns Google has relating to certain categories of requests, like job and salary history. *See, e.g.*, OFCCP Prehearing Statement at 17. However, Ms. Zmrhal testified that Google "would definitely review and analyze those documents before it would be produced" to protect employee privacy. Hrg. Tr. 302:23-303:10. That review would involve "attorneys, our internal team" or a "third party vendor," who, in combination, would "go through that and redact the personal and confidential information" in a "very time consuming" process. *Id.* at 303:4-10.

an employee's history of pay. *Id.* at 42:15-43:11. When asked by her counsel to explain why OFCCP's Subject Demand for job history was relevant, she said, "[I]t's very similar and interrelated to the salary history. . . . [W]e need the history of every job change that associates with the salary change." *Id.* at 45:12-23.

Ms. Wipper testified that the "reason why [OFCCP] asked for the employee contact information," was that OFCCP seeks "to conduct confidential employee interviews." *Id.* at 41:11-22. However, Ms. Wipper admitted her Agency would not interview all 21,000-plus employees in the Google MTV AAP. *Id.* at 151:16-152:19 ("[N]o, we wouldn't want to talk to all of them. . . . [W]e would want to talk to a sufficient amount of people – a sample.").

During its examination of Ms. Wipper, Google inquired into the basis for her conclusions—*e.g.*, her statement that her Agency "found" pay disparities. *Id.* at 47:24-48:10. But OFCCP's counsel repeatedly invoked the deliberative process privilege when Google asked Ms. Wipper to explain the basis for her findings. *See, e.g., id.* at 129:4-25 (Court sustained deliberative process privilege objection to question regarding types of analysis OFCCP ran on Item 19 data); 130:23-131 (OFCCP objected on deliberative process privilege grounds to question regarding indicators supporting OFCCP's request for job history); 149:6-150:13 (Court sustained deliberative process privilege objection to question regarding the Agency's explanation for why job history was relevant to compliance evaluation). In so doing, OFCCP hid behind the deliberative process privilege, thus shielding the basis for its requests from critical examination.

E. Jane Suhr Testimony

OFCCP District Director Jane Suhr offered weak and strange testimony regarding the time periods when Google has been a federal contractor. She testified that Google was a

contractor in 2007, but then admitted, “I wouldn’t know for the entire time.” *Id.* at 64:15-65:6. When asked by the Court if Google was a federal contractor on June 1, 2014 (the day before the “AMES” contract at issue in this matter was executed), Ms. Suhr testified, “Yes, I know they were a contractor in 2014 . . . as of June 1.” *Id.* at 65:17-22. But then later during her testimony, she stated that she did not, “know one way or the other if Google was, in fact, a federal contractor on the day before the AMES contract was awarded” (i.e., June 1, 2014). *Id.* at 87:10-15. Ms. Suhr also testified at length regarding the 2016 on-site visit OFCCP carried out at Google’s facility. Among other things, she testified that Google’s Director of Compensation Frank Wagner did not tell her that an “individual’s entire employment history [prior to Google] with respect to salary was relevant to setting compensation at Google.” *Id.* at 76:6-9. She also could not remember if she bothered to ask “Wagner or anyone on his team about whether or not starting position or title has any bearing on compensation.” *Id.* at 85:11-14.

F. Michael Brunetti Testimony

Originally identified by OFCCP as an expert witness, Michael Brunetti testified about a Form 10-K filed with the U.S. Securities and Exchange Commission by Alphabet Inc., Google’s parent company, even though reading a 10-K report is in the realm of non-expert knowledge. Unsurprisingly, the Court rejected OFCCP’s request to qualify Mr. Brunetti as an expert on the topic of whether Google’s burden in producing documents responsive to the Subject Demand was “insignificant compared to its total operating costs.” *Id.* at 103:2-24. The Court noted it could draw its own inferences regarding a Form 10-K. *Id.* Mr. Brunetti later testified that he does not “know anything about how Google maintains its employment records,” and is “not familiar with any of the data or network systems that Google maintains.” *Id.* at 105:3-11. He also admitted that he “can’t possibly testify how difficult or burdensome it actually will be on

Google to respond on these requests, other than in a monetary sense,” and that “money alone [does not] correlate to burden.” *Id.* at 105:12-19.

LEGAL STANDARDS

During the prehearing conference on April 5, 2017 as well as during the first day of the hearing on April 7, 2017, the Court asked for the parties’ input on a number of legal issues. Specifically, the Court asked: (1) what law was the Court bound by in rendering its recommended decision after the hearing; and (2) which party bears the burden of proof on the requirement that the Subject Demands not be unreasonably burdensome. In addition, the parties disagree regarding the appropriate standard to be applied in determining whether the Subject Demands are unreasonably burdensome and whether a rule of proportionality applies, as well as the impact that that the United States Supreme Court’s decision in *McLane v. EEOC*, 137 S. Ct. 1159 (2017), has on this case. Each of these issues is addressed below.

A. The Court Is Bound Only by Decisions of the Secretary of Labor and the United States Supreme Court.

In an OFCCP administrative proceeding, the Administrative Law Judge is bound only by the decisions of the Secretary of Labor and the law of the United States Supreme Court. *U.S. Dep’t of Labor v. Interstate Brands Corp.*, ALJ’s Recommended Decision, 97-OFC-0006, 2000 OFCCP LEXIS 21, 61 n.8 (Dep’t of Labor July 19, 2000) (referring to Secretary of Labor decision as “controlling precedent for an administrative law judge with the Department of Labor”). While an ALJ is not otherwise bound by the law of any particular jurisdiction, decisions of every jurisdiction may serve as persuasive authority with respect to a decision of this Court, as set forth below.

1. Department of Labor Decisions Demonstrate That the Court May Rely on Decisions of Any Jurisdiction.

Decisions authored by Department of Labor ALJs clearly demonstrate that this Court may rely on the law of any jurisdiction, as long as those decisions also follow or do not contradict existing binding precedent of the Secretary of Labor. *See U.S. Dep't of Labor v. TNT Crust*, 04-OFC-3, ALJ's Recommended Decision, 2007 OFCCP LEXIS 3 (Dep't of Labor Sept. 10, 2007); *U.S. Dep't of Labor v. United Airlines, Inc.*, 94-OFC-1, ALJ's Recommended Decision, 1996 OFCCP LEXIS 59 (Dep't of Labor Nov. 29, 1996). For example, in *United Airlines, Inc.*, 1996 OFCCP LEXIS 59 (1996), at issue was whether OFCCP, representing an individual plaintiff, had established that the plaintiff was a qualified individual under Section 503 of the Rehabilitation Act. *Id.* at 15. OFCCP objected to the court's reliance on a Department of Labor ALJ's recommended decision and order in *OFCCP v. Delta Airlines, Inc.*, No. 94-OFC-8 (1996), as well as various federal court cases that were decided under the Americans with Disability Act, because the ALJ's recommended decision and order was not approved by the Secretary of Labor.

Id. The ALJ disagreed, stating:

I am cognizant that the recommended decision in *Delta Airlines, Inc.*, as well as the cases cited by [the defendant] under the Americans with Disabilities Act, are not binding precedent. I find, however, that there is no case law from the Secretary of Labor which I consider to be clearly on point with the facts involved in this case. Therefore, I would be remiss in my responsibilities if I did not study the wisdom of other triers-of-fact, whom have considered factual situations and statutes comparable to the ones involved in this case.

Id. at 19-20. In reaching a final conclusion, the ALJ proceeded to consider decisions from various district and circuit courts, ADA regulations, and decisions of other ALJs, even where those decisions had not yet been finalized by the Secretary of Labor.

In *TNT Crust*, 2007 OFCCP LEXIS 3 (2007), a case arising under Executive Order 11246, the court considered cases from various jurisdictions in seeking to determine whether the government contractor discriminated against Hispanic applicants in hiring. *Id.* at 46. Like the court in *United Airlines*, the *TNT* court recognized the persuasive authority of federal case law: “Cases interpreting Title VII, while not necessarily binding authority for administrative proceedings under the Executive Order, do supply guidance in analyzing allegations brought by the government.” *Id.* at 47. The court looked to decisions from various jurisdictions in reaching its decision. *See id.*

As in *United Airlines* and *TNT*, where there is no Secretary of Labor precedent on point, the Court here should look to persuasive authority in any and all jurisdictions where those decisions “have considered factual situations and statutes comparable to the ones involved in this case.” *United Airlines*, 1996 OFCCP LEXIS at 19-20; *see also Int’l Unions, UAW v. NLRB*, 802 F.2d 969 (7th Cir. 1986) (demonstrating that federal courts also recognize that agencies should be guided by federal law throughout the United States).⁶

2. OFCCP’s Regulations Demonstrate That the Court May Rely on Decisions of Any Jurisdiction.

OFCCP’s regulations show this Court may rely on decisions of any jurisdictions that follow or do not contradict binding precedent of the Secretary of Labor. These regulations do not indicate what law should govern an ALJ’s decision. For example, 41 C.F.R. § 60-30.8, regarding motion practice, states that a party’s motion shall state the “authority relied upon” but does not set forth any parameters for the authority. Further, while pursuant to 41 C.F.R. § 60-30.15 an ALJ shall propose findings and conclusions to the Secretary, the authority is not limited

⁶ This Court, itself, has endorsed this principle in citing to case law from several different federal circuit and district courts in prior written rulings in this matter.

to any particular circuit court, district court, or otherwise. Moreover, while it is clear that an ALJ is constrained by the Office of Administrative Law Judges' Rules of Evidence with respect to evidentiary matters, there is no related provision with respect to legal authority. *See* 29 C.F.R. part 18; 41 C.F.R. § 60-30.18.

3. The Court May Rely on Decisions of Any Jurisdiction Because of Venue Uncertainty.

Generally, an agency must follow the rulings of a reviewing court. *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091 (D.D.C. 1991). However, ALJs are not bound by the law of any particular jurisdiction because broad venue provisions provide that an ALJ does not know what court reviews his or her actions. *See United States DOE v. Federal Labor Relations Auth.*, 106 F.3d 1158, 1162 n.8 (4th Cir. 1997) (finding that while generally an agency “must follow the law of the circuit whose courts have jurisdiction over the cause of action . . . the venue provision . . . is such that the [agency] cannot know which circuit court of appeals will review its decision.”).

For OFCCP matters, after an ALJ makes a recommended decision and the Administrative Review Board issues the Agency's final administrative determination, a federal contractor may seek review of the final administrative determination in federal court pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (the “APA”). Under the APA, the “form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction.” 5 U.S.C. § 703.

Given that normal rules of venue apply, the Court cannot determine where review of this case would take place. For example, were Google to seek APA review of a final agency decision in this matter, such an appeal may be taken “in any judicial district in which (A) a defendant in

the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred . . . , or (C) the plaintiff resides if no real property is involved in the action.” 28 U.S.C. § 1391(e)(1). Were the Government to seek APA review, such an appeal may be taken where Google resides or “where a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b).

Here, there is no certainty as to where APA review of a final agency decision would be venued (or, for that matter, whether either party will seek APA review). This venue uncertainty means that no particular law is binding on the Court in making a decision in this matter. Accordingly, while the Court is constrained by precedent of the United States Supreme Court and the Secretary of Labor, it is free to consider, as persuasive authority, decisions of any jurisdiction in reaching a decision.

B. OFCCP Bears the Burden of Proof on All of the *United Space Alliance* Elements.

The Subject Demands are evaluated under the *Fourth Amendment* 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); *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) (noting that the *United Space Alliance* standard “has bite”). Specifically, the Subject Demands must be “sufficiently limited in scope, relevant in purpose, and specific in directive, so that compliance will not be unreasonably burdensome.” *United Space All.*, 824 F. Supp. 2d at 91 (internal quotation marks omitted). The test therefore consists of three elements: (1) that requests are sufficiently limited in scope, (2) relevant in purpose, and (3) specific in directive. Contrary to OFCCP’s unsupported interpretation of the standard, the administrative subpoena standard “in

no way leaves an employer defenseless against an unreasonably burdensome administrative subpoena requiring the production of documents.” *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984). Rather, it “provide[s] protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.” *Id.*

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*, 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).

Indeed, it is OFCCP’s burden to prove the Subject Demands comply with all parts of the *Fourth Amendment* test, including a showing that complying with the demands will not impose an unreasonable burden on Google. *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 489 (5th Cir. 2014) (“The Government bears the initial burden to show” that “the demand is not unreasonably broad or burdensome,” “the subpoena is within the statutory authority of the agency,” and “the information sought is reasonably relevant to the inquiry.”) (internal quotation marks omitted).

As a matter of public policy, OFCCP’s burden to prove the Subject Demands are lawful is consistent with the broader principles of *Fourth Amendment* jurisprudence. In criminal cases,

courts have long held that “[t]he government bears the burden of justifying a warrantless search” when a defendant challenges it under the *Fourth Amendment*. *United States v. Johnson*, 936 F.2d 1082, 1084 (9th Cir. 1991). This is because a warrantless search is conducted without judicial oversight beforehand. *Mincey v. Arizona*, 437 U.S. 385, 390-91 (1978) (stating the government bears the burden of proving a warrantless search satisfies *Fourth Amendment* because the search is conducted “outside the judicial process, without prior approval by judge or magistrate”).

OFCCP’s Subject Demands are administrative subpoenas – i.e., they are warrantless searches, in that they are not based on an administrative *warrant*. Indeed, courts have specifically declined to compare OFCCP document demands to administrative warrants. *See, e.g., United Space All.*, 824 F. Supp. 2d at 90-92. Just like a warrantless criminal search, OFCCP issues document demands with no judicial oversight beforehand and no requirement that OFCCP have specific evidence of a violation. *Id.* at 90-91. Accordingly, when a contractor challenges an OFCCP demand under the *Fourth Amendment*, the government should bear the burden of proving compliance with the Constitution, just as it does in most *Fourth Amendment* search and seizure cases.

C. Proportionality Is Applicable to the Administrative Subpoena Standard.

The Court in this matter has endorsed Google’s view regarding the appropriate standard for an administrative subpoena, i.e. that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. *United Space All.*, F. Supp. 2d at 91 (quoting *Lone Steer*, 464 U.S. at 414). The cornerstone of this standard is “reasonableness” which is directly related to proportionality; in other words, only document requests that are proportional to the ends sought are reasonable.

An administrative subpoena for documents is unreasonable when “it is out of proportion to the end sought.” *United States v. Int’l Bus. Machs. Corp.*, 83 F.R.D. 97, 106 (S.D.N.Y. 1979) (quoting *McMann v. SEC*, 87 F.2d 377, 379 (2d Cir. 1937)). A court may consider whether the cost to the employer is disproportionate to any investigatory value to the agency of the requested documents, because an agency may only subpoena documents that are “adequate, but not excessive, for the purposes of the relevant inquiry.” *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 209 (1946). Thus, the *United Space Alliance* “reasonableness” standard incorporates the concept of proportionality, and OFCCP’s demands for documents and information can only be deemed reasonable if they are in proportion to the end sought.

In addition, Rule 26 of the Federal Rules of Civil Procedure codifies this concept, stating that discovery must be “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *See* Fed. R. Civ. P. 26(b)(1).

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).

The Court in this case endorsed the concept of proportionality as a component of assessing the reasonableness of an administrative subpoena. In the Court's Order denying OFCCP's Summary Judgment Motion, the Court cited to Rule 26 of the Federal Rules of Civil Procedure, stating that "proportionality is now a cornerstone of discovery and could be a basis for an order limiting discovery." *OFCCP v. Google Inc.*, 2017-OFC-00004, Order Denying Plaintiff's Motion for Summary Judgment, at 6, 6 n.7 (Dep't of Labor Mar. 15, 2017). This Court reaffirmed this notion in its Order Denying Google's Motion to Dismiss. *OFCCP v. Google Inc.*, 2017-OFC-00004, Order Denying Google's Motion to Dismiss, at 5, 6 n.10 (Dep't of Labor May 2, 2017) ("[T]he *Fourth Amendment* limits OFCCP's investigative powers" and OFCCP is only entitled to "items that are within its authority," "that are relevant to the compliance review" and "that are not unreasonably burdensome."). Inherently, the reasonable/burdensome analysis looks at proportionality because it looks at whether the requests are in proportion to the ends sought.⁷

D. The United States Supreme Court Decision in *McLane* Supports the Discretion of This Court to Apply the *Fourth Amendment* Standards Without Deference to OFCCP's Opinion.

In its opening statement, OFCCP made reference to the Supreme Court's recent decision in *McLane v. EEOC*, 137 S. Ct. 1159 (2017). While OFCCP's reference was topical, it was an inaccurate reading of the decision. In fact, the Supreme Court's decision in *McLane* undermines OFCCP's assertion and supports Google's position with respect to the deference this Court should afford OFCCP as an administrative agency.

OFCCP stated the following in its opening statement:

⁷ The Sedona Conference recently issued new guidance on proportionality, stating (among other things) that "[p]roportionality considerations often may be relevant to rules that do not explicitly adopt the term 'proportionality.'" 18 Sedona Conf. J. 148 (forthcoming 2017).

with respect to relevance, the Supreme Court in *McLane* reaffirmed this week long standing precedent that relevance in the administrative subpoena context must be understood generously in favor of federal agencies and be construed to permit agencies to, ‘virtually access,’ ‘virtually any material that might cast light on the issue under investigation.’ This analysis, as established Supreme Court precedent makes clear, and as Justice Ginsberg pointed out in *McLane*, does not require a particular showing of necessity of access.⁸

Hrg. Tr. 20:12-22. The viewpoint that OFCCP cited was that of an amicus brief, which argued that the Court should be more deferential to the government agency (in that case, the EEOC) than to the District Court. *McLane* rejected this view. The Court held that the District Court need not rely on the EEOC’s determination of relevance; it only needed to answer the question of relevance “cognizant of the agency’s broad authority to seek and obtain evidence.” *McLane*, 137 S. Ct. at 1169. Thus *McLane* stands for the proposition that a judge reviewing an administrative subpoena need not give any sort of “double deference” to the version of relevance set forth by the agency. *See id.* Accordingly, *McLane* supports Google’s position that this Court should use its own discretion to determine the relevance of the Subject Demands, without having to defer to the interpretation of OFCCP.

It is now beyond dispute that OFCCP’s regulations do not and cannot give the Agency the unfettered and unreviewable power to demand any document or information from Google, regardless of the scope. In other words, OFCCP’s self-serving position that 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, has been debunked. Under the Constitution and binding case law, OFCCP does not and cannot have such unchecked power.

⁸ Moreover, OFCCP argues that the relevance analysis “does not require a particular showing of necessity of access.” Hrg. Tr. 20:19-22. However, Justice Ginsberg made this statement in her concurrence/dissent; this idea was *not* part of the majority opinion of the Supreme Court.

Instead, the Subject Demands must comply with the *Fourth Amendment*, subject to this Court's review.

**ARGUMENT - POINT I:
OFCCP FAILED TO ESTABLISH THAT THE SUBJECT DEMANDS ARE
SUFFICIENTLY LIMITED IN SCOPE, RELEVANT IN PURPOSE, AND
SPECIFIC IN DIRECTIVE SO AS NOT TO BE UNREASONABLY
BURDENSOME.**

Plaintiff failed to establish the elements required to permit an administrative subpoena with respect to each of the three Subject Demands. Subject Demand 1, seeking the personal contact information for over 25,000 Google employees, is not sufficiently limited in scope since OFCCP admitted at the hearing that: (1) it cannot and will not interview all of these employees; and (2) it has interviewed employees in past compliance reviews when the employer knew of the identity of the interviewed employees. Similarly, Subject Demand 2 seeking the complete salary and job history of over 25,000 Google employees is not sufficiently limited since it seeks information beyond the two year review period, as well as information on job and salary history information the testimony showed could not have had any impact on the employees' September 1, 2015 salary. Similarly, Subject Demand 3 seeking a prior year snapshot is similarly overbroad and contains requests for irrelevant data. Since, as described in detail below, Plaintiff has failed to submit evidence sufficient to establish each of the elements of the administrative subpoena test, Plaintiff's denial of access claim should be dismissed in its entirety.

**A. OFCCP Has Failed to Establish That Subject Demand 1 Satisfies the
Fourth Amendment Standards for the Issuance of an Administrative
Subpoena.**

OFCCP has failed to submit any evidence supporting its position that Subject Demand 1, seeking the names and personal contact information for all of the over 25,000 employees in Google's MTV AAP as of September 1, 2015 and September 1, 2014, meets the administrative subpoena standard.

1. Ms. Wipper's Testimony Demonstrates That OFCCP Cannot Show Subject Demand 1 Satisfies the Elements of the Administrative Subpoena Test.

Ms. Wipper admitted at the hearing that OFCCP *could not and would not* interview the over 25,000 people on the September 1, 2015 snapshot, and that in order to obtain the information the Agency was seeking, it would only speak to “a sufficient amount of people – a sample.” Hrg. Tr. 152:19. This concession alone shows that the Subject Demand is not sufficiently limited in scope since the Agency has sought the names and contact information of people it will not interview.

In a failed attempt to somehow excuse this excessive demand, Ms. Wipper asserted at the hearing that OFCCP could not limit its requests to some reasonable portion of the workforce because doing so would require Google to become aware of the identity of the employees the Agency interviewed thus risking potential retaliation against such employees. Hrg. Tr. 58:2-4. A similar rationale has been repeatedly set forth in OFCCP's briefing to this Court prior to the administrative hearing on April 7, 2017. However, critically, Ms. Wipper admitted on cross examination that OFCCP has in fact coordinated non-manager interviews with the employer's knowledge of whom was being interviewed in cases where the contractor did not provide contact information to the Agency. *Id.* at 161-64. Indeed, that is the very situation before this Court. Accordingly, OFCCP cannot take the position in this proceeding that it has sufficiently limited the scope of its requests.

Moreover, Ms. Wipper's stated rationale for not limiting Subject Demand 1 is unsupported by the relevant record evidence. On cross-examination Ms. Wipper admitted that no employee has filed a complaint with the OFCCP related to the two year period under review. *Id.* at 126-27. Furthermore, OFCCP has proffered no evidence that Google has retaliated in any manner against any employee on the September 1, 2015 workforce snapshot for participating in

interviews with the OFCCP. Ms. Wipper's vague reference to the "informant's privilege" as a supposed justification for not limiting the Subject Demand lacks merit. Ms. Wipper's concession that OFCCP has interviewed employees with the contractor's knowledge demonstrates that the informant's privilege is not the basis upon which OFCCP is requiring the contact information for all Google employees in the Mountain View AAP, since any exception swallows the "rule." *Id.* at 160.

Furthermore, Ms. Wipper's blithe reference to an informant privilege does not come close to properly invoking the privilege. To invoke the informant's privilege the Government must make "a formal claim of privilege, lodged by the head of the department . . . after actual consideration by the officer." *Solis v. Wash. Dep't of Corr.*, No. 08-5362, 2009 U.S. Dist. LEXIS 131035, at *6 (W.D. Wash. May 27, 2009). While the DOL may delegate such duties to a high ranking administrator, such delegation and assertion of privilege must be in writing. *Chao v. Westside Drywall, Inc.*, 254 F.R.D. 651, 657 (D. Or. 2009). The officer must conduct "a careful review of the documents at issue" and provide a "detailed criteria" for claiming that the informant's privilege applies." *Id.* Here, the Secretary filed no written assertion of the informant's privilege, and submitted no written delegation to a high-ranking subordinate of the responsibility for asserting the privilege. Further, the *prospective* nature of the privilege sought alone operates to negate the privilege, for the Secretary simply cannot provide the required affidavit that he or anyone on his behalf conducted a careful review of the documents or testimony at issue (because they do not yet exist) to determine whether the privilege applies. Accordingly, Ms. Wipper's passing reference to an informant's privilege should be disregarded. *See id.* at 658 (finding that informant's privilege did not apply because "these are not merely technical requirements. Rather, their purpose is to insure that the privilege is claimed by

someone . . . with sufficient authority and responsibility so that the court can rely upon his judgment the claim was prudently invoked”) (internal quotations and citations omitted).

In addition, OFCCP’s purported rationale for why it cannot limit Subject Demand 1 shifted during the hearing. Ms. Wipper later testified that OFCCP required the names and contact information of all 25,000 plus Google employees since the possibility existed that some of them would decline to talk to the Agency, thus potentially leaving the Agency without a sufficient number of employees to interview. Hrg. Tr. 152:7-10 (“So, no, we wouldn’t want to talk to all of them. But it could be that we go through the list and there’s only a small percentage that actually wants to share information.”). Of course this testimony is incredulous. Even in the remote circumstance where 90% of the 25,000 employees refused outright to be interviewed by OFCCP, the Agency would still have the opportunity to reach out to another 2,500 employees. It is highly unlikely that OFCCP would conduct even this number of interviews, and even assuming OFCCP desired and had the resources to do so, it strains reason to argue that such a sample size would be insufficient for the Agency’s purposes.

OFCCP’s shifting rationales and admissions summarized above establish that the Agency simply cannot meet its burden of proof that the Subject Demand seeking the names and personal contact information for over 25,000 Google employees is sufficiently limited in scope and relevant in purpose.

2. *EEOC v. McLane Company, Inc.*, No. 13-15126 (9th Cir. May 24, 2017), Offers No Support for OFCCP’s Position That Google Must Fully Respond to Subject Demand 1.

During its closing statement, OFCCP erroneously cited to the recent Ninth Circuit decision in *EEOC v. McLane Company, Inc.*, No. 13-15126, 2017 U.S. App. LEXIS 9027 (9th Cir. May 24, 2017), to support its position that the names and contact information of all Google

employees in its Mountain View AAP are relevant. However, *McLane* is easily distinguished and does not control here.

In *McLane*, the EEOC was investigating a charge of discrimination filed by the complainant who specifically alleged that the McLane Company had discriminated against her on the basis of gender by requiring her to take a physical capability strength test. *McLane*, at 2. The Ninth Circuit merely found that the production of the names and contact information limited to other individuals, who, like the plaintiff, were required to take this test, was relevant under the administrative subpoena test. *Id.* at 7. Here, OFCCP is not arguing that this unlimited request for contact information is *relevant* to its investigation. To the contrary, the Agency has admitted all such information is not relevant when Ms. Wipper conceded that OFCCP could not and would not interview them all. As noted above, OFCCP has offered ever shifting explanations for the production of this information related to matters of administrative convenience (*i.e.*, its speculative and incredulous claim that unless it obtains names and contact information for all 25,000 plus Google employees it might not have enough employees to interview since some may refuse to be interviewed) or unsupported concerns about potential retaliation against potential future “government informants.” In contrast, *McLane* stands for the proposition that the names and contact information only for a limited scope of individuals – those who had taken the same test that the charging party alleged is discriminatory – was relevant to the EEOC’s investigation. This is in stark contrast to OFCCP’s view that it is entitled to the contact information for *all employees* purportedly to prevent retaliation, protect an inapplicable government informant privilege, or for administrative convenience.

3. OFCCP's Subject Demand for Names and Contact Information Is Unduly Burdensome Because of the Unnecessary Risk of Confidentiality Breaches.

Finally, OFCCP's Subject Demand for unlimited personal contact information is, on its face, unreasonably burdensome due to the risk of potential public disclosure of this information. Unlike Regional Director Wipper, this Court is fully aware of the federal government's failure to protect personal and confidential employee information in recent years. Hrg. Tr. 155:3-156:16. While Ms. Wipper asserts that providing the home phone numbers, addresses and e-mails of over 25,000 Google employees to OFCCP carries no risk of public disclosure due to OFCCP safeguards, throughout this proceeding OFCCP has rigorously objected to Google's requests to seal confidential material, demonstrating the Agency has little if any regard for the privacy of Google's employees.

B. OFCCP Has Failed to Establish That Subject Demand 2 Satisfies the *Fourth Amendment* Standards for the Issuance of an Administrative Subpoena.

OFCCP's Subject Demand 2 seeks the prior salary and competing offers, as well as job history and salary history at Google for over 25,000 employees in Google's MTV AAP. *See* Hrg. Ex. 6 at 2. "Job history" in this context includes "the history of jobs [an employee held] while an employee at Google." Hrg. Tr. 74:6-15. Similarly, "salary history" includes an employee's "pay history at Google." *Id.* at 76:25-77:2. OFCCP also includes in this category of requests "prior salary[] and prior experience." OFCCP Prehearing Statement at 4 n.3. For the reasons set forth below, OFCCP has failed to establish that Subject Demand 2 satisfies all of the elements of the administrative subpoena standard.

1. **OFCCP's Request for Salary and Job History Is Unreasonably Overbroad Because It Seeks Information Beyond the Agency's Two-Year Review Period.**

OFCCP contends that Google is attempting to hide something by defending its rights in this lawsuit that OFCCP chose to file against it. To the contrary, it is the OFCCP's repeated refusal to engage in a dialogue with Google or share any information whatsoever about alleged concerns so that the Company could understand why the Agency was taking positions contrary to its practices, policies and procedures that motivated Google to defend its rights in this matter. For example, as explained below, OFCCP has departed from its own, well established, two year review period for OFCCP compliance evaluations in this matter.

The temporal limit for an OFCCP compliance evaluation is two years prior to the scheduling letter that initiates the evaluation. In the present matter, this period runs from September 30, 2015, when OFCCP sent Google a scheduling letter, back to September 30, 2013. *See* Hrg. Ex. 5. Ms. Wipper testified the "temporal scope of a compliance evaluation" is "two years from when the scheduling letter is issued to the contractor." Hrg. Tr. 35:2-7. Specifically, she stated that the temporal scope of OFCCP's present Compliance Evaluation "would go back to September 2013." *Id.* at 35:15-19; *see also id.* at 40:6-8. The scheduling letter in this matter is dated September 30, 2015, Hrg. Ex. 5, so the furthest back OFCCP can look is September 30, 2013, according to Regional Director Wipper's testimony.

A DOL Final Rule called "Government Contractors, Affirmative Action Requirements, Executive Order 11246," 62 Fed. Reg. 44174 (Aug. 19, 1997), establishes the two-year limit. *Id.* at 44178. The rule states, "Reviews of contractors' compliance with the Executive Order and regulations cover a *two-year period*. The policy and practice are to examine the contractor's personnel policies and activities for the *two years* preceding the initiation of the review, and to assess liability for discriminatory practices dating back *two years*." *Id.* (emphasis

added). During this lawsuit, OFCCP has recognized this limit, stating in its motion for summary judgment that the Agency is limited to examining Google’s “*personnel policies and activities* for the *two years* preceding the initiation of the review.” OFCCP’s Motion for Summary Judgment at 6 (quoting 62 Fed. Reg. 44174, 44178) (emphasis added).

OFCCP’s Federal Contract Compliance Manual’s (“FCCM”) also establishes the two-year time limit on the Agency’s power to review documents as part of a compliance evaluation. FCCM section 1C03, titled “Evaluation Period,” states that in general, OFCCP “must evaluate the contractor’s performance for at least the last full AAP year” and “current year performance if the contractor is six months or more into its current AAP year.” Hrg. Ex. 121 at 19. In certain situations—where “[s]pecial circumstances or exceptions . . . exist”—OFCCP can look back further than one year prior to the scheduling letter. *Id.* at 20. Provided such circumstances exist, OFCCP can “extend[] the analysis of a contractor’s AAP(s), personnel activity, policy implementation and *supporting documentation* to cover a period beginning *two years* prior to the date the contractor received the Scheduling Letter.” *Id.* (emphasis added).⁹ Thus, under the FCCM, two years is the outer limit for a compliance evaluation, and for the Agency’s power to request supporting documents.

⁹ OFCCP has suggested that the Court should not rely on statements in OFCCP’s FCCM, even though it is the Agency’s own manual for conducting compliance evaluations. *See, e.g.*, OFCCP Reply in support of MSJ at 18. This is nonsense. The DOL Final Rule titled “Government Contractors, Affirmative Action Requirements, Executive Order 11246”—on which OFCCP has relied in this litigation—states that the FCCM

“contains the policy guidance interpreting the Executive Order and regulations, as well as agency instructions for implementing the regulatory provisions. OFCCP’s [FCCM] currently describes the procedures *for conducting compliance reviews*. The aspects of implementation addressed in the Manual include *the time frames for conducting the review*, how to open and close a review, and how frequently reviews should be conducted. The FCCM is the appropriate medium to specify the procedures for conducting the different types of compliance evaluations.”

62 Fed. Reg. 44174, 44180 (emphasis added).

The Agency's two-year limit in compliance evaluations is consistent with OFCCP's record retention regulation, which states, "Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than *two years* from the date of the making of the record or the personnel action involved, whichever occurs later." 41 C.F.R. § 60-1.12(a).¹⁰ It is logical that OFCCP's recordkeeping rule for contractors aligns with the Agency's power to look back in time; it would make no sense for OFCCP to have the power to look at records that contractors are not required to maintain.

The DOL Final Rule "Government Contractors, Affirmative Action Requirements, Executive Order 11246," the FCCM, OFCCP's recordkeeping regulation, and Regional Director Wipper's testimony are all consistent: the Agency is empowered to look back two years at most. Nothing in any of the regulations or laws cited by OFCCP expressly empowers OFCCP to request information or records from before the two-year period.

OFCCP's demand that Google provide job and salary history for more than 21,000 employees as well as the 2014 snapshot would include information well beyond OFCCP's two-year limit, and in some cases, all the way back to Google's founding in 1998. *See* Hrg. Tr. 46:25-47:17 (Ms. Wipper admitted that the Agency's request goes beyond the two-year limitation). This request runs contrary to the law described above, is unreasonably overbroad as to time, and violates the *Fourth Amendment*.

OFCCP also has suggested that 42 U.S.C. § 2000e-5(e)(3)(A)—which is part of Title VII of the Civil Rights Act of 1964—empowers the Agency to look back further than two years. OFCCP Reply in support of MSJ at 20 n.24; *see also* Hrg. Tr. 310:3-9. However, OFCCP's argument is fundamentally flawed because the Compliance Evaluation here is not subject to 42

¹⁰ OFCCP's recordkeeping regulation prescribes retention time periods for various situations, all of which are two years or less. 41 C.F.R. § 60-1.12(a).

U.S.C. § 2000e-5(e)(3)(A). *First*, the present matter is not a Title VII case because OFCCP’s authority derives from Executive Order 11246.¹¹ *Second*, 42 U.S.C. § 2000e-5(e)(3)(A), which was added to Title VII by the Lilly Ledbetter Fair Pay Act of 2009, “applies exclusively to causes of action arising out of the statutes which [the Ledbetter Act] amended.” *Koger v. Allegheny Intermediate Unit*, Civil Action No. 10-1466, 2012 WL 603565, 2012 U.S. Dist. LEXIS 24042, at *19 (W.D. Pa. Feb. 24, 2012); *accord Russell v. Cty. of Nassau*, 696 F. Supp. 2d 213, 230 (E.D.N.Y. 2010); *Leach v. Baylor College of Medicine*, Case No. H-07-0921, 2009 WL 385450, 2009 U.S. Dist. LEXIS 11845, at *49-51, (S.D. Tex. Feb. 17, 2009). The Fair Pay Act did not amend Executive Order 11246 or the statutes that provide OFCCP authority in this matter.¹² OFCCP, Executive Order 11246, and the Agency’s regulations were all in existence when the Fair Pay Act was enacted, but neither Congress nor the President chose to enlarge OFCCP’s authority. Accordingly, 42 U.S.C. § 2000e-5(e)(3)(A) has no bearing on the two-year review period here.

¹¹ OFCCP’s argument specifically references “Title VII’s limitations period.” OFCCP Reply in support of MSJ at 20 n.24. This alone defeats the Agency’s suggestion that 42 U.S.C. § 2000e-5(e)(3)(A) is relevant to an OFCCP compliance evaluation, which has nothing to do with Title VII.

¹² The Fair Pay Act amended 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.), 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. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009). OFCCP’s authority in the present case is based on different laws, specifically: Executive Order 11246, Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act, Section 503 of the Rehabilitation Act of 1973, and the Agency’s regulations at 41 C.F.R. chapter 60. Compl. at 1, ¶ 1; Hrg. Tr. 32:11-33:5 (OFCCP Regional Director Janette Wipper testified that “the law” that OFCCP “enforce[s]” consists of “Executive Order 11246,” “Section 503 of the Rehabilitation Act,” and “the Vietnam Veterans’ Readjustment Assistance Act”). The Supreme Court’s reasoning in *Ledbetter* (and the numerous Supreme Court cases on which *Ledbetter* relied) still governs disputes, like this one, that do *not* involve statutes that the Fair Pay Act amended. This has been the case where courts have considered *Ledbetter* outside of the context of Title VII or another regulation specifically addressed by the Fair Pay Act. *See Leach v. Baylor Coll. of Med.*, No. H-07-0921, 2009 U.S. Dist. LEXIS 11845, at *47 (S.D. Tex. Feb. 17, 2009); *Caldwell v. Enter. Prods. Co.*, No. H-15-3463, 2016 U.S. Dist. LEXIS 131612, at *10 (S.D. Tex. Sep. 26, 2016); *Richards v. Johnson & Johnson, Inc.*, No. 05-3663 (KSH), 2009 U.S. Dist. LEXIS 46117, at *31 (D.N.J. June 2, 2009).

Since the Fair Pay Act does not contemplate revising the governing regulations of the OFCCP, the reasoning in the Supreme Court case still governs this dispute. This has been the case where courts have considered the *Ledbetter* case outside of the context of Title VII or another regulation specifically addressed by the Fair Pay Act. See *Leach v. Baylor Coll. of Med.*, No. H-07-0921, 2009 U.S. Dist. LEXIS 11845, at *47 (S.D. Tex. Feb. 17, 2009); *Caldwell v. Enter. Prods. Co.*, No. H-15-3463, 2016 U.S. Dist. LEXIS 131612, at *10 (S.D. Tex. Sep. 26, 2016); *Richards v. Johnson & Johnson, Inc.*, No. 05-3663 (KSH), 2009 U.S. Dist. LEXIS 46117, at *31 (D.N.J. June 2, 2009).

OFCCP further argues that “past acts of discrimination impacting pay are renewed with each paycheck” under *Bazemore v. Friday*, 478 U.S. 385 (1986). Hrg. Tr. 310:3-7. But *Bazemore*, another Title VII case, *does not stand for this principle, as the Supreme Court held in its Ledbetter decision.* *Bazemore* involved a facially discriminatory pay structure that penalized racial minorities by segregating employees into a Black group and a White group, with the latter receiving higher pay. See 478 U.S. at 390-91, 395. The explicitly racist pay group system still existed when the plaintiffs sued under Title VII, and, therefore, that same intentionally discriminatory system *directly and intentionally impacted* their current paychecks. See *id.* at 391-93. Thus, *Bazemore* is not a paycheck accrual case at all. Indeed, *Ledbetter* distinguished *Bazemore* for precisely this reason. *Ledbetter*, 550 U.S. at 621, 646-47 (“*Bazemore* . . . is not [] a ‘paycheck accrual rule’.”).

Here, OFCCP does not assert, nor has it ever asserted, that Google maintained an intentionally discriminatory pay structure that purposefully seeks to pay women less than men and that same system *currently* results in current pay discrimination.

Nor, for that matter, could OFCCP cite to Agency practice, enforcement position, policy or regulation purporting to adopt the Fair Pay Act function to amend Executive Order 11246. Only an amendment to the Executive Order itself could effectuate such a change. *See Ledbetter*, 550 U.S. at 642 n.11 (rejecting the EEOC's position adopting a paycheck accrual rule in its enforcement decisions and field manual, and noting that EEOC's positions were based on a misreading of *Bazemore*).

OFCCP's request for job and salary history must comply with the *Fourth Amendment's* command that the Agency's document demands be reasonable. *United Space All.*, 824 F. Supp. 2d at 91. The rules and regulations discussed above limit the Agency to a two-year review investigation period, just as Regional Director Wipper testified. Requests for documents from a time period OFCCP cannot even investigate are unreasonable and overbroad.

2. The Court Should Afford No or Little Weight to Ms. Wipper's Conclusory, Contradictory and Self-Serving Testimony Regarding OFCCP's Preliminary Compensation Findings.

After almost a year since OFCCP issued the Subject Demands, at Day 1 of the Hearing in this case, Ms. Wipper testified that the Subject Demands are relevant to OFCCP's Compliance Evaluation because the Agency "found systemic compensation disparities against women pretty much across the entire workforce." Hrg. Tr. 47:24-48:6. Ms. Wipper released this information only after questioning by Government attorneys in a public forum in a case OFCCP elected to bring, after withholding the same information in response to Google's repeated requests for the basis of OFCCP's broad demands. This demonstrates bad faith.

Until the April 7, 2017 hearing, OFCCP refused to provide both Google and this Court with any basis for Subject Demand 2, which requests job history and salary history for employees in the MTV AAP. In fact, prior to the hearing, OFCCP repeatedly informed Google and this

Court that OFCCP's preliminary findings were "irrelevant to" the "issues in this matter" and that OFCCP would not disclose its preliminary findings at the hearing:

"To be clear, if any hearing is ordered, OFCCP witnesses will not offer any testimony regarding its internal deliberations concerning the ongoing compliance evaluation, *including its preliminary findings*. This testimony is wholly unnecessary to determining whether the Subject Items were properly requested. Moreover as explained in OFCCP's opening brief, such testimony would invade the agency's deliberative process and investigative files privileges and any work product protection."

OFCCP Reply Brief in Support of Motion for Summary Judgment at 27 (under heading "OFCCP Will Not Provide Any Testimony Disclosing Its Preliminary Findings or Aspects of the Ongoing Investigation"). In its Prehearing Statement, OFCCP again informed this Court that "OFCCP's preliminary findings are irrelevant to this case" and "[s]eparate from being irrelevant, OFCCP's preliminary findings and initial impressions are protected by the deliberative process and investigatory file privileges." OFCCP Prehearing Statement at 23. Furthermore, Plaintiff opposed Defendant's motion to remove this case from the expedited calendar by arguing that "there was no reason to permit discovery of the Agency's preliminary findings" – the very findings OFCCP's Regional Director testified about at the hearing:

"Revealing [OFCCP's preliminary findings] would permit Defendant to game Plaintiff's system of analysis to attempt to evade enforcement. Balanced against Defendant's future opportunity to challenge findings of discrimination (if there are any), there is no reason to permit discovery of preliminary findings."

Plaintiff's Response to Defendant's Motion to the Administrative Complaint from Expedited Procedures or Permit Discovery at 11.

Ms. Wipper's testimony must be viewed in light of OFCCP's prior statements in this matter that the Agency's preliminary analyses are "irrelevant." The Court should bear these

inconsistencies in mind and give no weight to Ms. Wipper's testimony. 29 C.F.R. § 18.613 (admissions of a party-opponent may be used as impeachment).

In fact, Ms. Wipper's uncorroborated testimony regarding the purported results of OFCCP's "irrelevant" preliminary compensation analyses should be disregarded in its entirety. It is well established that a witness's bold and conclusory testimony, without offering an explanation or other evidence supporting the statements, is entitled to no evidentiary value. *See United States v. Various Slot Machines*, 658 F.2d 697, 699-701 (9th Cir. 1981) (giving no weight to conclusory sworn statement of a witness because he "offers no facts to support the assertion"); *LabelGraphics, Inc. v. Commissioner*, 221 F.3d 1091 at 1096-97 (9th Cir. 2000) (affirming a lower court's decision to give "little weight to the conclusory claim" by a witness "because no analysis or explanation supported the claim"). Moreover, OFCCP's strategic decision to assert the deliberative process privilege, and, thus, not offer any facts supporting its alleged findings, cannot permit the Agency to avoid its obligation to meet burden of proof on the administrative subpoena standard. Otherwise, in all future cases, the Agency simply could make a single uncorroborated and unchallengeable assertion to circumvent the *Fourth Amendment* in all denial of access claims it brings. This would represent a denial of due process.

The positions OFCCP has taken in the hearing of this matter stand in sharp contrast to those it took in the hearing of *United Space Alliance* before ALJ Daniel A. Sarno, Jr. (A copy of relevant pages from the hearing transcript in the *United Space Alliance* case is attached hereto as Exhibit A.) At the *United Space Alliance* hearing, OFCCP submitted into evidence a table showing its compensation analyses in support of its position that the Agency was within its *Fourth Amendment* rights to seek 14 compensation factors for the contractor's the current year workforce. To further support its position that OFCCP's analyses showed potential indicators

of systemic discrimination against females, OFCCP called District Director Miguel Rivera at the hearing, who testified not only regarding the results of OFCCP's statistical analysis but also regarding the underlying analyses itself, including the specific type of analyses, the method used to run and refine the analyses, and the reasons why the analyses supported OFCCP's position that further compensation data was required. (See Exhibit A, at pages 46 to 81). See also, *United Space All., LLC*, 824 F. Supp. 2d at 75-76 (summarizing the testimony of District Director Rivera regarding the precise nature OFCCP's analyses, including the methodologies applied and refinements made to those analyses). In stark contrast, here OFCCP refuses to provide any evidence whatsoever regarding its compensation analyses to support Ms. Wipper's single line of testimony regarding the OFCCP's findings, instead taking the position that the underlying analyses are subject to government privileges. This approach leaves both Google and this Court with no opportunity to evaluate OFCCP's preliminary analyses and cross examine OFCCP's witnesses about them. This violates the due process rights that are afforded Google as a federal contractor. *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 95 (D.D.C. 2011) ("OFCCP expedited hearings respect the due process rights of federal contractors.")

3. Ms. Suhr and Ms. Wipper's Testimony Regarding the Onsite Interviews Should Not Be Credited.

OFCCP offered testimony aimed at showing how the Subject Demands were relevant. Much of this consisted of District Director Suhr's testimony regarding the onsite interviews that OFCCP conducted at Google's facilities in April 2016, which Ms. Suhr attended. Hrg. Tr. 66:21-67:1. The gist of Ms. Suhr's testimony was that Google employees—most frequently, Google Vice President Frank Wagner—told her about Google's compensation practices and policies, and based on those statements, the Subject Demands are relevant to compensation. *See id.* at 68:2-69:1. Regional Director Wipper testified in a similar fashion. *See, e.g., id.* at 50:6-20. But

Ms. Wipper's testimony regarding anything said by Google employees at the onsite visit consists of multiple levels of hearsay because she did not attend the onsite. *Id.* at 145:19-23.

There are two glaring problems with these two witnesses' accounts of Google's compensation practices and policies. First, their testimony is based on clear misunderstandings of Google's compensation systems. Second, their statements were rebutted by Mr. Wagner's testimony, which is by far the most reliable evidence the Court received regarding Google's policies and practices.

To take just one example, Ms. Suhr testified that Mr. Wagner told her that an employee's "prior salary" (i.e., salary before joining Google) is a "relevant component to setting compensation." *Id.* at 75:18-21. Ms. Wipper testified similarly. *Id.* at 50:6-14. However, Ms. Suhr later admitted that Mr. Wagner did not "tell [her] that [an] individual's entire employment history with respect to salary was relevant to setting compensation at Google." *Id.* at 76:6-9. She also admitted that she did not bother to ask if prior salary was relevant to some employees' compensation but not others. *Id.* at 76:16-24.

Mr. Wagner's testimony on this issue rebuts Ms. Suhr and Ms. Wipper's accounts, and makes it clear neither understands Google's salary policies. Specifically, he testified that 20% of Google's employees on the September 2015 snapshot were Campus Hires—i.e., employees hired directly from university. *Id.* at 197:25-198:7. For these employees, prior salary history plays no role in setting compensation. *Id.* at 171:9-172:1; 197:1-10. Google "do[es] not look at their compensation in any prior job for a new grad, period, ever." *Id.* at 216:2-14; *see also id.* at 171:9-19. OFCCP's fundamental misunderstanding of Google's compensation policies make it clear why the Agency's Subject Demands are overbroad and seek irrelevant evidence. Rather

than attempt to understand Google's systems, they instead issued extremely broad requests, even though the requests impose burdens on Google that to date have cost nearly \$500,000.

Ms. Suhr's testimony was also unreliable for other reasons, including vagueness and her admitted lack of investigation into Google's policies. For example, Ms. Suhr testified that competing offer information was a consideration in setting compensation for an unspecified amount of Google's workforce. *Id.* at 72:24-73:8. Ms. Suhr also testified, vaguely, that several *hiring managers* (not Frank Wagner) told her that education and experience will affect compensation. *Id.* at 73:20-24. Ms. Suhr testified that Mr. Wagner informed her, vaguely, that job history was relevant to compensation. *Id.* at 74:16-24. Ms. Suhr also testified that Mr. Wagner informed her that prior salary of applicants was relevant to compensation, because allegedly "Google tries to beat the prior salary of the individual by 10 to 20 percent." *Id.* at 76:6-18. Importantly, as revealed on cross-examination during the interview, Ms. Suhr did not clarify whether this was with respect to all employees or any particular sub segment of employees; she did not ask at the time of the onsite interviews and she did not know upon providing testimony whether her testimony applied to any certain percentage of the workforce. *Id.* Ms. Suhr's testimony is not reliable because she did not choose to ask questions to Google representatives as to whether the information she obtained applied to the entire workforce (it does not).

Although she was not present at the onsite, Ms. Wipper testified regarding the results of on-site interviews. *See, e.g., id.* at 43:23-25, 49:13-18, 50:8-20, 58:19-59:7. In fact, Ms. Wipper testified to what Ms. Suhr told her that Frank Wagner said at the site visit. This evidence consists of multiple levels of hearsay, and has been introduced for the truth of the matters asserted. If not inadmissible, the statement should certainly be acknowledged as unreliable in comparison to Mr. Wagner's testimony. Indeed, Mr. Wagner's testimony, and not the hearsay evidence, is the

most probative evidence. Hearsay is defined as an out of court statement offered in evidence to prove the truth of the matter asserted. 29 C.F.R. § 18.801(c). The reason that hearsay evidence is inadmissible in court is that it is considered unreliable and untrustworthy. *Valdivia v. Schwarzenegger*, 548 F. Supp. 2d 852, 1094 (E.D. Cal. 2008). Indeed, the Court is specifically empowered to exclude evidence it deems unreliable. *See* 41 C.F.R. § 60-30.15(h); *see also OFCCP v. Texas Eastern Transmission Corp.*, No. 88-OFC-30, 1990 OFCCP LEXIS 55, at *2-3 (Dep't of Labor 1990) (excluding evidence that was hearsay since it was not “the most probative evidence”); *Cody Zeigler Inc. v. Administrator, Wage and Hour Division, USDOL*, ARB Nos. 01-014 and 01-015, ALJ No. 1997-DBA-17, at 12 (Dep't of Labor ARB 2003) (excluding DOL investigator's hearsay testimony summarizing employee interviews, stating “[a]lthough it is well settled that hearsay evidence . . . is admissible in administrative proceedings . . . we must nevertheless evaluate the weight to be given to such hearsay evidence”).

4. Frank Wagner's Testimony Shows That the Subject Demands Are Unreasonable, Overbroad, and Seek Irrelevant Information.

OFCCP can only issue demands that are limited in scope and that seek relevant information. *United Space All.*, 824 F. Supp. 2d at 91. Mr. Wagner's un rebutted testimony shows that significant portions of OFCCP's Subject Demands 2 and 3 seek information that is by definition irrelevant to OFCCP's examination of compensation differences purportedly existing as of September 1, 2015.

a. Prior Salary History Is Irrelevant to Campus Hires' Salaries at Google.

One in five Google employees as of September 2015 were Campus Hires. *Id.* at 197:25-198:7. Mr. Wagner testified that the prior salary history for a Campus Hire (i.e., the person's salary just before joining Google) plays no role in setting that person's compensation. *Id.* at 171:9-172:1, 197:1-21, 198:4-9. Mr. Wagner also testified that Google “do[es] not look at . . .

compensation in any prior job for a new grad, period, ever.” *Id.* at 216:2-14; *see also id.* at 171:9-19. In addition, Mr. Wagner testified that an individual’s prior experience has no effect on what Google would offer the applicant. *Id.* at 230:13-16. In other words, 20% of OFCCP Subject Demand 2 related to prior salary history seeks irrelevant information. This Subject Demand is also overbroad for a related reason. OFCCP could have structured its request to avoid prior salary and prior job history for Campus Hires, which would reduce Google’s burden to respond. Instead, OFCCP issued a fishing expedition request with no limit, which violates the *Fourth Amendment*.

b. Job and Salary History at Google Are Irrelevant to an Employee’s Compensation as of September 1, 2015 in Many Cases.

With rare exception, employee salaries increase at Google only when an employee receives a merit increase (a raise while staying in the same job), when an employee transfers to a different position, and when an employee is promoted into a new position. Mr. Wagner testified that an employee’s job history at Google (all their jobs during their time with the Company) have no bearing at all on an employee’s merit increase. *Id.* at 179:8-12. Thus, OFCCP’s Subject Demand for job history seeks irrelevant evidence in the context of merit increases.

Mr. Wagner’s testimony also shows that salary history is irrelevant to how salary is determined for an employee awarded a promotion 80% of the time. *Id.* at 203:13-22. When employees are promoted, Google models their new salary at 85% of the MRP of their new job, and prior salary history plays absolutely no role. *See id.* at 200:13-22. There are two exceptions. First, if moving the employee to the modeled salary of their new job would result in a pay increase of less than 5%, Google will increase their pay at least 5%. *Id.* at 200:23-201:11. Second, in some situations, moving the employee to 85% of the modeled salary for their new

job would result in a pay increase of more than 20%. Google will only increase that employee's pay by 20%. *Id.* at 200:12-20. Mr. Wagner testified that these exceptions occur only 20% of the time, and for approximately 80% of promotions, compensation is "not affected by prior salary" because the 5% minimum/20% maximum rules are not triggered. *Id.* at 203:13-22.

Furthermore, an employee's "job history at Google is not taken into consideration when setting compensation" for the post-promotion job. *Id.* at 182:1-13. Neither does the Company consider an employee's *entire* salary history (the "salaries associated with each of the jobs they've previously held at Google") when setting compensation for the post-promotion job. *Id.* at 182:14-25. Instead, the only salary history that becomes relevant is the "immediate salary prior to the promotion for the people subject to the five percent minimum and 20 percent maximum." *Id.* at 204:14-23.

Mr. Wagner's testimony clearly shows that a significant portion of OFCCP's Subject Demand for job history and salary history seeks information irrelevant to an employee's compensation as of September 1, 2015. Accordingly, since OFCCP failed to limit Subject Demand 2 to situations where prior salary or salary history can have an impact on an employee's September 1, 2015 salary, OFCCP cannot satisfy its burden of showing that Subject Demand 2 complies with the *Fourth Amendment*.

5. The Undisputed Testimony of Kristin Zmrhal Establishes That OFCCP Did Not Meet Its Burden of Showing That Subject Demand 2 Is Not Unreasonably Burdensome.

The undisputed testimony of Discovery Program Manager Kristin Zmrhal regarding the burdensomeness of Google complying with OFCCP's requests demonstrates that the burden on Google outweighs the relevance of the information in the context of OFCCP's compliance evaluation. As stipulated, the value of the initial contract in question was \$100,000. Hrg. Tr. 5:17. As of December 29, 2016, Google had received approximately \$600,000 under the

contract. *Id.* at 6:9-11. Ms. Zmrhal testified that, to date, Google has spent just under \$500,000 on complying with OFCCP's requests. *Id.* at 275:14-17. Ms. Zmrhal testified that the cost to Google to just collect the data responsive to Subject Demands 2 and 3, prior to analysis, redaction and review by outside counsel, would be approximately another \$100,000. *Id.* at 277:8-14.

As explained, reasonableness hinges on proportionality – *i.e.*, whether the burden imposed upon the employer is proportional to the need for the information. Google's request for this information creates a sizable burden upon Google in the context of this compliance review, particularly because Google has testified that the information is largely not relevant to setting salary or the compensation data giving rise to the alleged disparities. This makes OFCCP's request for the job history and prior salary of its entire workforce unreasonable.

Beyond the human and financial capital that would be expended in obtaining this information, the information sought by OFCCP implicates the privacy rights of Google's employees. Google employees understand that the Company maintains certain information about how much they are paid. However, these employees do not consent to divulging this information to the government when applying to work at Google. There is no question that contents of personnel files, such as some of the information in question here, are afforded privacy rights; information contained therein can only be divulged if the need for the information outweighs these interests. *See United States EEOC v. McCormick & Schmick's Seafood Rests.*, Civil Action No. DKC-11-2695, 2012 U.S. Dist. LEXIS 115673, at *9 (D. Md. Aug. 16, 2012); *In re Xarelto (Rivaroxaban) Prods. Liab. Litig.*, 312 F.R.D. 32, 33 (E.D. La. 2016) (stating that prior salary contained in personnel file is sensitive information with privacy interests); *Raddatz v. Standard Register Co.*, 177 F.R.D. 446, 447 (D. Minn. 1997). When there is very little relevance to the information sought, the privacy hurdle is harder to clear.

OFCCP's reliance on *OFCCP v. Coldwell, Banker and Co.*, No. 78-OFCCP-12, 1987 OFCCP LEXIS 13 (Dep't of Labor 1987), in its closing statement is inapposite and taken out of context. In that case, Coldwell Banker argued it was not a government contractor and, therefore, did not need to comply with *any* affirmative action requirements of the OFCCP nor create an affirmative action plan. *Id.* at 4-5. In support, it argued that being subject to OFCCP regulations in and of itself was too costly. *Id.* at 20-22. Coldwell Banker argued that the entire regulatory scheme of the OFCCP was unconstitutionally burdensome. *Id.* at 20-22. Here, there is no doubt that Google is bound by the OFCCP regulations. The question here is the interpretation of the regulatory scheme, not whether it applies or not.

In support of this inapposite theory, OFCCP called an expert, Michael Brunetti, to essentially read the Form 10-K of Alphabet Inc., Google's parent company. Mr. Brunetti testified that Google's "total equity" was \$120 billion in 2015. Hrg. Tr. 101:2-11. He also testified that Google's net operating income for 2016 was \$27.89 billion. *Id.* at 102:7-8. Although the Judge interjected and informed the parties that he could make his own conclusions on the topic, Mr. Brunetti testified that in his opinion, the anticipated \$1 million cost of producing this information would not have a meaningful impact on Google's business. *Id.* at 103:2-104:20.

This information is irrelevant and only serves to prejudice the Google. Financial burden is not examined in a vacuum. If OFCCP's reasoning were followed, the fact-finder would only base burdensomeness on how financially sound the employer is. Any large profitable company could be expected to take on disproportionately broad discovery requests, simply because (as OFCCP argues), they can afford it. This reasoning is not in line with the concepts of reasonableness and proportionality that are the cornerstones of administrative subpoenas.

In reality, the burden is measured in proportion to the relevance of the information to the ends sought. In other words, if the information is marginally relevant, then a lesser amount of burden might make the disclosure unreasonable. If the information is extremely relevant, then it might justify a higher burden. Here, Google has demonstrated through direct evidence of its witnesses that much of the information sought in Subject Demand 2 is not relevant to the compensation data OFCCP alleges shows disparities in pay between men and women. Therefore, regardless of Google's net worth, for purposes of this Compliance Evaluation, the requests are burdensome.

**C. OFCCP Has Failed to Satisfy Its Burden of Proof that Subject Demand 3
Complies with Each Element of the Administrative Subpoena Standard.**

The record evidence also shows that OFCCP has failed to satisfy each element of the administrative subpoena standard with respect to Subject Demand 3. Subject Demand 3 seeks a prior year snapshot for the over 19,000 employees in Google's MTV workforce as of September 1, 2014, including all of the items of data Google supplied as part of its 2015 Snapshot, along with complete salary and job history, including prior salary, competing offers, and prior experience.

Ms. Wipper testified that OFCCP's request for the prior year snapshot was based on the Agency's purported findings that compensation disparities existed in the September 1, 2015 snapshot. Specifically, Ms. Wipper testified that as a result of these alleged findings, OFCCP wished to examine whether the same disparities existed as of September 1, 2014. For all of the reasons set forth in Point I, Subsection B.2 above, the Court should not afford any evidentiary weight to Ms. Wipper's conclusory and unsupported testimony regarding these alleged findings. Accordingly, this Court should preclude OFCCP from receiving the 2014 Snapshot as the

testimony demonstrated that this request rested entirely on Ms. Wipper's conclusory and uncorroborated assertion of pay disparities existing in the 2015 Snapshot.

Even if the Court were to credit Ms. Wipper's testimony, the request remains overbroad, since the only information OFCCP could possibly use to ascertain if the disparities existed in 2014 is the same data contained on the September 1, 2015 snapshot. Alternatively, even if OFCCP had a basis for requesting such data fields for the prior year snapshot, these requests are overly broad and irrelevant in significant respects for the same reasons set forth in Point I, Subsection B.4 above. Accordingly, OFCCP's demand for a 2014 Snapshot does not comply with the administrative subpoena standards and should be quashed.

* * *

Since OFCCP has failed to satisfy its burden of demonstrating that its requests are sufficiently limited in scope, relevant in purpose and specific in directive, so that compliance will not be unreasonably burdensome, and since OFCCP has not made any effort to limit the scope of its requests, Google respectfully requests this Court to issue an order dismissing OFCCP's denial of access complaint in its entirety.

POINT II
IN THE ALTERNATIVE, THIS COURT SHOULD MODIFY THE SUBJECT DEMANDS SO THEY COMPLY WITH THE *FOURTH AMENDMENT*.

While Google requests the Court quash OFCCP's Subject Demands in their entirety, it alternatively requests the Court modify them to adhere to *Fourth Amendment* principles. There is now no dispute that the Court has the discretion to blue pencil, or modify, the Subject Demands. Pre-Hrg. Tr. 33:20-34:18. If the Court chooses to permit OFCCP to proceed with any of the Subject Demands, they should be sufficiently limited in scope so as to satisfy the exact ends sought.

A. The Court Should Modify Subject Demand 1 to Permit OFCCP to Interview a Reasonable Sample of Google Employees.

OFCCP has requested the names, phone numbers, email addresses, and home addresses for 25,000-plus employees. Hrg. Tr. 7:23-8:3; Hrg. Ex. 6 at 2-3. Ms. Wipper testified that the "reason why [OFCCP] asked for the employee contact information," is that OFCCP seeks "to conduct confidential employee interviews." Hrg. Tr. 41:11-22. However, Ms. Wipper admitted OFCCP would not interview all 25,000-plus employees in the Google Mountain View AAP. *Id.* at 151:16-152:19. She stated, "[W]e wouldn't want to talk to all of them. . . . [W]e would want to talk to a sufficient amount of people – a sample." *Id.* Ms. Wipper's testimony provides a map for how the Court can blue pencil this Subject Demand—i.e., the Court can order Google to provide a reasonable number of employees' contact information, such that OFCCP has a sample sufficient to conduct confidential interviews.

For example, the Court could select 2,500 employees—and order Google to provide their contact information to OFCCP. This is a reasonable limit because it balances the competing concerns. On the one hand, OFCCP's will be able to interview employees, and the sample is large enough that Google will be unaware which employees are speaking with OFCCP. On the

other hand, more than 20,000 Google employees' contact information will be protected and the Subject Demand will have a reasonable limitation.

B. The Court Should Modify Subject Demand 2 to Impose Reasonable Scope Limitations and Eliminate Requests for Irrelevant Information.

OFCCP has requested job history and salary history for all 25,000-plus employees included in Google's Mountain View AAP. Hrg. Ex. 6 at 2; Stip. Fact 14; OFCCP Prehearing Statement at 4. OFCCP and its witnesses have stated that this request encompasses, among other things, the following four categories of information.

- Salary history while at Google. This includes the entire history of a Google employee's salary during their time at Google. Hrg. Tr. 42:15-43:11; OFCCP Prehearing Statement at 4 n.3.
- Job history while at Google. This includes the entire history of a Google's employee's positions during their time at Google. Hrg. Tr. 45:12-23; OFCCP Prehearing Statement at 4 n.3.
- Prior salary history before Google. This includes "prior salary"—i.e., "the salary the individual held before coming to Google." Hrg. Tr. 76:2-5; *see also* OFCCP Prehearing Statement at 4 n.3.
- Prior job history before Google. This includes "prior experience"—i.e., an employee's jobs before joining Google, even "going back to 1998" when Google was founded. Hrg. Tr. 147:23-148:17; OFCCP Prehearing Statement at 4 n.3.

As discussed above, these demands violate the *Fourth Amendment* in several ways. Therefore, the Court should modify the requests to repair these problems.

First, the Court should limit the requests to OFCCP's clearly recognized two-year review period (September 30, 2015 back to September 30, 2013).

Second, the Court should prohibit OFCCP from requesting prior salary before Google for any Campus Hires. As discussed above, prior salary is never relevant to a Campus Hire's

compensation as of September 1, 2015. This change alone would eliminate a fifth of the requested prior salary information and impose a reasonable limit on OFCCP's demand.

Third, the Court should preclude OFCCP from requesting prior salary for Industry Hires who were hired in at a salary of 80% of the MRP, since the testimony shows that such salary was not a consideration in setting initial compensation.

Fourth, the Court should order only the production of salary history for those employees who either never promoted or who received a promotional increase of either 5% or 20%, as the testimony demonstrated salary history would have no relevance to the compensation data contained in the September 1, 2015 snapshot.

Fifth, the Court should bar OFCCP from collecting job history at Google as the testimony clearly showed this information was not considered when making compensation decisions.

C. The Court Should Modify Subject Demand 3 to Eliminate Requests for Irrelevant Information.

OFCCP's Subject Demand seeks a prior year compensation snapshot as of September 1, 2014 for the over 19,000 employees in Google's MTV AAP as of September 1, 2014. As discussed above, OFCCP has failed to satisfy its burden of proving that this demand complies with each element of the administrative subpoena standard. Accordingly, the Court should modify Subject Demand 3 to exclude prior salary, prior experience, and job and salary history at Google. To the extent the Court orders production of these elements, they should be limited in the same manner as described in Point II, Subsection B above related to Subject Demand 2.

CONCLUSION

As set forth in detail herein, OFCCP has not met its burden of proof with respect to the standards required for the enforcement of an administrative subpoena. Accordingly, Plaintiff's denial of access claim should be dismissed in its entirety. However, if the Court determines

that some portion of the Subject Demands are sufficiently limited in scope, relevant in purpose, and specific in directive so as not to be not unreasonably burdensome, the Court is empowered to narrow the Subject Demands, and enforce them as modified.

Respectfully submitted,

Dated: June 2, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this ^{2nd} day of June 2017, I caused a true and correct copy of the foregoing Post Hearing Memorandum of Points and Authorities in Support of Dismissal of Plaintiff's Denial of Access Claim, Or in the Alternative, A Narrowing of the Subject Demands to be served by sending a copy of same via U.S. Mail and e-mail to (pursuant to the agreement of the parties):

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