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VIA HAND DELIVERY

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

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Office of Administrative Law Judges
San Francisco, Ca

Re: *OFCCP v. Google Inc.*, Case No. 2017-OFC-00004, Redacted
Plaintiff's Post-Hearing Brief

Your Honor:

As indicated in the cover-letter OFCCP submitted with Plaintiff's Post-Hearing Brief on June 2, 2017, and consistent with this Court's April 7, 2017, request for redacted versions of briefs for the public record (see 4/7 Hearing Transcript at 16:17-25), OFCCP hereby submits a redacted copy of its Post-Hearing Brief. The redacted Brief omits each and every reference to the Exhibits identified by Google in their pending Motion to Seal Exhibits. As this version of the brief does not include any information subject to the sealing Order, OFCCP does not intend to treat this Brief as sealed absent an Order from the Court.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

RECEIVED
JUN 05 2017
Office of Administrative Law Judges
San Francisco, Ca

PLAINTIFF'S POST-HEARING BRIEF
Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

OALJ CASE NO. 2017-OFC-00004
OFCCP NO. R00197955

OFCCP'S POST-HEARING BRIEF

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INTRODUCTION

OFCCP filed this denial of action case because Google—in clear derogation of its contractual and regulatory duties under Executive Order 11246 and its implementing regulations—refuses to comply with OFCCP's requests that Google supply employee contact information and other information related to its compensation practices during the course of a routine compliance review. Google claims that despite its contractual commitment to provide OFCCP access to information relevant to determine Google's compliance with its non-discrimination obligations under the Executive Order in exchange for receiving tens of millions of dollars in federal business, the Fourth Amendment of the United States Constitution gives it the right to withhold the requested information. For this defense to be successful, Google has to show that the requested items would shed no light on OFCCP's review of Google's compensation practices or that complying would hinder Google's normal business operations. Google has not made this showing.

Over the course of two-days of hearing, OFCCP proffered un rebutted evidence that each request, including all subparts, asks for information directly relevant to OFCCP's review of Google's compensation practices at its Mountain View headquarters. Specifically, the testimony and record evidence demonstrate that the requested September 2014 snapshot is relevant to a determination as to whether Google was in compliance for the entire two-year review period, the prior pay and salary history are relevant to determining the causes of disparities observed during the review period, and employee contact information allows OFCCP to further its investigation by speaking directly with Google employees about their compensation related experiences.

Google's only testimony on burden was a vague, all-in, and undifferentiated estimate that complying with the requests would cost \$100,000 and take approximately 400-500 employee hours. This estimate should not be credited as it was not based on the personal knowledge of the witness, the witness was not able to explain how many hours would be spent on the separate requests, and the witness was unable to break out the various tasks and describe them in sufficient detail for the court to determine which are legitimate costs and which are costs of Google's only making. However, even if fully credited, the cost estimate is insufficient to demonstrate that compliance would hinder Google's normal operations, as the record evidence establishes that Google, which had a *net* operating profit of almost \$28 billion in 2016, can easily afford to comply with the request.

As such, OFCCP respectfully requests that this Court compel Google to comply with its regulatory and contractual obligations and supply the requested information.

STATEMENT OF FACTS

I. Google Is a Successful Multi-Billion Dollar Company That Specializes in Making Information Accessible.

Google is “an information company,” with a mission to “organize the world’s information and make it universally accessible and useful.” Ex. 201 (Alphabet 2016 10-K) at 3.¹ The company prides itself in leveraging its “technical expertise to tackle big problems” and “providing ways to access knowledge and information.” Ex. 212 (Alphabet & Google 2015 10-K) at 2.

Since 2014, Google has earned almost \$70 billion in income. *See* Ex. 201 at 83. In 2016 alone, the company’s income exceeded \$27 billion, accounting for approximately \$62 billion in

¹ Unless otherwise stated, citations to exhibits are to the parties’ hearing exhibits. Exhibits numbered 1-16 are joint exhibits, those numbered 101-122 are Google’s exhibits, and those numbered 201-223 are OFCCP’s exhibits.

operating costs. *Id.*; *see also* Hrg. Tr. (Brunetti) at 102:9-14 (calculating operating costs based on Ex. 201). In 2015, the company had similar success, making over \$23 billion in income. Ex. 201 at 83.

With respect to its employees, Google pledges a culture of “[t]ransparency and open dialogue.” Ex. 201 at 6. In 2014, Google “spent \$115 million on diversity initiatives,” and planned to spend \$150 million in 2015. Ex. 210 (*USA Today* 5/2015 article) at 1.

II. For Approximately a Decade, Google Has Been a Federal Contractor Subject to Executive Order 11246, Receiving Millions of Dollars from Federal Contracts.

Since at least 2007,² Google has done business with the federal government, both as a federal contractor and subcontractor. Ex. 208 (*Google v. United States* Complaint) ¶ 3 (explaining company provides its services “either through direct agreements or Google’s licensed resellers”). The company has aggressively sought federal business, going so far as to sue the federal government in 2010 to obtain the opportunity to provide its “Google Apps” services to the Department of Interior. *Id.* At the time, Google was “developing a Government-only cloud environment available only for federal, state and local U.S. government customers.” *Id.* at Ex. A, page 3; *see also Id.* at ¶ 8 of the Complaint.

Through its federal business, Google has received tens of millions of taxpayer dollars. Since 2010, federal agencies have entered into several multi-year contracts for Google services, including:

- in 2010, a \$6.7 million contract to provide Google Apps to the General Services Administration (“GSA”), *see* Ex. 204 (12/2010 article regarding GSA contract), Ex. 205 (Google post regarding GSA contract);

² *See, e.g.,* Hrg. Tr. (Suhr) at 65:2-6 (noting OFCCP conducted compliance evaluations of Google in 2007, 2010, 2011, and 2012, meaning Google was a federal contractor at least during those periods).

- in 2011, a three-year \$11.5 million contract to provide Google Apps to the National Oceanic and Atmospheric Administration, *see* Ex. 206 at 1 (6/2011 article regarding contract), Ex. 207 (Google post regarding same);
- in 2012, after filing the lawsuit mentioned above, a seven-year \$34.9 million contract to provide Google Apps to the Department of Interior, Ex. 209 (5/2012 article regarding contract); and
- in 2016, a \$2.6 million subcontract with the National Cancer Institute for cloud computing services, Ex. 203 (2016 Contract) at 3.

In 2014 and 2015 alone, Google received approximately \$30 million for the federal government's use of its services. ALJ Ex. 2 ¶ 31.

Adding to this figure is Google's June 2, 2014 contract with GSA for "Advertising and Integrated Marketing Solutions" (hereinafter, "AIMS Contract"), which Google valued at \$25 million over its five-year term. Ex. 2 (AIMS Contract, Google Offer) at 3 (estimating \$5 million in "projected annual sales"). Under the AIMS Contract, among its other contracts, Google agreed voluntarily to submit to OFCCP's compliance reviews and requests for information. The AIMS Contract obligated Google to "comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor" and

permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.

ALJ Ex. 1 ¶ 5. Google accepted its obligations willingly, affirmatively representing that it took "no exceptions" to the AIMS Contract's "terms and conditions," which "reflect[ed] the outcome of negotiations between Google and [GSA.]" Joint Ex. 4 (Apr. 2014 Google Letter to GSA) at 1; *see also* ALJ Ex. 1 ¶ 6 (explaining letter).

III. In September 2015, OFCCP Initiated a Compliance Evaluation of Google's Mountain View Headquarters, Which Includes a Comprehensive Analysis of Google's Compensation Practices.

On September 30, 2015, OFCCP opened a compliance evaluation into Google's Mountain View headquarters. ALJ Ex. ¶ 7; *see generally* Ex. 5. A compliance evaluation entails "a comprehensive analysis and evaluation of a contractor's employment practices." Hrg. Tr. (Wipper) at 33:19-21; *see also* 41 C.F.R. § 60-1.20(a)(1).

The current compliance evaluation has a review period that spans from September 2013 through at least September 2015. Hrg. Tr. (Wipper) at 35:15-36:3 (explaining timeframe and that period may go beyond September 2015 if OFCCP identifies any violations). The review encompasses the over 21,100 employees Google included in its affirmative action program ("AAP"). *Id.* at 34:14-18, 38:15-18. Google did not request to use a functional affirmative action program ("FAAP") for its Mountain View headquarters, which are "often approved" and could have resulted in narrower groups of employees being subject to a compliance evaluation. *Id.* at 34:22-35:1 (discussing FAAP alternative), 39:4-19 (explaining FAAPs and how a request for one is "often approved"), 119:24-120:8 (explaining potential for narrower reviews with FAAPs).

OFCCP reviews contractors' compensation practices based on its Directive 307, a publicly published document that describes for federal contractors and other interested parties how the agency evaluates compensation practices. Hrg. Tr. (Wipper) at 36:5-13. Among other things, the Directive instructs OFCCP investigators that "when you're investigating compensation, you should be looking at all employment practices that have an impact on pay." *Id.* at 36:18-20. It also provides that, in conducting an evaluation, the agency considers "the factors the Agency believes are relevant and legitimate and also the factors that the Contractors asserts are relevant to pay practices and pay decisions." *Id.* at 36:22-25. Directive 307 also

provides that evaluations of compensation practices are done on a case-by-case basis, and that principles established under Title VII of the Civil Rights Act guide OFCCP's analysis. *Id.* at 158:21-159:3.

As part of the current compliance evaluation, among other things, OFCCP has analyzed compensation data Google produced in 2015 and interviewed with human resources personnel. Information obtained through both led OFCCP to request the additional materials at issue in this expedited proceeding.

A. Google's 2015 compensation data revealed systemic compensation disparities against women across the Mountain View workforce.

In the September 30, 2015 letter advising Google of the compliance evaluation, OFCCP made an initial request for data. *See* Joint Ex. 5 at 1. Google produced this initial set of data in late 2015. ALJ Ex. 1 ¶¶ 10-11.

Prior to June 2016, OFCCP reviewed Google's data production, which revealed "systemic disparities against women pretty much against the entire workforce." Hrg. Tr. (Wipper) at 48:4-5; *id.* at 128:6-11 (explaining OFCCP reviewed data before making June 2016 requests). The initial "indicators that were consistently adverse to women" were widespread. *Id.* at 132:1-7.

Having observed across-the-board disparities, OFCCP sought to determine how long such disparities existed and the cause of the observed compensation inequalities. *See, e.g., id.* at 40:21-24, 41:7-10 (explaining need "to find out what the cause of those disparities are"). As Regional Director Janette Wipper explained, "if we're looking at a disparate impact claim . . . we want to understand what's causing the disparity as well as how we can propose to correct it." *Id.* at 47:7-9.

B. In documents and during OFCCP's April 2016 onsite visit, Google disclosed information regarding its compensation practices.

In April 2016, OFCCP conducted a limited on-site visit of the Mountain View campus to “get a better understanding of Google’s . . . compensation process policies.” Hrg. Tr. (Suhr) at 67:5-10. As part of that visit, OFCCP met with several of Google’s human resources personnel, including Frank Wagner, Google’s Vice President of Compensation. *See, e.g., id.; id.* at 72:9-10 (discussing conversation with Wagner). That visit, along with documents Google disclosed, revealed the following about Google’s compensation policies.

1. Google deviates from its standard offers of salary and stock when candidates present a higher prior salary or competing offer.

At hire, all of Google’s employees are offered a compensation package consisting of salary, stock (*i.e.*, equity), an annual bonus, and a potential sign-on bonus. Hrg. Tr. (Wagner) at 217:15-218:17; *see also* Redacted Pending Ruling on Sealing of Exhibits

[REDACTED] Google has a standard, default offer for salary, stock (the target equity grant varies by job), and annual bonuses. Hrg. Tr. (Wagner) at 208:11-14 (college hire standard salary offer); 211:7:9 (college hire standard stock offer); 213:25-214:8 (employee bonuses); 218:8-14 (the same compensation package provided to industry hires as college hires); 218:24-219:1 (target equity grant). For instance, with respect to salary, Google’s “baseline offer” is 80 percent of the market reference point (“MRP”) for a given job.³ Hrg. Tr. (Wagner) at 170:10-12 (college hires); *id.* at 172:5-11 (industry hires).

In fashioning compensation offers, Google distinguishes between candidates who are new college graduates (*i.e.*, “college hires”) and industry hires. *E.g.*, Hrg. Tr. (Wipper) at 50:9-11; (Wagner) at 206:13-15. The primary distinction between the two is that industry hires, who

³ The “market reference point,” or MRP, is the salary amount that reflects the 90th percentile companies pay for a position according to market surveys. Hrg. Tr. (Wagner) at 169:20-170:6.

comprise the vast majority of the Mountain View workforce (Hrg. Tr. (Wagner) at 206:16-18), have a greater ability to negotiate their starting compensation packages.

For industry hires, Google will consider a candidate's prior salary or a competing offer in deciding the candidate's offer package. To illustrate, in setting starting pay, Google will exceed its 80-percent baseline offer if the candidate's prior salary (*i.e.*, the amount he or she earns in the job prior to Google) exceeds that amount. Hrg. Tr. (Wagner) at 176:2-14 (explaining relevance of prior salary). Google will also offer larger stock grants if the candidate has a high prior salary, competing offers, or a substantial equity grant at his or her current job. *Id.* at 222:23-223:16. Prior pay and competing offers can also play a role in increasing the sign-on bonus an industry hire may receive. *Id.* at 223:23-224:14.

By contrast, college hires can rely only on a competing offer to increase their initial compensation package from Google. A competing offer may lead Google to offer a college hire a larger initial equity grant or a larger sign-on bonus. *Id.* at 210:3-18.

2. Google employees can receive annual salary increases, either through merit raises or promotions.

Annually, incumbent Google employees can receive salary increases either through merit increases or promotions. As with starting salary, such salary increases focus on what an employee's salary is relative to his or her job's MRP.

Google provides merit increases that are a percentage of an employee's pay, which is a function of the employee's current salary (*i.e.*, specifically, the "compa-ratio," or the ratio between that salary and the MRP) and his or her performance reviews for that year. Hrg. Tr. (Wagner) at 177:17-22; *see also* Redacted Pending Ruling on Sealing of Exhibits

[REDACTED]. Except for employees who only meet expectations or need improvement, Google offers standard merit increases. Google's system is intended, "over time," to have employees

who are in the same job and performing at the same level earn a similar amount. Hrg. Tr. (Wagner) at 246:3-8.

Incumbent employees also receive a pay increase if they are promoted, with Google raising a promoted employee's pay to 80% of the MRP for the post-promotion job. Hrg. Tr. (Wagner) at 181:1-11. However, if that employee already exceeds that 80% baseline, the employee will receive a minimum 5% raise. *Id.* at 181:22-25.

3. Much of Google's Compensation and Human Resources Information Is Stored in Electronic Databases.

Google has several electronic, online systems that provide information on its employees' demographic information and compensation history.

- **WorkDay:** WorkDay contains [Redacted Pending Ruling on Sealing of Exhibits], compensation history (*id.* at 196-206), and job history (*id.* at 207-210).
- **gComp:** [Redacted Pending Ruling on Sealing of Exhibits]
- **Prosper:** [Redacted Pending Ruling on Sealing of Exhibits]
- **gHire:** gHire contains information related to Google's recruiting and hiring processes, including prior salary. Hrg. Tr. (Wagner) at 232:16-24.

IV. Google Refused to Produce Additional Information OFCCP Requested After Seeing Pay Disparities and Learning More About Google's Compensation Practices.

After seeing pay disparities in Google's 2015 compensation data and after obtaining additional information about how Google compensates its employees, on June 1, 2016, OFCCP requested the following additional information:

- a compensation database as of September 1, 2014 for the employees Google identified in its Affirmative Action Plan ("AAP") that includes the data Google produced with respect to the September 1, 2015

compensation snapshot, along with the additional data requested in the June 1, 2016 letter;⁴

- the full job and salary history for the employees in Google's September 1, 2015 compensation snapshot and the requested September 1, 2014 compensation snapshot;⁵ and
- the names and contact information for the employees in the September 1, 2015 and the September 1, 2014 snapshots (hereinafter, the Subject Items).

Joint Ex. 6 at 2; *see also* ALJ Ex. 1 ¶ 14.

In the six months that followed, Google repeatedly refused to produce the Subject Items, insisting that OFCCP was required to disclose any initial indicators with specificity. *See, e.g.*, Joint Ex. 7 (6/17/16 Camardella Ltr.) at 3-4 (requiring OFCCP to disclose "(1) the nature and extent of the purported issues, if any, OFCCP has found in the data/information already provided to the Agency and (2) each specific area where these potential issues are found"); Joint Ex. 12 at 4 (requiring OFCCP to "provide a brief, *but specific*, description of the potential issues it had observed in the data already provided") (emphasis added).

Google also claimed that producing the subject items would be unduly burdensome, although the company's claims over burden have shifted over time. At the outset, Google alleged that producing the Subject Items would entail "over 154,000 hours" at a cost of more

⁴ The additional data identified in that letter are: bonus earned, bonus period covered, campus hire or industry hire, competing offers, current compa ratio, current job code, current job family, current level, current manager, current organization, date of birth, department hired into, education equity adjustment, hiring manager, job history, locality, long-term incentive eligibility and grants, market reference point, market target, name, performance rating for past 3 years, prior experience, prior salary, referral bonus, salary history, short-term incentive eligibility and grants, starting compa ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, stock monetary value at award date, target bonus, and total cash compensation. Ex. 6 at 2.

⁵ Job and salary history is a subset of the data identified in the June 1, 2016 letter, including starting compa ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, prior salary, and prior experience. Ex. 6 at 2.

than “1.5 million dollars.” Joint Ex. 9 (6/30/16 Camardella Ltr.) at 5. At the hearing, Google claimed that collecting the Subject Items would take 400 to 500 hours at a cost of approximately \$100,000. Hrg. Tr. (Zrmhal) at 276:18-277:14.

ARGUMENT

As a federal contractor and subcontractor, Google is required to comply with OFCCP's production requests. Under long-established Fourth Amendment law, Google's contractual agreement to provide OFCCP access to the type of documents sought in this matter—those relevant to its determination of compliance with the Executive Order—operates as a waiver of its Fourth Amendment rights with respect to such documents. However, even if the court finds no such waiver, the Fourth Amendment simply does not justify withholding the information OFCCP seeks in this matter because OFCCP's requests are plainly relevant to an investigation of Google's compensation practices and Google has entirely failed to meet the standard for showing that a request is unduly burdensome.

I. OFCCP is Seeking Information that Google Agreed to Provide OFCCP in Exchange for Federal Business, Thereby Google Waived its Fourth Amendment Rights with Respect to Such Material.

Because Google specifically agreed to provide OFCCP access to the documents OFCCP now seeks—i.e. documents relevant to a determination of whether Google is in compliance with its nondiscrimination obligations under the executive order with respect to pay—Google has waived its Fourth Amendment rights with respect to such documents. *See, e.g., Zap v. United States*, 328 U.S. 624, 628 (1946) (“[W]hen petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.”), *vacated on other grounds*, 330 U.S. 800 (1947); *see also United States v. Schleining*, 181 F. Supp. 3d 531, 537 (N.D. Ill. 2015) (holding government contractor

“to the terms of a contract in which it voluntarily relinquished Fourth Amendment rights in exchange for a valuable business opportunity”).

It is well-settled that Fourth Amendment rights are waived with respect to records that a person or entity agrees to furnish for inspection in exchange for a government benefit or to participate in a government program. *See, e.g., United States v. Jennings*, 724 F.2d 436, 448 (5th Cir. 1984) (“[b]y entering into this agreement [(to provide all documents related to a food stamps program to the government at a reasonable time and place)], SPI voluntarily waived any claims to privacy that it might have had with respect to documents relating to this contract”); *United States v. Brown*, 763 F.2d 984, 988 (8th Cir. 1985) (holding that court could “see no constitutional infirmity in the government requiring a provider to agree to maintain records of Medicaid transactions and to permit periodic audits of those records as a condition for participation in the Medicaid Program.”); *Copar Pumice Co., Inc. v. Morris*, 632 F. Supp. 2d 1055, 1079-1080 (D.N.M. 2008) (where a contractor agreed to the terms and conditions of an air-quality permit, it “consented to inspections conducted in compliance with the permit and the terms of the state statute” and therefore the Fourth Amendment did not apply to inspections that comported with the agreement).⁶

⁶ One out-of-circuit case, *First Alabama Bank of Montgomery v. Donovan*, 692 F.2d 714 (11th Cir. 1982) failed to follow the *Zap* doctrine in the OFCCP context. Tellingly, however, despite the fact that OFCCP had not affirmatively argued a contractual consent theory before the ARB and the *United Space Alliance* district court, both courts raised the issue *sua sponte* and explicitly reserved ruling it. *See OFCCP v. Bank of Am.*, 2003 WL 1736803, at *11-13 & n.19 (ARB 2003) (citing *United States v. Brown*, 763 F.2d 984, 987-88 (8th Cir. 1985) and *Zap v. United States*, 328 U.S. 624 (1946), but declining to rule on the matter since it was not raised); *United Space*, 824 F. Supp. 2d at 91 & n.8 (specifically reserving the issue).

The same principals apply here. The AIMS Contract obligated Google to “comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor” and

permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.

ALJ Ex. 1 ¶ 5. Here, the “investigation” in question is a compliance review—which is a “comprehensive analysis and evaluation of the hiring and employments practices of the contractor.” 41 C.F.R. § 1.20(a)(1). Because, as is discussed in detail in Section II below, Subject Items are relevant to the matter under investigation and pertinent to determine compliance with the Executive Order, the requested documents are squarely within the scope of the material Google agreed to provide OFCCP when it entered the AIMS contract.

II. The Subject Items Requested do not Violate the Fourth Amendment.

The Fourth Amendment imposes “rather minimal limitations” on administrative subpoenas. *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *see also United States v. Golden Valley Elec Ass’n*, 689 F.3d 1108, 1115 (9th Cir. 2012) (“In the context of an administrative subpoena, the Fourth Amendment’s restrictions are limited.”) (quoting *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 448 (9th Cir. 1994)). For Fourth Amendment purposes, “it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see also Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (“[T]he Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.”) (quoting *City of Seattle*).

A. The Subject Items are Relevant to the Compliance Evaluation.

The Court applies a “deferential standard for relevance.” Summ. J. Order at 7. Under this standard, a “court defers to the agency’s appraisal of relevancy, which must be accepted so long as it is not obviously wrong.” *N.L.R.B. v. Am. Med. Response*, 438 F.3d 188, 193 (2d Cir. 2006); *see also Dir., Ofc. of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (“If the dispute turns on the *relevance* of the information sought by a government agency, we have said that the district court should not reject the agency’s position unless it is ‘obviously wrong.’”) (emphasis in original); *EEOC v. Randstad*, 685 F.3d 433, 448 (4th Cir. 2012) (noting “we largely defer to the EEOC’s expertise” with respect to relevance). As the D.C. Circuit has explained,

We give the agency a wide berth as to relevance because it need establish only that the information is relevant to its *investigation* not to a hypothetical adjudication, and as we have explained, the boundary of an investigation need only, indeed can only, be defined in general terms.

Vinson & Elkins, 124 F.3d at 1307 (citations omitted; emphasis in original).

The broad nature of the relevancy requirement in the administrative subpoena context was recently re-affirmed by the Supreme Court in the case of *McLane Company, Inc. v. E.E.O.C.*, 137 S.Ct. 1159 (2017) and the Ninth Circuit’s remand decision of that matter, – F.3d --, 2017 WL 2261015 (9th Cir. 2017). With respect to the EEOC’s administrative subpoena at issue, the Ninth Circuit explained on remand:

The relevance limitation imposed by § 2000e–8(a) “is not especially constraining.” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984). The question is not whether the evidence sought would tend to *prove* a charge of unlawful discrimination. At the investigative stage, the EEOC is trying to determine only whether “reasonable cause” exists “to believe that the charge is true.” 42 U.S.C. § 2000e–5(b). So the relevance standard in this context sweeps more broadly than it would at trial. It encompasses “*virtually any material that might cast light on the allegations against the employer.*” *Shell Oil*, 466 U.S. at 68–69, 104 S.Ct. 1621.

2017 WL 2261015, at *2 (9th Cir. May 24, 2017) (emphasis added).⁷

Here, on their face, the Subject Items are relevant to evaluating Google's compensation practices. However, as explained further below, additional reasons demonstrate how these Subject Items shed light on Google's compensation practices.

1. The requested 2014 compensation snapshot is relevant to, among other things, show whether the observed systemic compensation disparities existed over time and to determine the cause of these disparities.

Compliance reviews determine whether federal contractors are in compliance with its Executive Order 11246 obligations during a two year period. The Google compliance review involves an examination of the contractor's compliance with its Executive Order obligations during the two-year period prior to the scheduling letter.⁸ The requested September 1, 2014, snapshot of Google's compensation practices is plainly relevant in determining whether Google was in compliance with its affirmative action and non-discrimination obligations throughout the two-year review period. Disparities revealed in the 2015 snapshot might not be present in 2014 or might not exist to the same extent and the reverse might also be true. Either way, the data sought, which represents information relevant to half the required review period, would shed

⁷ See also *McLane*, 137 S. Ct. at 1163 (2017) (Quoting *Shell Oil*, the Supreme Court stated that it is an "established rule" that, in the administrative subpoena context, "the term 'relevant' be understood 'generously' to permit the EEOC 'access to virtually any material that might cast light on the allegations against the employer.'" The Court went on to state: "Nor do the constitutional underpinnings of the *Shell Oil* standard require a different result. While this Court has described a subpoena as a " 'constructive' search," *Oklahoma Press*, 327 U.S., at 202, 66 S.Ct. 494 and implied that the Fourth Amendment is the source of the requirement that a subpoena not be "too indefinite," *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401, not every decision touching on the Fourth Amendment is subject to searching review.").

⁸ See 62 FR 44174-01 ("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.").

significant light on Google's compliance with its non-discrimination obligations during the review period.

In addition to shedding light on any disparities that were in place as of September 1, 2014, the second snapshot provides highly relevant information when considered in relation to the information provided in the September 1, 2015 snapshot. As Ms. Wipper testified:

We typically [request a second snapshot] when we review and analyze the current year's snapshot and we find systemic compensation disparities. And so in order to determin[e] whether there's a continuing violation, we will look back for the entire review period. So we ask for that prior year's snapshot to determine whether the systemic compensation disparities we found in the current year existed in the prior year.

Hrg. Tr. (Wipper) at 40:17-24. Ms. Wipper further explained that the second snapshot was requested because OFCCP "found systemic compensation disparities against women pretty much across the entire workforce" so OFCCP "wanted to look to see what happened the year before."

Id.

In addition to explaining the relevance of a the 2014 snapshot, OFCCP has also put forward corroborated or unrebutted evidence establishing the relevance of each specific factor OFCCP has requested in the snapshot. This testimony establishing relevance is summarized in TABLE 1, which is submitted as an Addendum to this brief. TABLE 1 describes the testimony proffered by OFCCP, as well as corroborating testimony of Google's own witness, Mr. Wagner, as to the relevance of each item that OFCCP requested as part of its snapshot, as reflected in Exhibit 6, page 2-3. Although not required for a follow up request, TABLE 1 also demonstrates that every factor, other than Name (discussed below), is fully consistent with the factors described in the standard, OMB-approved data requests OFCCP sends at the beginning of each compliance review.

2. **The requested salary and job history are relevant because, among other things, they will shed light on the cause of the disparities OFCCP found.**

OFCCP requested salary and job history information for the employees contained in Google's 2015 snapshot because that information is relevant to understanding the cause and origins of observed disparities that are present during the review period.⁹

Courts have long recognized that prior acts of discrimination, if not affirmatively eliminated, continue to have a present impact (for which there is liability) with each new paycheck. In *Bazemore v. Friday*, 478 U.S. 385, 394 (U.S. 1986), the Supreme Court reviewed an appeals court decision that held that an employer “was under no obligation to eliminate any salary disparity between blacks and whites that had its origin prior to 1972 when Title VII became applicable to public employers such as” the employer at issue. The Supreme Court sharply rejected this holding, stating:

Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.

Bazemore v. Friday, 478 U.S. 385, 395–96, 106 (1986) (emphasis added). Following *Bazemore*, the paycheck accrual rule became a bedrock principal of compensation discrimination law.¹⁰

⁹ Indeed, Google's own purported expert witness, Michael Aamodt, which Google did not ultimately place on the stand, has explained: "An Individual's base pay is a function of many different compensation decisions *spanning multiple years*, decision-makers, market characteristics, life circumstances, and career decisions. Effectively modeling such complex phenomena to appropriately evaluate whether EEO issues exist, requires a fairly sophisticated understanding of *historical data* and regression analysis." See Kayo Sady and Mike Aamodt, *Is "Total Pay" A Useful Analysis?* (Dec. 15, 2015), blog posted at <http://dciconsult.com/total-pay-useful-analysis/> (emphasis added).

Twenty-one years later, in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), the Supreme Court re-interpreted *Bazemore* to assert that discrete acts of compensation discrimination were not continuously actionable with each new pay check. The decision caused a significant public outcry and was expressly overturned by Congress with the passage of the Lilly Ledbetter Fair Pay Act of 2009, 123 Stat 5 (2009). In overturning *Ledbetter*, Congress made these findings:

- (1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections *by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.*

¹⁰ See *Wedow v. City of Kansas City*, 442 F.3d 661, 671 (8th Cir. 2006) (interpreting *Bazemore* as establishing that “each week’s paycheck that delivers less on a discriminatory basis is a separate Title VII violation”); *Forsyth v. Federation Employment & Guidance Serv.*, 409 F.3d 565, 573 (2d Cir. 2005) (“[E]very paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act.”); *Shea v. Rice*, 409 F.3d 448, 452 (DC Cir. 2005) (“[An] employer commit[s] a separate unlawful employment practice each time he pa[ys] one employee less than another for a discriminatory reason.”) (citing *Bazemore*); *Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1009 (10th Cir. 2002) (“But [*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination – instead it is itself a continually recurring violation.”); *Anderson v. Zubieta*, 180 F.3d 329, 335 (DC Cir. 1999) (“The plaintiffs respond that their complaints allege continuing violations of Title VII, actionable upon receipt of each paycheck. We agree. * * * The Courts of Appeals have repeatedly reached the same conclusion.”) (citing *Bazemore* and collecting court of appeals cases); *BrinkleyObu v. Hughes Training, Inc.*, 36 F.3d 336, 349 (4th Cir. 1994) (“[P]aychecks are to be considered continuing violations of the law when they evidence discriminatory wages.”); *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796-800 (11th Cir. 1992) (“[T]he Supreme Court clearly recognizes the distinction this court has drawn between the present effects of a one-time violation—as in *Ricks*—and the continuation of the violation into the present—as in *Bazemore*.”); *EEOC v. Penton Indus. Publ’g Co.*, 851 F.2d 835, 838 (6th Cir. 1988) (“The Supreme Court has recognized the existence of a ‘continuing violation’” in *Bazemore*, where “there was a *current* and *continuing* differential between the wages earned by black workers and those earned by white workers.”) (emphasis in original).

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims *ignores the reality of wage discrimination* and is at odds with the robust application of the civil rights laws that Congress intended.

Id. at Section 2 (emphasis added). The law corrected the *Ledbetter* decision and restored the principles articulated in *Bazemore* by retroactively amending Title VII to make clear: “an unlawful employment practice occurs, with respect to discrimination in compensation . . . when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.” *Id.* section 2.¹¹

Given that a contractor may be liable for prior discriminatory practices that have a present impact on pay, OFCCP is entitled to information relating to any practice—discriminatory or not—that might have caused a present pay disparity so OFCCP can determine if disparities are the result of unlawful discrimination. As Janette Wipper testified:

[I]f we get to the point where we wanted to issue a violation, in order to do our due diligence, we want to look at not only the pay level, but the cause. Especially if we're looking at a disparate impact claim, because we want to understand what's causing the disparity as well as how we can propose to correct it.

So if we're seeing the disparity stemming from a negotiation process at hire, the only way we could really look at that is to go back to that group of employees and look at the year they were hired and see how -- if they were hired in a fair way at that time.

So it would -- for the people that go back to the earlier than two years, it would be requesting their full salary history.

¹¹ Because *Ledbetter* was a decision about when the charging period under Title VII expires, that decision had no impact on OFCCP's jurisdiction with respect to compensation reviews since Executive Order cases have no statute of limitations. *See, e.g., Lawrence Aviation Industries, Inc. v. Reich*, 28 F. Supp. 2d 728, 737 (E.D.N.Y. 1998), affirmed in pertinent part by *Lawrence Aviation Industries, Inc. v. Reich*, 1999 U.S. App. LEXIS 15568 (2nd Cir. 1999). Nonetheless, *Bazemore* and the *Lilly Ledbetter Paycheck Fairness Act* are instructive as they demonstrate that under Title VII, an employer remains liable for prior acts of discrimination to the extent those acts are subsequently renewed by the issuance of new paychecks.

Hrg. Tr. at 47:2-17.

OFCCP has shown that information specific to this case further demonstrates the relevance of prior pay and salary information. The testimony in support of this is detailed in TABLE 1. Moreover, as outlined above, Mr. Wagner testified in detail as to how new hires may come in at different compensation levels depending on factors such as prior pay and other job offers. He also confirmed that once in the job, Google offers merit pay increases that are in part determined by the employees' current salary. As such, a similarly situated employee performing at roughly the same level as another employee may continue to trail that employee for years. While Mr. Wagner vaguely testified that Google's system is intended, "over time," to have employees who are in the same job and performing at the same level earn a similar amount (Hrg. Tr. (Wagner) at 246:3-8) OFCCP is not required to take his word for it—which was unsupported by data or any clear formula. OFCCP is entitled to obtain the data itself so it can make independent conclusions as to the cause disparities. *Cf. McLane*, 2017 WL 2261015, at *3 ("The very purpose of the EEOC's investigation is to determine *whether* the test is being neutrally applied; the EEOC does not have to take McLane's word for it on that score.") (emphasis in original).

OFCCP notes that the use of prior pay and competing offers in initial salary setting is the subject of copious research and discussion, with Massachusetts, California, and other jurisdictions enacting laws specifically banning employers from inquiring about the prior pay and competing offers for applicants.¹² When or whether such practices constitute employment

¹² See, e.g., Christina Cauterucci, *Equal Pay Legislation Banning Salary History Questions is Absolutely Based in Data*, Slate (April 14, 2017) available at http://www.slate.com/blogs/xx_factor/2017/04/14/equal_pay_legislation_banning_salary_history_questions_is_based_in_data.html; see also Laszlo Bock (then Google Vice-President), *How the "what's your current salary?" Question hurts the gender pay gap*, Washington Post (April 29,

discrimination is not an issue in this denial of access proceeding. The question here is only whether OFCCP is entitled to information that would allow it to analyze whether such practices are the cause of disparities observed during the review period.

As this Court has previously recognized, the answer to this question is yes. *See* Order Denying Motion to Dismiss (May 2, 2017) ("At a minimum, [the applicable disparate impact legal standard] requires OFCCP to identify the practice that it contends is causing the disparity, and to consider whether the practice is job-related and consistent with business necessity . . . Thus, OFCCP's investigation is incomplete if it stops with a finding of pay disparity linked to sex. It must determine what caused (or is causing) the disparity and whether that factor is job-related and consistent with business necessity. If the employer no longer is engaging in the practice, OFCCP must look to whether another policy has continued the adverse effects into the period under investigation and whether that practice is job-related and consistent with business necessity.").

3. The requested employee contact information is relevant to assist OFCCP in determining the cause of any compensation disparities.

OFCCP's request for basic employee name and contact information is relevant to the matters under investigation. This Court should order Google to comply with this request because OFCCP's ability to contact employees directly will shed light on the issues under investigation and no way impedes employee privacy rights.

2016), available at https://www.washingtonpost.com/news/on-leadership/wp/2016/04/29/how-the-whats-your-current-salary-question-hurts-the-gender-pay-gap/?utm_term=.0327dbae34df. On May 24, 2017, the EEOC submitted an amicus brief to the Ninth Circuit asking that it overturn a panel decision on the standards it set for liability based on setting salaries based on prior pay in *Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017).

A. Employee Contact Information is Relevant.

As Ms. Wipper testified “in order to understand compensation practices from both sides, not only the contractor, but also the employee's point of view, we need to talk to the employees about the practices and how they're applied, which is the reason why we asked for the employee contact information.” Hrg. Tr. at 41:16-21.

Under very similar circumstances in *McLane*, the Ninth Circuit found that a district court’s refusal to enforce an administrative subpoena seeking far more invasive employee contact information—including social security numbers—was an error of law. The Court explained:

Speaking with those individuals “might cast light” on the allegations against *McLane*—whether positively or negatively. To take but one example, the EEOC might learn through such conversations that other female employees have been subjected to adverse employment actions after failing the test when similarly situated male employees have not. Or it might learn the opposite. Either way, the EEOC will be better able to assess whether use of the test has resulted in a pattern or practice of disparate treatment. To pursue that path, however, the EEOC must first learn the test takers' identities and contact information, which is enough to render the pedigree information relevant to the EEOC's investigation.

McLane, 2017 WL 2261015, at *2.

As in *McLane*, OFCCP may learn significant information from speaking directly to employees about their personal experience with Google’s compensation system. The Agency has long recognized that interviewing “employees potentially impacted by discriminatory compensation” is “an invaluable way for [OFCCP] to determine whether compensation discrimination in violation of Executive Order 11246 has occurred and to support its statistical findings.” *See* 79 FR 55712-02, 2014 WL 4593912 (F.R.), Proposed Rules, 41 C.F.R. Part 60-1, RIN 1250-AA06. For example, employee interviews allow OFCCP to better assess: how Google’s stated compensation policies match Google’s actual practices as experienced by

employees; the range of duties and responsibility that occur in a specific job title or across similar job titles; and whether employees encounter personal experiences reflective of bias.

B. OFCCP is entitled to contact employees directly.

For reasons identified by Ms. Wipper and grounded in numerous precedents, it is imperative that OFCCP be able to communicate directly with employees, without such contacts being arranged by the employer. Ms. Wipper explained, OFCCP seeks to protect the identity of informants consistent with the government informants' privilege. "In order to ensure that privilege is protected, the identify of employees that we speak with and that provide us information, we have to protect. So if we go through Google to talk to employees, Google will be informed of the identi[ty] of the employees that we're talking to, and that undermines the integrity of the investigation." Hrg. Tr. at 57:21-58:2.

Ms. Wipper further explained that communications with employees that are arranged through the contractor or its counsel "puts employees at risk for whether real or perceived potential retaliation for talking to us." *Id.* at 58:2-4. Courts have repeatedly acknowledged this risk. For example, in broadly construing an anti-retaliation provision in a federal employment law, the Supreme Court recognized that for effective enforcement, the Secretary of Labor necessarily relies upon "information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Kasten v. St.-Gobain Performance Plastics Corp.*, 531 U.S. 1, 11-12 (2011). The Supreme Court has also acknowledged these same concerns with respect to Title VII. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006)(citations omitted) ("Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. Interpreting the antiretaliation

provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.”).

In recent days, publicly available information indicates that at least some Google employees have concerns with respect to speaking openly about Google's employment policies, including compensation. Google recently admitted in a press statement that Google employees have created an employee-run email list called “Yes, at Google” that tracks complaints of harassment and bias that Google's employees experience.¹³ Employees submit their anonymous complaints to message board which are then communicated in a weekly email.¹⁴ In addition, the National Labor Relations Board has filed a complaint against Google claiming the Mountain View-based company's rules against discussing workplace conditions violate federal law.¹⁵

¹³ See Ellen Huet and Mark Bergen, *At Google, Employee-run Email List Tracks Harassment and Bias Complaints*, Bloomberg (May 23, 2017) available at <https://www.bloomberg.com/news/articles/2017-05-23/at-google-an-employee-run-email-list-tracks-harassment-and-bias-complaints> (reporting that Google management was aware of the website as reflected by a Google press statement). OFCCP request the court take notice of this report as it indicates Google itself confirmed the substance of the article. The proper scope of notice in administrative proceedings is broader than in other contexts “because the rules of evidence are more liberal and volume of cases is so much greater.” *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992).

¹⁴ *Id.* See also Luke Stangel, *'Yes, at Google' Employee-run Email Calls Out Bad Behavior in the Workplace*. (May 23, 2017) available at <http://www.bizjournals.com/sanjose/news/2017/05/23/yes-at-google-employee-email-list.html>; Lisa Ryan, *Google's Employee-run Email List Helps Workers Anonymously Submit Bias and Harassment Complaints* (May 23, 2017) available at <https://www.thecut.com/2017/05/google-employee-sexual-harassment-bias-newsletter.html>.

¹⁵ Charge Against Employer available at <https://www.nlrb.gov/case/32-CA-176462>. Documents available through government agency websites, such as that provided here, are often considered appropriate for judicial notice as documents in the public record are not reasonably subject to dispute. *Musgrave v. ICC/Marie Calleder's Gourmet Products Div.*, No 14-CV-02006, 2015 WL 510919, at *3 (N.D. Cal. Feb. 5, 2015). To be clear, OFCCP does not seek to show here that the charge is accurate, but rather only that the fact of the charge is indicative that employees may be concerned about speaking freely about Google's employment practices.

In short, OFCCP is entitled to employee contact information so that it can make direct contact with Google employees in a confidential manner without informing Google.

C. Google's Purported Privacy Concerns have no basis in fact or law.

Google has contended that this Court should not allow OFCCP to obtain employee contact information based on an abstract claim that Google must protect its employees' privacy rights. This assertion has no bases in law and must be rejected. The federal government, whether it be the IRS, the Social Security Administration, or any number of other agencies, routinely receives and maintains sensitive personal information in order to conduct its business. OFCCP, an agency whose mission is to protect employees,¹⁶ is similarly equipped and entitled to receive information related to the employees it is charged with protecting.¹⁷

Because it is presumed that the Agency will maintain sensitive information such as personal contact information, a number of regulations and policies protect against the disclosure of personal identifiable information. For example, the Privacy Act, 5 U.S.C. § 552 *et seq.*, prohibits the disclosure of a record about an individual from a system of records absent the written consent of the individual, unless the disclosure is pursuant to one of twelve statutory exceptions. In addition, this Court's rules require redactions of information like social security numbers and other personal identifiers in filings. *See* 29 C.F.R. § 18.31. Moreover, the Department of Labor has a policy that, similarly, protects personal identifying information. *See*

¹⁶ *See* <https://www.dol.gov/ofccp/aboutof.html> ("**Mission Statement:** At [OFCCP], *we protect workers, promote diversity and enforce the law.*") (emphasis added).

¹⁷ Google raised the specter of a cyber attack to justify withholding information from OFCCP. However, if the abstract threat of a cyberattack justified withholding sensitive information from the government, then the government would be unable to fulfill many functions. Moreover, Google presented *no* evidence that OFCCP's databases or systems were the subject of a successful cyber attack. Indeed, Google did not present any evidence that any personal information was *ever* inappropriately released by OFCCP.

Department of Labor Guidance on the Protection of Personal Identifiable Information,
<https://www.dol.gov/general/ppii>.

In the context of private litigation, the information sought by OFCCP is routinely provided to plaintiffs not subject to the same regulatory requirements. *Artis v. Deere & Co.*, 276 F.R.D. 348, 353 (N.D. Cal. June 29, 2011) (“the privacy interests at stake in the names, addresses, and phone numbers must be distinguished from those more intimate privacy interests such as compelled disclosure of medical records and personal histories. While the putative class members have a legally protected interest in the privacy of their contact information and a reasonable expectation of privacy the information sought by Plaintiff is not particularly sensitive.”); *Khalilpour v. CELLCO Partnership*, 2010 WL 1267749, at *3 (N.D. Cal. Apr. 1, 2010) (“the disclosure of names, addresses, and telephone numbers is common practice in the class action context because it does not involve revelation of personal secrets, intimate activities, or similar private information, which have been found to be serious invasions of privacy”).

Contrary to Google’s claims, its purported privacy concerns do not provide a legal basis from withholding employee contact information from a federal agency dedicated to protecting the very workers for which contact information is requested.

B. Producing the Subject Items will not threaten to disrupt or seriously hinder the normal operations of Google’s multi-billion dollar business.

In a majority of circuits, including the D.C. Circuit, courts hold that an administrative subpoena is unduly burdensome only if compliance with the subpoena “threatens to unduly disrupt or seriously hinder normal operations of a business.” *FTC v. Texaco, Inc.*, 555 F.2d 862,

882 (D.C. Cir. 1977).¹⁸ While a court should consider the particular facts of a given case, that analysis primarily focuses on “the cost of production in the light of the company’s normal operating costs.” *Randstad*, 685 F.3d at 451 (citation omitted). Where the resisting party fails to proffer evidence of “its normal operating costs” or “that gathering the requested information would ‘threaten’ or ‘seriously disrupt’ [its] business operations,” burden objections fail as a matter of law. *Id.*

1. Google can easily afford to comply with OFCCP’s production request.

At hearing, Google estimated that the costs necessary to comply with OFCCP’s requests is approximately \$100,000. Hrg. Tr. (Zrmhal) at 277:8-14. While, as noted below, this estimate appears to be a wild exaggeration and was not appropriately supported by any corroborating

¹⁸ In addition to the D.C. Circuit, the courts of appeal for the Second, Fourth, Fifth, Eighth, and Tenth Circuits have adopted this formulation or a similar standard. *See Am. Med. Response*, 438 F.3d at 193 (noting “courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business”) (citation omitted); *Randstad*, 685 F.3d at 451 (“The burden of proving that an administrative subpoena is unduly burdensome is not easily met. . . . The party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations.”) (citation omitted); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 649 (5th Cir. 1999) (“[A] subpoena is not unreasonably burdensome unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”); *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 819 (8th Cir. 2012) (holding that a subpoena was not unduly burdensome because it was not shown that compliance “will interfere with care at the facility”); *E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) (“A court will not excuse compliance with a subpoena for relevant information simply upon the cry of ‘unduly burdensome.’ Rather, the employer must show that compliance would unduly disrupt and seriously hinder normal operations of the business.”). District courts in the First, Third, and Ninth Circuits have also applied this standard. *See, e.g., N.L.R.B. v. Champagne Drywall, Inc.*, 502 F. Supp. 2d 179, 182 (D. Mass. 2007) (“Not only does Champagne Drywall not detail how compliance would hinder its business, but that prospect seems unlikely.”); *U.S. ex rel. Office of Inspector Gen. v. Philadelphia Hous. Auth.*, No. 10-0205, 2011 WL 382765, at *3 (E.D. Pa. Feb. 4, 2011) (A demand that is “unreasonably broad or burdensome” has been defined as a demand with which compliance threatens to unduly disrupt or seriously hinder normal operations of a business.) (citation omitted); *U.S. E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009) (“Compliance with a subpoena is excused if it threatens to unduly disrupt or seriously hinder normal operations of a business.”) (citation omitted).

evidence, even if the estimate were accurate, it would not be a sufficient burden given the context to support a Fourth Amendment defense. The standard by which Google's burden should be assessed in this context, as stated above, is whether compliance “threatens to unduly disrupt or seriously hinder normal operations of a business.” *Texaco, Inc.*, 555 F.2d at 882. The crux of that inquiry is the estimated cost of production in the light of the company’s normal operating costs. *Randstad*, 685 F.3d at 451. The cost of compliance— \$100,000— will not hinder Google’s normal business operations as the cost of production is a nearly imperceptible fraction of a percentage of Google’s normal operating costs. What's more, the estimated 400 to 500 hours it will take to collect the requested information represents approximately one week of work for a team of ten people.

Dr. Brunetti--a labor economist with a Ph.D. in economics from U.C. Berkeley (Hrg. Tr. (Brunetti) at 95:4-5) and a master’s degree in taxation from Golden Gate University (*id.* at 95:7-8) with significant financial industry experience in assessing complicated corporate balance sheets to determine whether debts could be paid (*id.* at 95:17-96:10)—provided expert testimony based on Google’s financial filings with the SEC. Dr. Brunetti opined that even a regulatory burden of \$1 million “would have no meaningful impact” on Google’s business. *Id.* at Tr. 104:10-13. He explained that this is the case “[b]ecause they have sufficient cash to make a \$1 million payment. They have \$120 billion of equity. They have \$16 billion of operating income and just as an example, on this page 80, if you look at Google's operating income, it's 27.892. That's \$27,892 million. That would be 27,891. So it's one number off of what's presented in the table.” *Id.* at 104:14-20. In light of Google’s subsequent estimate that compliance would not cost \$1 million, but \$100,000, Dr, Brunetti’s point is only further underscored. Just looking at

Google's *net* profits in a single year, Google could afford to pay this regulatory obligation 278,910 times without incurring a loss.

The burden Google claims it will suffer in complying with OFCCP's requests is directly connected to Google's size. Google, as a sophisticated multi-billion dollar company, has many employees and a complex compensation system. Due to the scale on which Google operates, complying with any OFCCP request will necessarily be more involved than if Google were a smaller government contractor. Google cannot, as it attempts to do, rely on the sheer scale of its operation and the resulting amount of data it maintains to argue that routine requests are unduly burdensome. The perverse result of Google's position would be that the largest government contractors, employing the greatest number of workers, are held to the lowest accountability standard.

As explained in detail in OFCCP's pre-hearing statement, the ARB has described the equal opportunity provisions of the Executive Order and the other laws enforced by OFCCP as "mandatory contract clause[s] that express[] a significant or deeply ingrained strand of public procurement policy." *OFCCP v. UPMC Braddock*, ARB CASE NO. 08-048, 2009 WL 1542298, *3 (ARB May 29, 2009). Thus, not surprisingly, the Secretary of Labor decisively rejected a subcontractor's contention that OFCCP could not require it to develop AAPs for its nationwide workforce based on a single lease with a government Agency that the subcontractor had no part in negotiating and lacked the ability to refuse. The Secretary held that even though the ALJ found that the subcontractor ultimately made more money from the federal subcontract than it would take to develop AAPs nationwide, that was not the right test:

[T]he constitutionality of the applicability of the Executive Order does not turn on whether, as applied to a particular contractor, the contractor's government derived revenues exceed costs associated with compliance. Cost alone does not

make application of a law unconstitutional. *Day Brite Lighting Inc. v. Missouri*, 342 U.S. 421, 424-25 (1952).

OFCCP v. Coldwell Banker, 78-OFCCP-12, 1987 WL 774229, *7 (Secretary Decision, Aug. 14, 1987) (emphasis added).

2. Google presented no credible evidence of its burden in complying with OFCCP's requests.

Google failed to present credible evidence that responding to OFCCP's request would be burdensome to the multibillion dollar information company. As an initial matter, Google presented precisely *zero* evidence related to its expected costs or burden associated with supplying employee contact information. Hrg. Tr. (Zrmhal) at 279:3-6, 280:2-4. In an unsuccessful attempt to demonstrate the purported burden of producing the other two Subject Items, Google relied solely on the testimony of Senior Legal Operations Manager Kristin Zrmhal, who lacked personal knowledge of what complying with OFCCP's request would specifically require. Rather, she provided generalizations about the time and costs required to comply based on conversations she had with various team members. Hrg. Tr. (Zrmhal) at 283:8-12. Zrmhal "spoke with a number of different teams" to arrive at the conclusion that it would take 400 to 500 hours to collect the requested information at a cost of \$100,000. *Id.* at 277:2-14. Due to a lack of knowledge of the specific details on which she based her conclusions, Zrmhal failed to provide sufficient details for this Court to determine how accurate her estimate was and what portions of the estimate were true costs of production and those which were self-imposed by Google.¹⁹

¹⁹ Although the evidentiary in this proceeding are informal, the Court should consider standards set by the Federal Rules of Evidence (FRE) as an indication the Zrmhal's testimony should be given little weight in this context. Those rules would exclude Ms. Zrmhal's testimony as a witness is required to possess personal knowledge of the matter about which she testifies.

Zrmhal testified that she analyzed how many hours it would require to address all three Subject Item categories based on conversations she had with a number of different teams involved in data collection. *Id.* at 281:9-14. Zrmhal herself had no personal knowledge of any of the specific components comprising her estimate gathered from conversations, and could not speak to any details regarding how the estimate was built. She also lacked knowledge of how or where specific data was stored, what, if any, information was not stored electronically, and how long it would take to produce any specific data or the actions necessary to produce that data. She therefore could not provide with any certainty the actual burden of responding to OFCCP's requests.

The conclusory nature of Zrmhal's testimony was revealed by her inability to provide even basic information as is illustrated by the following:

- Zrmhal was unable to break down the 400 to 500 hours in any concrete way with estimates of how many hours it would take to complete subtasks. *Id.* at 284:5-286:8, 290:22-297:1.
- Zrmhal did not know whether or not any responsive information is not electronically stored. *Id.* at 280:9-281:1.
- Zrmhal had no knowledge of the time it would take to respond to any specific item or category, "[j]ust the three together."²⁰ *Id.* at 283:22-284:3.
- Zrmhal testified that one aspect of her estimate was the necessity for new scripts to be developed (*id.* at 285:5-12) to query data bases, but had no knowledge of how many new scripts would be required. *Id.* at 285:14-21.
- Zrmhal could not speak to where relevant data is stored or how it is aggregated. *Id.* at 286:12-20.

Federal courts will exclude conclusory opinion testimony based on a lack of personal knowledge. *See, e.g. Pas Communs. Inc. v. Sprint Corp.*, 139 F. Supp. 2d 1149, 1182 (D. Kan. 2001).

²⁰ This testimony was inconsistent with other testimony in which Ms. Zrmhal stated that her estimate did not include one of the three Subject Items, employee name and contact information. *Id.* at 280:2-4

- Zrmhal had no knowledge of how Google maintains basic payroll data. *Id.* at 287:17-288:2.
- Zrmhal could not estimate the time it would take to gather the raw information requested. *Id.* at 294:23-25.
- Zrmhal had no knowledge of the time spent in producing the 2015 snapshot. *Id.* at 295:1-5. Nor did she know how long it took to calculate that the 1.3 million items of data Google provided to OFCCP. *Id.* at 295:11-21.

Because Zrmhal had no actual knowledge of how Google plans to respond to OFCCP's requests involving the three categories of Subject Items, or where the data would be pulled from, her testimony with respect to Google's burden is not credible.

Moreover, because Zrmhal offers no component parts that support her all-in-estimate, Google has offered this Court no method for determining the burden of each specific request, nor a basis for how limiting one request (e.g., the 2014 snapshot but not prior history information or vice versa) would impact or potentially alleviate Google's financial burden in complying. As such, the estimate does not support Google's request that this Court redline requests to make them more limited.

Furthermore, Zrmhal provided insufficient testimony to evaluate what portion of the estimated hours to complete the task are of Google's own making. *See Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 611 (D. Neb. 2001) ("The fact that a corporation has an unwieldy record keeping system which requires it to incur heavy expenditures of time and effort to produce requested documents is an insufficient reason to prevent disclosure of otherwise discoverable information."); *Delozier v. First Natl Bank of Gatlinburg*, 109 F.R.D. 161, 164 (E.D. Tenn. 1986) (court will not shift burden onto discovering party where the costliness of the discovery procedure is product of defendant's recordkeeping system); *Kozlowski v. Sears Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) (corporation "may not excuse itself from compliance with Rule

34, Fed. R. Civ. P., by utilizing a system of recordkeeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition").

Similarly, Zrmhal's testimony indicates that a significant portion of the hours involve some undefined quality control. As a district court recently stated in the context of a private class action involving claims of systemic compensation discrimination:

[A] substantial portion of Goldman Sachs' time estimate -- between 40 and 80 hours -- is allocated to quality assurance. (Obradovich Aff., ¶ 6). This estimate, which is rather conclusory, appears to be based on a goal of providing a pristine set of data. However, the standard for the production of ESI is not perfection. Rather, "[a] responding party must use reasonable measures to validate ESI collected from database systems to ensure completeness and accuracy of the data acquisition." The Sedona Conference, The Sedona Conference Database Principles: Addressing the Preservation and Production of Databases and Database Information in Civil Litigation, March 2011 Public Comment Version, at 32 (emphasis added).

Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 306-307 (S.D.N.Y. Sept. 10, 2012).

Here, Google has provided insufficient information for the Court to determine what level of quality control Google is conducting and whether associated costs are warranted.

In short, Zrmhal's conclusory estimates are insufficient for this Court to rely upon. Instead of providing a list of hours or costs, Google asks this Court to limit OFCCP's ability to conduct its investigation based on a conclusory and undifferentiated estimate.

III. Google misstates the "limited in scope" requirement of administrative subpoenas in an attempt to persuade the court to impermissibly limit OFCCP's requests.

In its closing argument at the hearing, Google relied heavily on the "limited in scope" language contained in some administrative subpoena decisions to argue that OFCCP's request

are overbroad and this Court should limit them.²¹ However, as OFCCP has demonstrated that the requests are relevant to this specific inquiry underway—a full compliance review of Google's Mountain View establishment for the period from September 2013 to September 2015—OFCCP's are appropriately limited in scope. There is no basis for Google's proposed revisions of the Agency's requests, which are both unworkable and plainly violative of the Ninth Circuit's *McLane* decision.

A. OFCCP's Requests Are Appropriately Limited in Scope Because they are Within OFCCP's Mandate.

The Supreme Court has stated that “the breadth of the subpoena” is a matter “variable in relation to the nature, purposes, and scope of the inquiry.” *Okla. Press*, 327 U.S. at 210 (citations omitted). Against that backdrop, courts have held that requests are sufficiently limited so long as they are within the scope of the investigation authorized. *See, e.g., Mont. Sulphur*, 32 F.3d at 445 (in an OSHA case, holding “subpoena as appropriately narrow because the documents sought related to whether the employer” was satisfying its general duty to keep its employees safe). Indeed, in *First Alabama*, which Google has relied upon, the court noted that, as a matter of law, “searches conducted pursuant to E.O. 11246 . . . are properly limited in

²¹ Throughout these proceedings, Google has consistently asserted that OFCCP ignores the scope element of the administrative subpoena test. However, as explained elsewhere, the agency relies on *Morton Salt*'s language that requests must be “not too indefinite” rather than *Lone Steer*'s articulation that requests must be “sufficiently limited.” Opp'n at 12-13; *see also* Pl.'s Mem. of P&A at 20 (explaining how scope element is met). These are two sides of the same coin: if a request is sufficiently limited, it is not too indefinite, and vice-versa based on Supreme Court precedent. In using the “sufficiently limited” language, *Lone Steer* quotes *City of Seattle*, which in turn cites *Morton Salt*'s “not too definite” standard. *See Lone Steer*, 464 U.S. at 415 (citing *City of Seattle*); *City of Seattle*, 387 U.S. at 544 (citing *Morton Salt*). Indeed, by the Supreme Court's express terms, *Lone Steer* did not alter the *Morton Salt* test, making clear that *Lone Steer* held “only that the defenses available to an employer do not include the right to insist upon a judicial warrant as a condition precedent to a valid administrative subpoena.” *Lone Steer*, 464 U.S. at 415.

scope.” 692 F.2d at 721 (citing *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 908 (5th Cir. 1981) (“[B]ecause the searches are restricted to an inspection solely of business records to test compliance with the affirmative action program, they are properly limited in scope.”).²²

As the Subject Requests only seeks information relevant for OFCCP to complete its task of determining whether Google is in compliance with its Executive Order obligations at the Mountain View facility, this prong of the Fourth Amendment administrative subpoena analysis provides no justification for Google's refusal to supply the requested information. With respect to the 2014 snapshot, this information is limited in scope in that OFCCP is authorized to determine compliance for a full two-year period and the snapshot date is well within this period. As for the prior pay and salary history, OFCCP has only asked for information that directly relates to compensation and might have explanatory impact on pay disparities observed during the review period. OFCCP's employee contact request is also limited in scope as OFCCP is only seeking contact information with respect to employees that were employed by Google at the relevant time—OFCCP has not sought information with respect to Google's employees beyond the review period or at its numerous other locations.

As the requests are all limited to information relevant to OFCCP's specific and legally authorized task of determining whether Google's pay practices during the review period complied with its Executive Order obligations, the requests are appropriately limited in scope.

²² However, as *United Space* notes, *First Alabama* and *Mississippi Power* were decided before *Lone Steer* and incorrectly decided that the heightened Fourth Amendment standard applied to administrative warrants applies to administrative subpoenas. *United Space*, 824 F. Supp. 2d at 93. Given that *First Alabama* and *Mississippi Power* applied the stricter Fourth Amendment standard that *Lone Steer* held to be inapplicable, their holdings that requests pursuant to the Executive Order are, as a matter of law, “properly limited in scope” applies with greater force in the less stringent test applied to administrative subpoenas.

B. Google’s Plea to Limit the Requests is Plainly Violative of the Principals Set Down by the Ninth Circuit in *McLane*.

Using the “limited in scope” standard as a fig leaf, Google has asked that this Court to nevertheless limit OFCCP’s requests despite the fact that the requests are relevant and not unduly burdensome under the administrative subpoena standards. At bottom, Google’s requests invite the Court to second-guess the Agency and take a “needs-based” approach that was squarely rejected just last week by the Ninth Circuit.

In *McLane*, the employer contended “that, given all of the other information it has produced, the EEOC cannot show that production of the pedigree information is ‘necessary’ to complete its investigation.” The Ninth Circuit rejected this position, stating: “[T]he governing standard is not ‘necessity’; it is relevance. If the EEOC establishes that the evidence it seeks is relevant to the charge under investigation, *we have no warrant to decide whether the EEOC could conduct the investigation just as well without it.*” 2017 WL 2261015, at *2 (emphasis added). The Court continued:

[T]he district court erred as a matter of law when it held that pedigree information is irrelevant “at this stage” of the investigation. The court reasoned that the evidence *McLane* had already produced would allow the EEOC to determine whether *McLane*’s use of the strength test discriminates on the basis of sex. The court suggested . . . the pedigree information might become relevant and obtaining that information might then be “necessary.” The EEOC argues that the district court improperly required it to substantiate the allegation of systemic discrimination before it could obtain access to relevant evidence. We doubt that is what the district court meant, as the Supreme Court has made plain that courts may not condition enforcement of EEOC administrative subpoenas on a threshold evidentiary showing that the allegations under investigation have merit. *Shell Oil*, 466 U.S. at 71–72 & n.26, 104 S.Ct. 1621. Rather, the district court appeared to conclude that the EEOC did not really need pedigree information to make a preliminary determination as to whether use of the strength test has resulted in systemic discrimination. As we have explained, however, that line of reasoning is invalid: *The EEOC’s need for the evidence—or lack thereof—simply does not factor into the relevance determination.*

Id. (emphasis added).

For the same reasons, this Court should resist Google's attempt to limit OFCCP's lawful requests based on a "needs-based" analysis. For example, Google requests that this Court edit the request for employee contact information, if it is unwilling to strike the request in its entirety. Google requests that this Court permit it to provide contact information for a "random" sample of unknown size of its employees, if those employees consent to providing their information.²³ This is an entirely unworkable proposal for at least two reasons. First, it continues to allow Google to know the identities of all individuals OFCCP interviews. Google would have to contact its "randomly selected" employees to determine if they were willing to talk to OFCCP. That contact would necessarily chill those employees' willingness to fully participate in OFCCP's investigation. It is well established in the employment context that employees may be deterred from providing full and frank information if their employer is involved. *See, e.g., Camp v. Alexander*, 300 F.R.D. 617, 622 (N.D. Cal. 2014) (noting "potential for coercion" where employer communicates with employees regarding litigation) (citing various cases); *Mevorah v. Wells Fargo Home Mortg., Inc.*, Case No. No. C 05-1175 MHP, 2005 WL 4813532, at *4 (N.D. Cal. Nov. 17, 2005) ("[I]t is . . . reasonable to assume that an employee would feel a strong obligation to cooperate with his or her employer in defending against a lawsuit").²⁴

Second, a "random" sample would impermissibly limit OFCCP's investigatory function. Forcing OFCCP to use only a "random" selection of employees would thwart its attempts to find the most informative and probative evidence of Google's employment practices. OFCCP cannot communicate the methods it uses to determine which witnesses it will interview to Google without giving away its investigative process and thereby compromising its ability to conduct the

²³ Hrg. Tr. (Sween) at 324:16-25.

²⁴ *See* also cases cited in Section II(3)(B) above.

most effective enforcement of the law. Accordingly, OFCCP must be free to select from among the employees covered by Google's AAP, following its own theories and investigative practices and ensuring that the interviewed employees will not be deterred from participating in its investigation.

Google makes a similar plea to the Court to limit OFCCP's requests for job history, salary history, prior salary and competing offers to only what is 'necessary' for its investigation. Google argues that the fact that *it alleges* that (1) a minority of its employees are paid without reference to prior salary and (2) job history and salary history are not used in setting compensation should deprive OFCCP of this information. Hrg. Tr. (Sween) 325:15-326:1. This is precisely the kind of overreach that the Ninth Circuit rejected in *McLane*. OFCCP's "need" for the evidence is not germane, rather the only inquiry is whether the information would cast light on Google's employment practices. 2017 WL 2261015 at *2. Google's assertion that OFCCP could conduct its investigation without this information is of no moment. *Id.* ("we have no warrant to decide whether the EEOC could conduct the investigation just as well without" information defendant claims is unnecessary).

IV. Janette Wipper's testimony generally describing the results of OFCCP's preliminary analysis is credible and appropriate to establish the context in which OFCCP's requests are made.

In a stunning reversal of its demand throughout these proceedings that OFCCP provide some explanation as to its preliminary findings, Google now says that this Court should provide no weight to the information OFCCP offered this Court simply to demonstrate the context in which the requests were made. Like an out of court statement offered into evidence because it is not introduced to prove the truth of the matter asserted, Ms. Wipper's testimony with respect to the results of OFCCP's preliminary analysis are not intended to prove that the analysis is correct. Rather, it was offered simply to provide the Court context in light of Google's continued

accusation, including in its Opening Statement, that OFCCP was on nothing more than a "fishing expedition." Hrg. Tr. (Sween) at 25:5-7.

Contrary to the Regional Director's testimony, Google suggests that (1) OFCCP's assertion of relevance rests on the preliminary analysis of the limited information Google produced and (2) that Regional Director Wipper's testimony is not credible about those initial analyses.²⁵ This, according to Google, defeats the relevance of OFCCP's requests.²⁶

As discussed above, "virtually any material that might cast light on the allegations against the employer" is relevant to an agency request during an investigation into equal employment opportunity compliance. *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984); *E.E.O.C. v. McLane Co., Inc.*, 2017 WL 2261015, at *2 (9th Cir. 2017) (slip op.) (quoting *Shell Oil*). Regional Director Wipper testified that each of the Subject Items would cast light on OFCCP's investigation into whether Google was complying with equal employment opportunity laws. *See supra*.

The results of the preliminary analysis of the limited data Google produced are not necessary to establish that the Subject Items would "cast light on" Google's employment practices. OFCCP was not required to establish preliminary findings in order to obtain the records sought here; as the Ninth Circuit recently reaffirmed, "the Supreme Court has made plain that courts may not condition enforcement of EEOC administrative subpoenas on a threshold evidentiary showing that the allegations under investigation have merit." *McLane Co., Inc.*, 2017 WL 2261015, at *2 (citing *Shell Oil Co.*, 466 U.S. at 71-72); *see* Order Denying Summary Judgment, March 15, 2017 at 6-7 & n. 8 (citing *United Space Alliance*, 824 F.Supp.2d at 91) (in

²⁵ 5/26 Hrg. Tr. (Sween) at 322:14-22.

²⁶ *Id.*

dicta, recognizing that OFCCP is not prosecuting this case based on its investigative findings, nor is it required to engage in an iterative process of revealing its preliminary findings in order to get more information). The basis for, or content of, OFCCP's preliminary findings do not answer whether or not the Subject Items requested are relevant for OFCCP's investigation. The fact that the Subject Items are clearly contemplated by OFCCP's regulations governing compliance reviews strongly reinforces this view. *See* Order, February 21, 2017 at 3 (Order denying Google's motion to remove proceedings from expedited processes). Regional Director Wipper provided substantial testimony on the usefulness and relevance of the Subject Items with respect to *any* compliance review of compensation or other employment practices.

However, to the extent that the Regional Director's testimony about OFCCP's preliminary findings are material to this Court's recommended decision and order, there is no reason to discredit Regional Director Wipper's testimony based on her testimony regarding preliminary results of the compliance review. As the regulations themselves provide, compliance reviews generally proceed in stages, with each stage providing a context for the following stages. 41 C.F.R. 60-1.20(a) (compliance reviews typically proceed through a desk audit, on-site review and further off-site analysis stages). Regional Director Wipper testified that OFCCP wanted to follow up the initial observed disparities to determine the cause of those disparities and determine the appropriate remedy. In the context of this case, her testimony is consistent with other testimony given at hearing, and the evidence in this case that OFCCP was attempting to complete is statutorily mandated review of Google. *See Bristow v. Dep't of Army*, 232 F.3d 908 (Fed. Cir. 2000) (unpublished) (finding an MSPB Judge was entitled to rely on the testimony of agency witnesses where that testimony was straightforward, and consistent with other testimony and evidence). Whether Regional Director Wipper supported testimony about OFCCP's

preliminary findings is wholly irrelevant; she was explaining the overall process of the review, demonstrating that OFCCP was following its normal procedures and requesting items clearly relevant to its view of the facts.

CONCLUSION

For the reasons set forth within, the record evidence and testimony fully support OFCCP's authority and entitlement to the information contained in the Subject Items. As Google has failed to proffer the requisite evidence to justify withholding the requested information, OFCCP respectfully asks that this Court order Google to come into compliance by producing all documents responsive to OFCCP's Subject Requests.

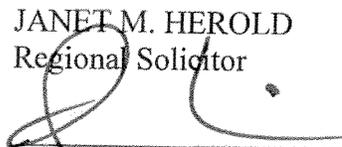
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TABLE 1

Item Requested (Joint Ex. 6)	Item 19 of Scheduling Letter (Joint Ex. 5)	Testimony
Bonus Earned	"Other compensation . . . such as bonuses"	Bonuses earned are a component of pay. Hrg. Tr. (Wipper) 49:9-12; (Suhr) 68:13-25; (Wagner) 168:110-111. OFCCP learned through interviews that actual bonuses earned differed from target bonuses. <i>Id.</i> (Wipper) at 49:9-12.
Bonus period covered	"Other compensation . . . such as bonuses"	OFCCP discovered that bonuses were prorated if employees worked for less than the full year bonus period. <i>Id.</i> (Wipper) at 49:25-50:5; (Suhr) at 68:13-25.
Campus Hire or Industry Hire	"additional data on factors used to determine employee compensation"	The pay setting system at Google differed for Campus or Industry hires. <i>Id.</i> (Wipper) at 50:8-14; 68:13-25. Setting pay for campus hires did not consider negotiation for salaries or prior salaries. <i>Id.</i> (Wagner) at 197:25-198:9.
Competing Offer	"additional data on factors used to determine employee compensation"	Google attempted to match competing offers in setting salary. <i>Id.</i> (Wipper) at 50:17-21; (Suhr) at 68:13-25; (Wagner) at 200:1-7.
Current Comp Ratio	"additional data on factors used to determine employee compensation"	OFCCP learned that Google sets salary against a market reference point to determine a ratio which they tracked. <i>Id.</i> (Wipper) at 50:22-25; (Suhr) 68:13-25; (Wagner) at 233:8-16.
Current Job Code	"additional data . . . such as . . . department or function"	Google picked the market reference point for its comp ratio by reference to the job code and location for its employees. <i>Id.</i> (Wipper) at 51:1-4; (Suhr) 68:13-25; (Wagner) 175:3-7. Job code also affects the bonus offered. <i>Id.</i> (Wagner) at 214:16-23.
Current Job Family	"Provide . . .EEO-1 Category and job group"	Based on the investigation, Google set either equity or bonus targets with reference to the employee's job family. <i>Id.</i> (Wipper) at 51:6-10; (Suhr) at 68:13-25.
Current Level	"additional data . . . Such as . . . Salary level"	Google used job level as a component of setting compensation. <i>Id.</i> (Wipper) at 51:9-10; (Suhr) at 68:13-25; (Wagner) at 174:19-24.
Current Manager	additional data on factors used to determine employee compensation	OFCCP's onsite interviews revealed that managers had discretion to set merit increases. <i>Id.</i> (Wipper) at 43:17-20, 51:16-19; (Suhr) at 68:13-25; (Wagner) 239:12-25.

Item Requested (Joint Ex. 6)	Item 19 of Scheduling Letter (Joint Ex. 5)	Testimony
Current Organization	"additional data . . . such as . . . department or function"	Compensation structures in Google differed by organization, and some HR personnel had responsibilities across organizations. <i>Id.</i> (Wipper) at 51:22-52:2; (Suhr) at 68:13-25.
Date of Birth	"additional data on factors used to determine employee compensation"	Age can be used a proxy for experience. <i>Id.</i> (Wipper) at 52:18-19.
Department hired into	"additional data . . . such as . . . department or function"	Department affects salary at Google. <i>Id.</i> (Wipper) 52:5-7; (Suhr) at 68:13-25. New hires into a department may negotiate salary. <i>Id.</i> (Wagner) 199:17-200:7.
Education	"additional data . . . such as education".	Education is generally considered relevant to pay; additionally, Google's H1(b) application materials explicitly state education is a consideration in setting pay. <i>Id.</i> (Wipper) at 52:22-53:7; (Suhr) at 68:13-25.
Equity Adjustment	"Other compensation"	Google has affirmative action obligations to achieve pay equity, equity adjustments would reflect fulfilling that obligation. <i>Id.</i> (Wipper) at 53:11-14.
Hiring Manager	"additional data on factors used to determine employee compensation"	Hiring managers are involved in setting starting pay. <i>Id.</i> (Wipper) at 53:17-20; (Suhr) at 68:13-25.
Job History	"additional data . . . such as education"	Job history at Google is a factor impacting compensation for the current job. <i>Id.</i> (Wipper) at 45:14-23; (Suhr) at 68:13-25, 74:14-15.
Locality	"additional data . . . duty location"	Google has separate locality pay to address cost of living differences across the country. <i>Id.</i> (Wipper) at 53:25-54:5; (Suhr) at 68:13-25.
Long term incentive eligibility and grants	"Other compensation . . . such as . . . incentives"	Long term incentives are generally stock, and eligibility for stock is a component of compensation. <i>Id.</i> (Wipper) at 54:8-12; (Suhr) at 68:13-25.

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Market Reference Point	additional data on factors used to determine employee compensation	Google tries to tie their compensation to the market, to position themselves in a certain position. <i>Id.</i> (Wipper) at 54:13-21; (Wagner) at 175:5-7, 178:13-15. Google employees that are promoted have their salaries adjusted to 85% of the new position's market reference point. <i>Id.</i> (Wagner) 200:13-23.
Market Target	"additional data on factors used to determine employee compensation"	Every time Google changes an employee's compensation, they compare the compensation to the market target for the employee. <i>Id.</i> (Suhr) at 77:6-11. Google sets initial pay based on a market target. <i>Id.</i> (Wagner) at 170:22-25.
Name		In order to fully investigate Google's employment practices, OFCCP needs to speak to employees to verify data and collect information. <i>Id.</i> (Wipper) at 54:25-55:4.
Performance rating for past 3 years	"additional data...performance ratings"	Google considers performance ratings in merit pay increases and promotions. <i>Id.</i> (Wipper) at 55:7-10; (Wagner) 177:12-25.
Prior Experience	"additional data...prior experience"	Based on interviews, prior experience is considered in setting compensation. <i>Id.</i> (Suhr) at 75:8-11.
Prior Salary	"additional data...salary"	Based on interviews, Google considers prior salary in setting compensation. <i>Id.</i> (Wipper) at 59:8-16. Based on interviews, Google attempts to beat the prior salary of the employee by 10%. <i>Id.</i> (Suhr) at 76:11-12. Google seeks to bring employees in at 80% of the market target, but will provide more than that if the new hire was already making 80% of the market target. <i>Id.</i> (Wagner) at 172:10-18, 201:3-8.
Referral Bonus	"Other compensation . . . such as bonuses"	Who gets referral bonuses may reflect who is being recruited for hiring purposes and affects compensation of the individuals getting the bonus. <i>Id.</i> (Wipper) at 55:14-16; (Suhr) at 68:13-25.
Salary History	"additional data...salary"	Based on interviews, salary changes regularly at Google, and each time it does, there is significant discretion by decision makers about how much pay will change. <i>Id.</i> (Wipper) at 42:15 - 43:11. Interviews suggested that salary at Google was in an easily accessible database, accessed by managers. <i>Id.</i> at 44:7-20; (Suhr) at 77:7-11.

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Short term incentive eligibility and grants	"Other compensation . . . such as . . . incentives"	Short term incentives usually mean bonuses which are a component of compensation; eligibility for those bonuses determines whether or not an employee gets them. <i>Id.</i> (Wipper) at 55:20-24; (Suhr) at 68:13-25.
Starting Compa Ratio	"additional data on factors used to determine employee compensation"	Based on interviews, Google uses Compa Ratio at hire to look at where an employee is in the market range and set compensation accordingly. <i>Id.</i> (Suhr) at 78:20-22. OFCCP learned that Google sets salary against a market reference point to determine a ratio which they tracked. <i>Id.</i> (Wipper) at 50:22-25; (Suhr) 68:13-25; (Wagner) at 233:8-16.
Starting Job Code	"additional data on factors used to determine employee compensation"	Based on the on-site review, Google uses job code to indicate an employee's position. <i>Id.</i> (Suhr) at 79:6-8. Google picked the market reference point for its comp ratio by reference to the job code and location for its employees. <i>Id.</i> (Wipper) at 51:1-4; (Suhr) 68:13-25; (Wagner) 175:3-7. Job code also affects the bonus offered. <i>Id.</i> (Wagner) at 214:16-23.
Starting Job Family	"additional data on factors used to determine employee compensation"	Based on interviews, Google sets starting salary on market target, and market targets are based on job families. <i>Id.</i> (Suhr) at 80:17-18.
Starting Organization	"additional data on factors used to determine employee compensation"	Based on the on-site review, the organization in Google is related to compensation. <i>Id.</i> (Suhr) at 84:2-9. Compensation structures in Google differed by organization, and some HR personnel had responsibilities across organizations. <i>Id.</i> (Wipper) at 51:22-52:2; (Suhr) at 68:13-25.
Starting Position/Title	"additional data on factors used to determine employee compensation"	Based on the investigation, Google has multiple levels for each job title that impact pay. <i>Id.</i> (Suhr) at 85:6-8.

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Starting Salary	"additional data on factors used to determine employee compensation"	Based on the investigation, starting salary is negotiable, and hiring managers have wide discretion to set the salary. <i>Id.</i> (Wipper) at 42:25 - 43:11. Current pay for employees is a combination of all of the pay decisions that occurred from your starting salary at your current employer. <i>Id.</i> at 158:15-20. Google brings in new hires at 80% of the market target to give them the opportunity to earn incremental compensation increases for performance. <i>Id.</i> (Wagner) at 171:4-8. New hires may negotiate salary. <i>Id.</i> (Wagner) 199:17-200:7.
Stock Monetary Value at award date	"Other compensation"	Based on interviews, stock compensation is a significant part of the compensation package at Google; the stock as a monetary value at the time of granting that increases over the vesting period. <i>Id.</i> (Wipper) at 56:4-13; (Wagner) at 210:14-18.
Target Bonus	"Other compensation . . . such as bonuses"	Based on interviews, target bonus is tied to job level and can be modified based on performance. <i>Id.</i> (Wipper) at 56:15-17.
Total Cash Compensation	"Other compensation"	Analysis of compensation should be run with respect to all compensation and by component. <i>Id.</i> at 57:2-6. Google compares total compensation in competing offers when determining how to set initial pay for college hires. <i>Id.</i> (Wagner) 212:2-7.

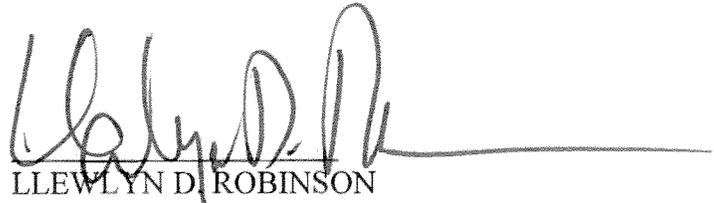
CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On June 2, 2017, I served the attached **PLAINTIFF'S POST-HEARING BRIEF** on Defendant Google Inc. through serving its attorneys below via electronic mail, pursuant to the parties' agreement:

Camardella, Matthew J. (CamardeM@jacksonlewis.com);
Duff, Daniel V., III (Daniel.Duff@jacksonlewis.com);
Raimundo, Antonio (Antonio.Raimundo@jacksonlewis.com);
Sanchez-Moran, Amelia (Amelia.Sanchez-Moran@Jacksonlewis.com)
Sween, Lisa Barnett (Lisa.Sween@jacksonlewis.com);

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in San Francisco, California on June 2, 2017.


LLEWELYN D. ROBINSON