

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

ADMIN. REVIEW BOARD
SEP 22 2017
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OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

ARB Case No. 17-059

ALJ Case No.: 2017-OFC-00004

**GOOGLE INC.'S EXCERPTS OF RECORD
IN SUPPORT OF RESPONSE TO OFCCP'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S JULY 14, 2017 RECOMMENDED DECISION AND
ORDER**

OFCCP v. Google Inc.
ARB Case No. 17-059; ALJ Case No. 2017-OFC-00004
Excerpts of Record – Table of Contents

Description	Pages
Prehearing Conference Transcript (April 5, 2017) (excerpts)	ER001-008
Hearing Day 1 Transcript (April 7, 2017) (excerpts)	ER009-182
Hearing Day 2 Transcript (May 26, 2017) (excerpts)	ER183-297
ALJ Berlin's Order Denying Plaintiff's Motion for Summary Judgment (Mar. 15, 2017)	ER298-305
The Parties' Stipulated Facts 1 – 30 (Mar. 28, 2017)	ER306-310
OFCCP's Motion for Summary Judgment (Feb. 7, 2017) (excerpts)	ER311-313
OFCCP's Reply In Support of Motion for Summary Judgment (Mar. 6, 2017) (excerpts)	ER314-316
OFCCP's Pre-Hearing Statement (Mar. 28, 2017) (excerpts)	ER317-323
OFCCP's Redacted Post-Hearing Brief (June 5, 2017) (excerpts)	ER324-328
Hearing Exhibit 5: OFCCP Scheduling Letter (Sept. 30, 2015)	ER329-335
Hearing Exhibit 6: OFCCP Letter to Google (June 1, 2016)	ER336-338
Hearing Exhibit 7: Google Letter to OFCCP (June 17, 2016)	ER339-349
Hearing Exhibit 8: OFCCP Letter to Google (June 23, 2016)	ER350-354
Hearing Exhibit 9: Google Letter to OFCCP (June 30, 2016)	ER355-362

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:)
)
OFFICE OF FEDERAL CONTRACT) Case No. 2017-OFC-08004
COMPLIANCE PROGRAMS, UNITED)
STATES, DEPARTMENT OF LABOR,)
)
Plaintiff,)
)
vs.)
)
GOOGLE, INCORPORATED,)
)
Defendant.)

PROCEEDINGS TELEPHONICALLY HELD

Wednesday,
January 5, 2017

90 Seventh Street
Suite 4-800
San Francisco, California

The above-entitled matter came on for prehearing
conference, pursuant to notice, at 11:04 o'clock a.m.

BEFORE: THE HONORABLE STEVEN BERLIN,
Administrative Law Judge

ER001

APPEARANCES:

On behalf of the Plaintiff:

MARC A. PILOTIN, ESQ.
IAN ELIASOPH, ESQ.
JEREMIAH MILLER, ESQ.
United States Department of Labor
90 Seventh Street, Suite 3-700
San Francisco, California 94103

On behalf of the Defendant:

LISA BARNETT SWEEN, ESQ.
MATTHEW CAMARDELLA, ESQ.
ANTONIO RAIMUNDO, ESQ.
DANIEL DUFF, ESQ.
Jackson Lewis
50 California Street, 9th Floor
San Francisco, California 94104

I N D E X

<u>PROCEEDINGS:</u>	<u>PAGE:</u>
Wednesday, April 5, 2017	4

WITNESSES: DIRECT CROSS REDIRECT RECROSS ALJ

(None called.)

EXHIBITS: IDENTIFIED RECEIVED REJECTED

PLAINTIFF

(None marked, nor received.)

DEFENDANT

(None marked, nor received.)

ADMINISTRATIVE LAW JUDGE

(None marked, nor received.)

1 with your order.

2 JUDGE BERLIN: So the question, then, of Google's
3 good faith is not really relevant for this proceeding. Am I
4 right, Mr. Pilotin?

5 MR. PILOTIN: That is the Agency's position, Your
6 Honor. This proceeding is focusing on whether or not, you
7 know, these requests were produced or not and, you know,
8 that's the primary issue.

9 Now, Google does have its defense, but we do not
10 see good faith being relevant to this discussion. It's a
11 binary issue at this point. Good faith, at most, along with,
12 you know, the failure to comply with your order and, you
13 know, enforcing --

14 JUDGE BERLIN: Well, Ms. Sween, for the purpose of
15 this proceeding, Google does not need to prove good faith in
16 order to involve debarment. Debarment is not even at issue
17 in this proceeding. It could be in a subsequent proceeding
18 if I order Google to produce something that's been requested
19 and that order stands on appeal and Google fails to do it.
20 But it is not presently -- debarment is not presently an
21 issue.

22 So, did Google want to demonstrate good faith for
23 some other reason that is relevant?

24 MS. SWEEN: Well, thank you, Your Honor. That
25 explanation actually is very helpful to Google. Certainly

1 good faith would have been an affirmative defense to the
2 Complaint, as pled. And so the facts that we have
3 clarification now that that is a prospective sanction
4 stemming from any proceedings in this matter and your order
5 is helpful.

6 We have one witness that we were planning on
7 putting on for the purpose of demonstrating good faith up to
8 this point. And that witness will also testify, Your Honor,
9 to the extent that Google has spent hundreds of thousands of
10 dollars in responding to the request to date.

11 JUDGE BERLIN: Well, what I'm -- you know, that
12 witness can testify about the expense of complying with
13 OFCCP's requests, but it appears that it would be irrelevant
14 to hear testimony to demonstrate good faith, because it
15 simply is not at issue.

16 Does anyone have an argument why good faith is
17 relevant or can we just exclude that? Mr. Pilotin?

18 MR. PILOTIN: We're fine with excluding that topic
19 and streamlining this hearing, Your Honor.

20 JUDGE BERLIN: Ms. Sween?

21 MS. SWEEN: In light of the Court's assessment of
22 that and Mr. Pilotin's representation, we're fine with
23 excluding good faith at this proceeding.

24 JUDGE BERLIN: Okay. So, I notice in the
25 Plaintiff's pretrial there's the possibility of recalling the

1 parties agreed in Stipulation No. 31. That's something that
2 addresses three or four of the requests for admission -- some
3 of them, I don't think would help me much at all. For
4 example, how much money Google spends on meals for its
5 employees. You know, if Google has to do that to be
6 competitive in the market to get the best people, that just
7 shows what a tough life Google has that they have to spend so
8 much money on food.

9 So, I don't know what it proves one way or the
10 other. And -- but I'm not going to get into these on a
11 one-by-one basis. The way the regulation reads, which makes
12 no sense to me, does not require an answer until 11 days
13 after the hearing is over on a case where I have to have a
14 decision out within 15 days.

15 So, it might have worked to everyone's advantage if
16 these could have been answered. The hearing's in two days.
17 They haven't been answered. The answers are not due, so the
18 requests for admission are stricken, as they were untimely
19 propounded. That's my ruling on that.

20 All right. Let me just make sure -- Mr. Pilotin, I
21 want to make sure and I think I understood from Ms. Sween,
22 but I'll check with you, too. My understanding is that if I
23 find that some of what is sought, OFCCP is entitled and some
24 they are not entitled to, I may issue an order that orders
25 what I conclude what OFCCP is entitled to and deny the rest.

1 I am not required to simply grant everything or deny
2 everything.

3 And it seems to me that both parties agreed with
4 that proposition in the briefs that I asked you to submit.
5 But if you don't agree with that proposition, this would be
6 the time to say so.

7 MS. SWEEN: Yes, Your Honor, we agree with that
8 proposition. The Court has absolute discretion in blue
9 penciling the requests and making a determination request-by-
10 request as to which ones of them meet the relevant standard
11 and the reasonableness standard and which ones do not.

12 JUDGE BERLIN: Mr. Pilotin?

13 MR. PILOTIN: Yes, Your Honor. In terms of your
14 granting in part and denying in part the requests, we agree
15 that that's something that the Court can do. I think the
16 disagreement between the parties was the amount of discretion
17 that the Court has, but we do agree that the Court does have
18 discretion.

19 JUDGE BERLIN: All right. Now, from some things I
20 read in the pretrial statements, I just want to make clear
21 for the record -- well, one thing I want to add to the
22 comment about the procedural question of whether you can
23 raise summary judgment motions on this expedited process, I
24 just want to add this. Should it be litigated on appeal --
25 not that -- I mean, you would still have to reach the merits

REPORTER'S CERTIFICATE

1
2 TITLE: Office of Federal Contract Compliance Programs, et
3 al., vs. Google, Inc.

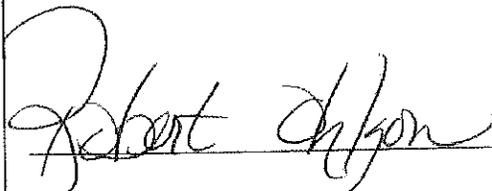
4 CASE NUMBER: 2017-OFC-00004

5 OWCP NUMBER: N/A

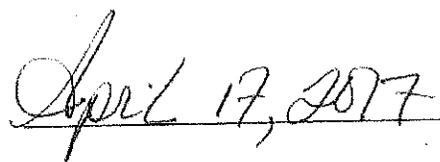
6 DATE: April 5, 2017

7 LOCATION: SAN FRANCISCO, CALIFORNIA
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12 This is to certify that the attached proceedings
13 before the United States Department of Labor, were held
14 according to the record and that this is the original,
15 complete, true and accurate transcript which has been
16 compared to the reporting or recording accomplished at the
17 hearing.
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22 SIGNATURE OF REPORTER

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22 DATE

UNITED STATES DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:)
)
OFFICE OF FEDERAL CONTRACT) Case No. 2017-OFC-08004
COMPLIANCE PROGRAMS, UNITED)
STATES, DEPARTMENT OF LABOR,)
)
Plaintiff,)
)
vs.)
)
GOOGLE, INCORPORATED,)
)
Defendant.)

Friday,
April 7, 2017

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, California

The above-entitled matter came on for hearing,
pursuant to notice, at 9:01 o'clock a.m.

BEFORE: THE HONORABLE STEVEN B. BERLIN,
Administrative Law Judge

ER009

APPEARANCES:On behalf of the Plaintiff:

MARC A. PILOTIN, ESQ.

IAN H. ELIASOPH, ESQ.

JANETTE WIPPER, ESQ.

United States Department of Labor
90 Seventh Street, Suite 3-700
San Francisco, California 94103On behalf of the Defendant:

LISA BARNETT SWEEN, ESQ.

DANIEL DUFF, ESQ.

ANTONIO RAIMUNDO, ESQ.

Jackson Lewis

50 California Street, 9th Floor
San Francisco, California 94104

I N D E XPROCEEDINGS:PAGE:

Friday, April 7, 2017

4

WITNESSES:DIRECTCROSSREDIRECTRECROSSALJ

Janette Wipper

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Jane Suhr

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Michael Brunetti

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Janette Wipper

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Frank Wagner

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EXHIBITS:IDENTIFIEDRECEIVEDREJECTEDPLAINTIFF

201 through 223

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DEFENDANT

101

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102

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106 through 111

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ADMINISTRATIVE LAW JUDGE

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JOINT

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P R O C E E D I N G S

(9:01 o'clock a.m.)

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3 JUDGE BERLIN: This is the United States Department
4 of Labor, Office of Federal Contract Compliance Programs
5 versus Google, Inc. It's Case No. 2017-OFC-4. And I'd like
6 to begin by taking the appearance of counsel.

7 MR. PILOTIN: Good morning, Your Honor, Mark
8 Pilotin on behalf of the Office of Federal Contract
9 Compliance Programs. With me is Ian Eliasoph and Regional
10 Director Janette Wipper.

11 JUDGE BERLIN: Good morning.

12 MR. PILOTIN: Good morning.

13 MS. SWEEN: Good morning, Your Honor. Lisa Barnett
14 Sween, Jackson Lewis, on behalf of Google. I have several
15 colleagues here this morning: Matt Camardella from our New
16 York office, along with Daniel Duff. I also have Antonio
17 Raimundo and Amerlio Sanchez-Maran assisting us. And our
18 client, Amy Lambert from Google.

19 JUDGE BERLIN: Good morning.

20 All right. So, let's talk a little bit now about
21 the matters that are disputed and undisputed. That was the
22 subject of some of the conversation at the pretrial
23 conference that we had on Wednesday. And I don't think that
24 I want to go over all of the matters that appear to be
25 undisputed now, because I think a lot of that is reflected in

1 the stipulations of the parties.

2 Let me say I've received stipulations from the
3 parties in writing. They're numbered 1 through 32. At the
4 pretrial, I made them ALJ Exhibits 1 and 2 and they were
5 admitted into the record.

6 (Administrative Law Judge
7 Exhibit Nos. 1 and 2, having
8 previously been marked for
9 identification and received
10 into the record.)

11 JUDGE BERLIN: There's just a few things that I did
12 notice in the stipulations. Let me just recite those for the
13 record. If I get any of this wrong, please interrupt me
14 right away, don't wait.

15 So, the Contract on which OFCCP is investigating
16 compliance was awarded on June 2, 2014.

17 The value of the Contract is for \$100,000 or more.

18 The Contract requires compliance with Executive
19 Order 11246 and the two other statutes that are involved in
20 this case -- let me just state what those are: Section 503
21 of the Rehabilitation Act of 1973 and the Vietnam Era
22 Veterans Readjustment Assistance Act of 1974.

23 So the Contract also includes an agreement by
24 Google to cooperate -- and I'm characterizing -- I mean the
25 Contract states what it states, but I'm just characterizing

1 it -- that Google will cooperate in compliance reviews,
2 including making available for inspection of certain
3 materials.

4 Google received a scheduling letter from OFCCP,
5 notifying it that there was going to be a compliance review
6 and Google received this on or about September 30th, 2015.

7 Google submitted its affirmative action plan to
8 OFCCP on or about November 19th, 2015.

9 As of December 29th, 2016, GSA -- which is the
10 Government contracting party -- had paid Google approximately
11 \$600,000 under the contract.

12 The parties agree that the request for information
13 that OFCCP is making is akin to an administrative subpoena,
14 although OFCCP does not formally have subpoena authority.

15 There's no dispute that OFCCP selected Google for
16 the compliance review through the application of appropriate
17 neutral criteria.

18 There's also no dispute for purposes of this matter
19 that OFCCP met its conciliation requirements prior to filing
20 the action.

21 The parties agree that the Administrative Law Judge
22 is not constrained to either approve or disapprove, order or
23 not order, everything that OFCCP is demanding, but can blue-
24 pencil demands to exclude those portions that are not
25 justified under the applicable law.

1 There's an agreement that any form of penalty at
2 this point would be premature. There must first be an order
3 requiring for the production of information or documents and
4 Google would have to fail to comply with the order before
5 there would be penalties. So, at this point, OFCCP is not
6 seeking deboment or any other penalty. And, accordingly,
7 Google need not show good faith at this point, because it
8 doesn't have to justify its actions beyond the general legal
9 requirement of what has to be produced and what doesn't have
10 to be produced.

11 So, what's disputed are three different kinds --
12 categories -- of documents or information that OFCCP wants,
13 has requested. One is a snapshot of the Google headquarters'
14 employees in Mountain View as of September 1st, 2014. OFCCP
15 has requested a job history and salary history for employees
16 on that snapshot. And, also, on a snapshot that OFCCP
17 provided as of September 1st, 2015. The job and salary
18 histories would include starting salaries, starting position,
19 starting comp ratio, starting job code, starting family --
20 job family -- starting job level, starting organization. And
21 then for each of those, go through the changes that have
22 occurred since the employee was first hired.

23 OFCCP has also requested contact information for
24 all of the employees that are on either of the two, or both,
25 of the snapshots.

1 The parties agreed that -- or OFCCP has clarified
2 that the contact information it's seeking is name, address,
3 telephone number, and email address.

4 Okay. Any other issues in dispute besides those I
5 listed?

6 MR. PILOTIN: No, Your Honor, not from OFCCP.

7 MS. SWEEN: Did you ask any other issues in
8 dispute?

9 JUDGE BERLIN: Yes. Their entitlement to all of
10 those, I should be clear. So Google is disputing Google's
11 entitlement to the three categories of documents and other
12 information requested.

13 MS. SWEEN: Your Honor, the only thing that I would
14 contend may still be in dispute is the proprietariness of
15 OFCCP's notice of violation that it issued to Google,
16 stemming from its belief that Google had not yet complied and
17 had not engaged in good faith.

18 JUDGE BERLIN: Is that a proposed exhibit?

19 MR. PILOTIN: It is a proposed exhibit, Your Honor,
20 but this is the first time that we're hearing that it is a
21 matter in issue in this case.

22 JUDGE BERLIN: Well, are you asserting that there
23 is a violation? I haven't reviewed the notice, but are you
24 asserting some violation or is this simply a proceeding in
25 the nature of subpoena enforcement action, where you're

1 asking for an order requiring Google to produce the
2 responsive items that fall into these three categories?

3 MR. PILOTIN: That is correct in terms of the
4 current proceeding, Your Honor. And I think, also, the
5 document Ms. Sween may be talking about -- the show cause
6 notice. We haven't -- the Agency hasn't issued a notice of
7 violation at this stage.

8 JUDGE BERLIN: All right. Ms. Sween, does that
9 address that concern?

10 MS. SWEEN: It does, Your Honor.

11 JUDGE BERLIN: Okay. I did ask you all to
12 interrupt me if I recited something as not disputed and you
13 thought that it was. No one said anything. I take it that
14 no one does dispute any of the issues that I listed as not
15 disputed, correct?

16 MS. SWEEN: Correct, Your Honor.

17 MR. PILOTIN: Yes, Your Honor.

18 JUDGE BERLIN: All right. I'd like to know which
19 witnesses at this point the parties plan to call. We
20 discussed this some at the pretrial trial. So, Mr. Pilotin,
21 for OFCCP, who can I expect to be hearing from?

22 MR. PILOTIN: Yes, Your Honor. You will hear from
23 Regional Director Janette Wipper, Deputy Regional Director
24 James Suhr -- S-u-h-r -- and Michael Brunetti.

25 JUDGE BERLIN: And Ms. Sween?

1 MS. SWEEN: Your Honor, Google intends to also call
2 Ms. Wipper, Ms. Carolyn McHam-Menchyk, it's VP _Google's VP
3 of Compensation, Frank Wagner, Google's Senior Legal
4 Operations Manager, Kristen Zimmerhal (phonetic), and Dr.
5 Michael Aamodt, who is an expert witness.

6 JUDGE BERLIN: Thank you.

7 Rather than take the time from -- to spell all of
8 those names, I'll just counsel, when you call the witness, to
9 have them not only state their name, but also spell it for
10 the record.

11 MS. SWEEN: Your Honor, may I just for the matter
12 of record, counsel for OFCCP indicated that there was no
13 violation issued, just a show-cause notice. However, the
14 show-cause notice has an Attachment A called "violation." So
15 just for the record, Your Honor.

16 JUDGE BERLIN: Thank you. I assume, Mr. Pilotin,
17 that does not change your statement about there being no
18 finding of a violation at this time? Or that is not a
19 subject of this proceeding.

20 MR. PILOTIN: There -- I don't know for -- there
21 has been a violation insofar as this is a denial of access
22 case, akin to, as Your Honor mentioned, an administrative
23 subpoena proceeding, where we're requesting documents. And I
24 don't know if that clarifies it sufficiently for the record.

25 JUDGE BERLIN: Okay. But you are not -- well, let

1 me be clear. If I find that OFCCP is entitled to some or all
2 of the materials it's sought, I'm just going to require
3 Google to produce those. I'm not going to make any specific
4 finding of any kind of violation.

5 So, that's my understanding of the pleadings.
6 That's my understanding of all that OFCCP is asking for.

7 MR. PILOTIN: That is correct, Your Honor.

8 JUDGE BERLIN: All right. Let's turn, then, to the
9 exhibits. The parties have identified 16 Joint Exhibits
10 numbered 1 through 16.

11 (Joint Exhibit Nos. 1 through
12 16 were marked for
13 identification.)

14 JUDGE BERLIN: Does someone have a copy of those
15 Joint Exhibits that I could have for the record?

16 MS. SWEEN: We do, Your Honor.

17 JUDGE BERLIN: All right. If I might have those?

18 MR. RAIMUNDO: May I approach?

19 JUDGE BERLIN: Please. Thank you.

20 All right. I have received Joint Exhibits 1
21 through 16. I take it there are no objections to these
22 exhibits, correct?

23 MS. SWEEN: That's correct, Your Honor.

24 MR. PILOTIN: That's correct, Your Honor.

25 JUDGE BERLIN: All right. They're admitted.

1 the Agency helpless against federal contractors who might in
2 the future question the Agency's requests, regardless of how
3 reasonable or unreasonable such requests may be. This is a
4 unique case where the facts are extreme and OFCCP has issued
5 grossly overbroad demands. The only slippery slope that
6 might arise from this matter would stem from a ruling that
7 effectively grants OFCCP what it seeks: Unlimited and final
8 authority to do as it sees fit.

9 If the Fourth Amendment has any meaning at all in
10 the context of federal agency audits, which this Court
11 recognizes reasonable standard has bite, then Google
12 respectfully submits that the Court properly check OFCCP's
13 extreme and unconstitutional actions which are not
14 sufficiently limited in scope or relevant in purpose and for
15 those reasons are unduly burdensome, regardless of Google's
16 operating expenses.

17 Thank you, Your Honor.

18 JUDGE BERLIN: Thank you.

19 All right. Let's turn to the witness testimony and
20 we'll begin with the Plaintiff's case in chief.

21 Mr. Pilotin, your first witness?

22 MR. PILOTIN: Thank you, Your Honor. OFCCP would
23 like to call Regional Director Janette Wipper to the stand.
24 Whereupon,

25 JANETTE WIPPER,

1 having been first duly sworn by the Administrative Law Judge,
2 was examined and testified as follows:

3 JUDGE BERLIN: Please have a seat.

4 MR. PILOTIN: Thank you, Your Honor.

5 DIRECT EXAMINATION

6 BY MR. PILOTIN:

7 Q Good morning, Ms. Wipper.

8 A Good morning.

9 Q For the record, would you please spell your name?

10 A Janette, J-a-n-e-t-t-e, Wipper, W-i-p-p-e-r.

11 Q Thank you. And who is your current employer?

12 A OFCCP, Department of Labor.

13 Q And what is your position with OFCCP?

14 A It's Regional Director for the Pacific Region.

15 Q And since when have you had that position?

16 A Since January 2014.

17 Q And can you briefly summarize your duties in your
18 position as Regional Director?

19 A As Regional Director, I oversee the Pacific Region,
20 which includes eight states and we have roughly 90 employees
21 that essentially are charged with compliance evaluations and
22 other enforcement and outreach activities with respect to
23 equal employment opportunities and affirmative action
24 obligations as federal contractors and subcontractors.

25 Q If you can estimate annually how many compliance

1 evaluations do you oversee?

2 A Roughly -- typically it's about 500 to 600 in our
3 region, and agency-wide it's roughly 4,000.

4 Q Prior to your position with OFCCP, were you
5 employed?

6 A Yes.

7 Q And who was your prior employer?

8 A Sanford-Heisler, which is a law firm that
9 specializes in employment class action litigation.

10 Q And what was your position with Sanford-Heisler?

11 A I was the managing partner in the San Francisco
12 office.

13 Q Did you have any other role with Sanford-Heisler?

14 A I worked a lot on class action litigation
15 throughout the firm with expert witnesses and statistical
16 evidence. I also worked a lot on e-discovery matters across
17 the firm.

18 Q And with respect to statistical evidence, in what
19 cases would that evidence arise?

20 A Typically at Sanford-Heisler it was with Title 7,
21 class actions in federal court, nationwide class actions,
22 often. Also, wage and hour litigation, sometimes statistical
23 information would be relevant to sampling and other evidence
24 related to the wage and hour matters.

25 Q And when you refer to Title 7, what do you mean by

1 that?

2 A Title 7 of the Civil Rights Act of 1964, which
3 prohibits discrimination in employment.

4 Q Prior to your work at Sanford-Heisler and/or OFCCP,
5 had you had any other experience with statistical evidence?

6 A So, before I worked at Sanford-Heisler, I worked in
7 the non-profit sector at NAACP and at Lawyers' Committee for
8 Civil Rights. And in those roles, I worked on other types of
9 civil rights litigation, such as voting rights employment and
10 education equity, which included statistical evidence.

11 Q Okay. I'd like to turn now to OFCCP. What is the
12 agency's mission?

13 A So, the mission is to protect workers, promote
14 diversity and enforce the law. And, essentially, what you
15 alluded to earlier in the opening statement, what we do is we
16 do more than the typical Equal Employment Opportunity Agency.
17 We do audits. We're not complaint-driven. And we monitor
18 the compliance of federal contractors and subcontractors who
19 have agreed in exchange for federal contracts to abide by
20 Equal Employment Opportunity obligations, as well as
21 affirmative action obligations, which is more than what would
22 be required under Title 7 of the Civil Rights Act.

23 Q And just to make it clear, when you say "enforce
24 the law," what do you mean by "enforce" -- which law are you
25 talking about?

1 A So, Executive Order 11246, which is at issue today,
2 which deals with compensation, discrimination of federal
3 contractors. Also, Section 503 of the Rehabilitation Act,
4 and VEVRAA -- which is the Vietnam Veterans' Readjustment
5 Assistance Act.

6 Q And what does the OFCCP do to enforce the law, as
7 part of its mission?

8 A So, we do compliance evaluations, which is at issue
9 today. We also investigate complaints when complaints are
10 filed with the Agency. That is a small part of our work.
11 But we mainly do the compliance evaluations and we do
12 outreach and work with other agencies with community-based
13 organizations and with the contractor community about best
14 practices and EEO and affirmative action.

15 Q And what do you mean by "EEO"?

16 A I'm sorry, Equal Employment Opportunity.

17 Q And if you could generally summarize, what is a
18 compliance evaluation?

19 A So, in our regulations it's defined as a
20 comprehensive analysis and evaluation of a contractor's
21 employment practices. So it is a very broad evaluation.
22 It's really, essentially, an audit where we're looking at all
23 employment practices from recruiting to terminations. And
24 we're looking at all bases. So it's not -- it's race, color,
25 national origin, sex, sexual orientation, gender identity, a

1 veteran status and disability status. So it's very broad.

2 JUDGE BERLIN: So, you've listed activities -- law
3 enforcement activities of the Agency. Does the Agency also
4 bring litigation on the merits of alleged violations?

5 THE WITNESS: Yes. So we also do enforcement
6 actions, which is, you know, what we're doing here, with an
7 access action. But in the event that we can't resolve a
8 matter, it will be filed with the administrative -- with this
9 office. It's very rare, though. Like 99 percent of our
10 compliance evaluations result in settlements and where we
11 find any kind of discrimination. So it's a rare thing, but
12 it is part of our work.

13 BY MR. PILOTIN:

14 Q When it comes to a compliance evaluation, which of
15 the contractor's employees fall within the scope of that
16 evaluation?

17 A So, generally it's the employees included in the
18 affirmative action program. So our regulations require a
19 contractor to have all of their employees within an
20 affirmative action program. And the general rule is that
21 they would fall within the establishment's affirmative action
22 program. There's also a separate exception that's not
23 established in this space that's called a FAAP. It's a
24 Functional Affirmative Action Program that a contractor can
25 choose to do in lieu of the establishment-based affirmative

1 action program.

2 Q And what is the temporal scope of a compliance
3 evaluation?

4 A Two years.

5 Q Two years from when?

6 A Two years from when the scheduling letter is issued
7 to the contractor.

8 Q And what is a scheduling letter?

9 A So the scheduling letter is essentially the initial
10 point of contact, notifying the contractor that they would be
11 -- they've been selected for compliance evaluation. And in
12 that scheduling letter, there are requests for information,
13 which includes an itemized listing of information such as the
14 compensation information at issue today.

15 JUDGE BERLIN: So by the two-year scope, do you
16 mean -- where does the scope begin?

17 THE WITNESS: So, it's two years from this
18 evaluation. So we sent the scheduling letter September 2015.
19 So it would go back to September 2013.

20 JUDGE BERLIN: Okay. So, by the scope, you mean
21 that you go back two years from the date of the scheduling
22 letter?

23 THE WITNESS: Yes.

24 JUDGE BERLIN: And how about going forward?

25 THE WITNESS: So, going forward, we can look going

1 forward to determine whether any violations we found have
2 been corrected. And it could be -- if they haven't, then we
3 could seek back-pay going forward.

4 BY MR. PILOTIN:

5 Q Now, with respect to compliance evaluations, are
6 there any public agency statements explained to the
7 contractors how OFCCP undertakes reviews of compensation
8 policies?

9 A Yes. We have a Directive 307 that's available on
10 our website, so that's publically-available. And it
11 describes the practices and procedures that the Agency will
12 follow in investigating compensation discrimination. It was
13 issued in, I believe, February 2013.

14 Q And generally speaking, what does that directive
15 provide with respect to compensation evaluations?

16 A It talks about the process for investigating
17 compensation, the types of information to look at. It also
18 points out that when you're investigating compensation, you
19 should be looking at all employment practices that have an
20 impact on pay. It talks about the statistical analysis and
21 the factors that you would consider in a statistical analysis
22 evaluating pay disparities. So, the factors that the Agency
23 believes are relevant and legitimate and also the factors
24 that the Contractor asserts are relevant to pay practices and
25 pay decisions.

1 Q Okay. We're here today because of a specific
2 compliance evaluation, correct?

3 A Yes.

4 Q And which evaluation is that?

5 A The evaluation of Google and Mountain View.

6 Q And when was that compliance evaluation initiated?

7 A September 2015.

8 Q I'm going to show you a document --

9 MR. PILOTIN: If I may ask Counsel, does the
10 witness have the Joint Exhibit binders?

11 MS. SWEEN: Your Honor, we forgot to provide the
12 witness with their binders. If you will allow Mr. Antonio to
13 approach?

14 JUDGE BERLIN: Yes, please.

15 MR. PILOTIN: Thank you.

16 MS. SWEEN: With the Joint Exhibit binders. We
17 don't have your exhibits.

18 MR. PILOTIN: Understood. Thank you, Counsel.

19 BY MR. PILOTIN:

20 Q Ms. Wipper, I'd like you to turn to Exhibit 5 in
21 the Joint Exhibit binder. After you've taken a look at it,
22 please let me know when you're ready.

23 A Yes, I'm ready.

24 Q What is Exhibit 5?

25 A It's the scheduling letter.

1 Q And does -- does the exhibit -- does the scheduling
2 letter make any requests to Google?

3 A Yes, it's asking for the AAP and there's also an
4 itemized listing which is attached to the scheduling letter,
5 outlining the information requested to be submitted within 30
6 days to the agency. Item 19 is the item that addresses
7 compensation.

8 Q Thank you, Ms. Wipper. We can set Exhibit 5 aside
9 for now.

10 A Okay.

11 Q Just turning back to Exhibit 5, save for the
12 contractor's address, is Exhibit 5 a form letter?

13 A Yes. It's approved by OMB and a burden analysis
14 been conducted with respect to it as a result.

15 Q Now, with respect to Google's Mountain View -- to
16 Google's Mountain View headquarters, how many employees are
17 within the scope of that compliance review?

18 A I believe it's 21,154 employees.

19 Q And what is that number based on?

20 A Based on the AAP created by Google.

21 Q You mentioned earlier regarding a potential
22 exception to the AAP rule. Do you recall that testimony?

23 A Yes.

24 Q Does that exception exist here?

25 A No.

1 Q How does the number of employees within this
2 compliance review compare to other compliance reviews in the
3 region?

4 JUDGE BERLIN: I'm sorry. I just want to be sure -
5 - I want something to be clear here. The option for the
6 functional AAP does exist for Google's benefit, if they
7 requested it. You're just saying it doesn't apply here?

8 THE WITNESS: Yes.

9 JUDGE BERLIN: Because there was no request, is
10 that the reason?

11 THE WITNESS: Yes. If they -- there's a process in
12 order for the contractors to ask for an approval for a
13 functional AAP, it would go through the national office and
14 then our national office would review it, approve it, and
15 then they would essentially create the FAAP.

16 JUDGE BERLIN: Approve it or disapprove it?

17 THE WITNESS: Yes.

18 JUDGE BERLIN: Okay.

19 THE WITNESS: It's often approved.

20 JUDGE BERLIN: Thank you.

21 BY MR. PILOTIN:

22 Q We were just speaking about the number of employees
23 in this compliance evaluation. How does that number of
24 employees in this compliance evaluation compare to the size
25 of other compliance evaluations in the region?

1 A In this region, it's the largest compliance
2 evaluation we have opened currently. It could -- nationally,
3 it's one of the largest. It's not the largest and probably
4 in the last three or four years, it's one of the top 10
5 largest that we've had at our agency.

6 Q And what is the temporal scope of this compliance
7 review?

8 A Two years. September of 2013 to September 2015.

9 Q And if you could just summarize briefly, there are
10 certain requests that are the subject of this action,
11 correct?

12 A Yes.

13 Q And what are those requests?

14 A So, the first is a second snapshot. So, they
15 provided a September 2015 snapshot in response to the Item 19
16 attachment to the scheduling letter. And so we requested a
17 2014 snapshot. We typically do that when we review and
18 analyze the current year's snapshot and we find systemic
19 compensation disparities. And so in order to determine
20 whether there's a continuing violation, we will look back for
21 the entire review period. So we ask for that prior year's
22 snapshot to determine whether the systemic compensation
23 disparities we found in the current year existed in the prior
24 year.

25 The second thing we asked for was the job and

1 salary history. Usually after you find a disparity in pay
2 level, the second question you want to answer is the cause of
3 the disparity. So, what you'll do is look back at every
4 decision that impacted pay, from starting salary to every
5 change going forward. This is something that not only we do,
6 but Google itself says it does when they do pay equity
7 analysis. There's public statements that they do that. So
8 we requested fee salary and job history because of the pay
9 level disparities and our second question, a follow-up, is to
10 find out what the cause of those disparities are.

11 The third thing we asked for was the name and
12 contact information for employees -- personal contact
13 information. Within our compliance evaluation, which I
14 stated was in a comprehensive analysis of all of the
15 employment practices, we conduct confidential employee
16 interviews, that's within our regulations. So we -- in order
17 to understand compensation practices from both sides, not
18 only the contractor, but also the employee's point of view,
19 we need to talk to the employees about the practices and how
20 they're applied, which is the reason why we asked for the
21 employee contact information. The names of the employees, as
22 well as their contact information.

23 JUDGE BERLIN: So the employees include managerial
24 employees?

25 THE WITNESS: So, yes, and we're aware that if we

1 contacted a manager, we would only be talking to a manager
2 about their specific experiences with potential
3 discrimination. We wouldn't be asking anything about
4 confidential information. And we probably would notify
5 Google before we contacted the managers.

6 So, yes, but that was included in the request,
7 because they also -- with respect to the disparities that I
8 mentioned, it was not limited to non-management employees.

9 BY MR. PILOTIN:

10 Q So, I'd like to break down each of the subject
11 requests and go through each of them more specifically.

12 A Okay.

13 Q Let's start with salary history.

14 A Okay.

15 Q How is the salary history that's requested in this
16 case relevant to the compliance evaluation?

17 A So, salary history, as I said, is essentially all
18 of the changes in salary throughout an employee's tenure at
19 Google. So, we look at that as the second question to
20 determine the cause of disparities that we're finding in the
21 pay level, like the base salary. So we ask for it for that
22 reason.

23 The second reason we ask for it is when we do the
24 on-site review, there was -- there were statements from the
25 HR representatives at Google saying that at each point in the

1 pay changes there is discretion. The first point is at the
2 setting of salary -- starting salary. There's a
3 negotiation, particularly for the industry hires, that
4 occurs. They also look at prior salary and they try to beat
5 it according to their HR compensation representatives by 10
6 to 20 percent. They also have a range of somewhere between
7 80 and 120 percent of their mid-point, which is a very large
8 range that allows for a lot of discretion and negotiation.

9 So if we're finding a pay disparity, we want to
10 find out if the cause is happening from starting salary. So
11 that's why we would ask for the initial salary.

12 Then throughout the course of the salary changes,
13 there's also openings for discretion and potential bias based
14 on the statements that Google provided. So, one was at
15 merit, they do have the merit increases tied to the mid-point
16 or the market target or market reference point, whatever they
17 want to call it, and their performance. However, managers
18 are able to adjust that and that was told to us not only by
19 their HR representatives, but also by their management -- the
20 management representatives. So people who are managers said
21 they can adjust the merit increases.

22 On promotions, there's a -- there's a range of a
23 five to a 20 percent increase. So you can also -- there's
24 wide discretion on how much you're paid to change in
25 association with a promotion. So we would also want to look

1 at that to determine whether that's the source of disparity.
2 And, again, this is something that Google itself, in public
3 statements, say that this is how you would look at pay
4 equity, not only the level, but where the cost has gone.

5 Q Does the Agency have an understanding as to where
6 salary history is stored at Google with respect to employees?

7 A So, our understanding from the on-site interviews
8 is they have a system called "Workday," which is, you know,
9 available in the market. It's a commercial system. It's not
10 custom to Google. And they store salary history and job
11 history within that. And that is accessible by the
12 employees, as well as the managers. You can export data
13 according to the manual and online instructions for Workday
14 into Excel files. So it's not only accessible, it's
15 centrally located, it's electronic and exportable and readily
16 available. So, based on the information we gather.

17 They also have a system called gComp, which I
18 believe is a custom system that Google created that feeds
19 information into Workday. So I think that's also
20 compensation history contained in gComp.

21 Q Based on your experience with the Agency and
22 experience, what burden would Google suffer based on
23 extracting the information from these electronic systems?

24 A I believe it would be a query. There was someone
25 at the on-site interview that stated that you could query

1 information from a centralized data base into and -- and
2 export it into Excel. So I think it would be very minimal.

3 With respect to my prior experience, it's a
4 standard in a pay -- a class compensation discrimination
5 case. This is how salary is actually produced. It's not
6 produced in a snapshot created by the company or the
7 defendant. It would be produced as it's kept in the ordinary
8 course of business, which is within the salary and job
9 history file.

10 Q I'd like to turn next to job history.

11 A Okay.

12 Q How is job history relevant to the current ongoing
13 compliance evaluation?

14 A So, it's very similar and interrelated to the
15 salary history. So in order to look at and do the analysis,
16 let's say, of starting pay, we would have to also know the
17 employee's starting position, starting level, any other
18 factor that would have an influence on their pay. So we
19 couldn't just look at their starting pay alone. We'd have to
20 have all of the factors that, basically, were existing at the
21 same time. So that's why the job history is important,
22 because we need the history of every job change that
23 associates with the salary change.

24 Q And does the Agency have an understanding as to
25 where the job history data is stored at Google?

1 A From our -- from the same things I already
2 mentioned: The Workday manual online instructions and some
3 of the statements that were provided at the on-site. It's
4 also kept in Workday and can be pulled through the export
5 that is also in the instructions.

6 Q And based on your experience, again, what -- in
7 terms of extracting this information, what would the burden
8 be to Google?

9 A It would also be a query. So, you know, they have
10 a set number of employees, the 21,154 employees. They have a
11 set time period, you know, the two years, for as long as they
12 work there, and you just -- you know, you could just export
13 that. For each employee, they're going to have this entry
14 any time there's a pay change or a job change. And so you
15 could export this employee's transactional record into an
16 Excel file. So, essentially, you have the group of employees
17 and then you work from there and export the data and it's
18 electronically stored.

19 JUDGE BERLIN: When you say for the two years or as
20 long as they work there, I need to follow-up on "as long as
21 they work there." So, do you mean if they work there less
22 than two years, it would not cover the two years because they
23 weren't there?

24 THE WITNESS: Yes.

25 JUDGE BERLIN: Is it correct that you aren't

1 suggesting looking back more than two years?

2 THE WITNESS: So, for purposes of the review and
3 the back pay, you know, or any remedy, it would only be
4 limited to two years back. If we -- if we get to the point
5 where we wanted to issue a violation, in order to do our due
6 diligence, we want to look at not only the pay level, but the
7 cause. Especially if we're looking at a disparate impact
8 claim, because we want to understand what's causing the
9 disparity as well as how we can propose to correct it.

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

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

18 BY MR. PILOTIN:

19 Q Okay. I'd like to now turn to the September 1st,
20 2014, snapshot. First of all, what does that snapshot
21 entail?

22 A It is the prior year snapshot of what we received
23 already for September 2015.

24 Q And how is the September 1st, 2014 snapshot
25 relevant to the ongoing compliance evaluation?

1 A So, with respect to this evaluation, we reviewed
2 and analyzed the 2014 snapshot and ran regressions on that --
3 I'm sorry, the 2015, sorry. So we reviewed that and analyzed
4 that. And because we found systemic compensation disparities
5 against women pretty much across the entire workforce, we
6 wanted to look to see what happened the year before.

7 So in order to -- if we're going to issue a
8 violation for two full years, we want to make sure that we're
9 using -- we're looking at the two full years to see whether
10 the pattern exists against women in all components of pay.

11 Q If you would, please turn to Exhibit 6 in your
12 Joint Exhibit binder? And please let me know when you're
13 ready.

14 A I'm ready.

15 Q Does Exhibit 6 -- what is Exhibit 6?

16 A So, this is a supplemental request for compensation
17 information that was sent to Jackson Lewis, the outside
18 attorneys for Google, from Agnes Huang, who is the Assistant
19 District Director in our Los Angeles office who's working on
20 this audit.

21 Q And does Exhibit 6 contain some of the factors that
22 were requested as part of the September 1st, 2014, snapshot?

23 A Yes.

24 Q And where are those additional factors?

25 A They're in the attachment.

1 Q Okay. Just very briefly, just to establish their
2 relevance, I'm going to go through each of these and I'll ask
3 questions about each of these. On which page of the
4 attachment?

5 A There's only -- the first page.

6 Q Okay. The first item on that list is "bonus
7 earned." How is bonus earned relevant to the compliance
8 evaluation?

9 A So, well, bonus is one of the components of pay.
10 So within our scheduling letter and the itemized listing,
11 which is approved by OMD, which I mentioned, bonus is
12 included, so we ask for bonus.

13 After the on-site interviews at Google, we learned
14 that they have a system where they set bonus targets by level
15 and then they modify those targets based on either the mid-
16 point for the role or the individual salary of the employee,
17 as well as their performance. So there's a modifier that's
18 applied.

19 So what is earned is not the same as what the
20 target is. So we want to look at both, to look at any
21 potential for bias or discrimination.

22 Q Okay. I'm just going down the list on this page.
23 How is bonus period covered relevant to the current
24 compliance evaluation?

25 A So, in order to ensure we're looking at the correct

1 bonus, we want to determine whether an employee worked and
2 was eligible for the bonus for the full year. So in the on-
3 site interviews, they -- one of the HR representatives stated
4 that they do pro-rate bonus. So if you work half a year, you
5 would only be entitled to half the bonus.

6 Q How about campus hire or industry hire, how is that
7 relevant to the compliance evaluation?

8 A So, again, on the -- in the on-site interviews, as
9 I think was discussed in the opening statements, Frank Wagner
10 did state that there is a separate pay setting system for
11 industry hire and campus hire. Prior salary is considered
12 and tried to be beat by 10 to 20 percent for industry hire.
13 For campus hire, they would be a student, so prior salary
14 wouldn't be any burden to produce.

15 Q And how about competing offer, how is that relevant
16 to the compliance evaluation?

17 A Again, competing offers came up in the on-site
18 interviews and I believe it was Frank Wagner that said
19 competing offers were considered in setting salary. They try
20 to match the competing offers, as well as beat prior salary.

21 Q And current comp ratio, how is that relevant?

22 A This is also something that Google uses. So they
23 measure an individual salary against this market reference
24 point to determine their ratio. This was discussed, as well,
25 in the interviews of the HR representatives.

1 Q How about current job code?

2 A Current job code is the code assigned to their
3 position. It's also what's used -- it's how they assign the
4 market reference point.

5 Q And current job family?

6 A The job family is something that they use for
7 targets -- setting targets. So the two HR representatives
8 mentioned that family was used when looking at, I think it
9 was, bonus, maybe equity target. So it's family, level, and
10 location.

11 Q Okay. I think you mentioned "current level."

12 Separate from -- let me just continue. How about
13 current manager?

14 A So, the manager -- so, I mentioned earlier that the
15 interviews -- at the on-site interviews, they said managers
16 have discretion at merit increases. So there is a
17 recommended target when you're going to do a merit increase
18 that's tied to the market, but the managers have discretion
19 to adjust those increases.

20 Q How is current organization relevant to the
21 compliance evaluation?

22 A So, the organization is also linked to where -- how
23 the structure is. So the compensation policies within an
24 organization may differ, so we would want to look at that.
25 One of the HR representatives that we interviewed covered

1 three of the organizations. So they even, you know, have
2 their HR separately assigned by organization.

3 Q How about department hired into, how is that
4 relevant to the compliance evaluation?

5 A So this goes back to the salary setting. So we
6 would like to look at where an employee came when initial
7 salary is set, so we can analyze that.

8 Q And why would you want to analyze that?

9 A Because there's negotiation at the salary setting
10 point. There's a lot of research that negotiation at hire
11 with respect to salary has a disparate impact or could have a
12 disparate impact on women. I believe that a former SVP that
13 worked at Google also has public statements about anchoring
14 bias and negotiations and the disparate impact on women when
15 a negotiation -- a process is used for setting salary.

16 Q I skipped date of birth. How is that relevant to
17 the compliance evaluation?

18 A So, date of birth, we would be interested in
19 looking at age as a proxy for experience.

20 Q How about education, how is that relevant to the
21 compliance evaluation?

22 A So, generally, education, you know, in labor
23 economic theory, the higher the education, it's assumed the
24 higher the productivity of an employee and the higher the
25 pay.

1 In the labor condition applications that Google
2 submits to the Department of Labor for the H1(b) visas, they
3 state for their engineering positions that education is
4 relevant to compensation. There's a wage memo attached to
5 their application and they state the factors that they
6 consider when looking at pay and setting pay and education is
7 one of them.

8 Q How about equity adjustment, how is that relevant
9 to the compliance evaluation?

10 A So, we're looking at pay equity. So we're
11 interested, from that standpoint. Also, Google has
12 affirmative action obligations to do pay equity analyses on
13 an annual basis. So we want to look to see if those were
14 done and if they were done correctly.

15 Q Hiring manager, how is that relevant to the
16 compliance evaluation?

17 A So, hiring manager is involved in the hiring
18 process. So, we would want to look whether there's any
19 discrepancies in pay associated with who someone's hiring
20 manager was.

21 Q Okay. I know we discussed job history, so I'm
22 going to skip that.

23 What about locality, how is that relevant?

24 A So, you know, there's different -- just generally,
25 there's different costs of living across the country. That's

1 generally accepted. In the on-site interviews, Google also
2 said they have separate locality pay. I believe the Bay Area
3 is premium, and then they have discounted areas. So we'd
4 want to take that into account if we did a regression
5 analysis.

6 Q And long term incentive eligibility and grants, how
7 is that relevant?

8 A So the long term incentives are generally stock and
9 they're used to -- essentially to create the incentive for
10 the employees to stay long term. If we evaluate that, we
11 want to understand the eligibility for those stock grants, so
12 that's why we ask for the eligibility.

13 Q And market reference point and target -- I know you
14 briefly discussed that already.

15 A Yeah, and I think Google's counsel talked about it,
16 also, in the opening statement. It's relevant. They use --
17 they benchmark their compensation to the market and they want
18 to set themselves at a certain place in the market. But
19 that's what happens outside the company. Inside the company,
20 we're looking at equity within the company, not across the
21 tech industry.

22 Q And why is name relevant to the compliance
23 evaluation?

24 A For the reasons I mentioned earlier about the
25 employees. That in order to understand the practices in a

1 comprehensive way, we would want to speak to the employees.
2 And if we're speaking to an employee, we would like to know
3 and verify that the data that we have with respect to that
4 employee is correct.

5 Q And performance rating, how is that relevant to the
6 compliance evaluation?

7 A So, in the on-site interviews, they're -- the HR
8 representatives and, I believe, some of the managers stated
9 that the performance ratings are considered in merit
10 increases and promotions.

11 Q We've discussed prior experience and prior salary,
12 how about referral bonus, how is that relevant?

13 A It's relevant not only to compensation, but also to
14 hiring. So we'd like to look at the successful referral
15 bonuses and who's referring employees to be hired at Google
16 and whether there is -- it's a diverse group or not.

17 Q The short-term incentive eligibility and grants,
18 how is that relevant?

19 A So that short-term incentives usually relate to
20 bonus. So, again, what I've mentioned earlier, because they
21 said they have a prorated system. If an employee doesn't
22 work a full year, their bonus would be decreased. We would
23 need to understand the eligibility requirements, so we can
24 analyze it correctly.

25 Q Okay. I'm going to skip the starting items there,

1 because we've discussed that in the context of salary
2 history. What about stock monetary value, how is that
3 relevant to the compliance evaluation?

4 A So, we -- you know, our scheduling letter and the
5 itemized listing asked for all components of pay, including
6 incentives. Our regulations also instruct us to -- when we
7 do a compliance review, to look at all forms of compensation.

8 At Google, it's our understanding from our interviews, that
9 stock compensation is a significant part of the compensation
10 package and we understand from the HR interviews that there
11 is a value -- a monetary value associated with the stock
12 award at the time it's granted, with the hope that it will
13 increase over the vesting period.

14 Q Okay. What about target bonus?

15 A Target bonus, as I mentioned earlier, is tied to
16 level. So they have a set percentage based on the level, and
17 then that can be modified by modifier and the rating.

18 Q And how does that relate to the compliance
19 evaluation and the pay?

20 A So, again, bonus is included in our itemized
21 listing as a component of pay. It's also a part of the
22 compensation package at Google. So in order to look at all
23 components of pay, we would look at bonus, as well.

24 Q And, finally, on the last page, total cash
25 compensation, how is that relevant to pay -- to the

1 compliance evaluation concerning pay?

2 A So that is -- so we would want to look at all of
3 the components of pay separately, as well as together, and
4 understand what the employee is actually receiving in
5 compensation that year. And we would run an analysis
6 separately of total compensation.

7 Q Okay. We can set that exhibit aside for now.

8 The last item I'd like to focus on, since we have
9 discussed names, is employee contact information. How is
10 that information relevant to the current compliance
11 evaluation?

12 A So, in our regulations we are required to look --
13 take a comprehensive look at all employment practices and as
14 part of that, conduct confidential employee interviews. So -
15 - and I know I mentioned earlier, so we get information from
16 Google, but that's only one side of the story. And so it's
17 important for us to be able to talk to the employees, as
18 well, to understand their perspective about how these
19 practices are actually applied.

20 The other thing that comes into play is there's an
21 informant's privilege that applies to the government. In
22 order to ensure that privilege is protected, the identify of
23 employees that we speak with and that provide us information,
24 we have to protect. So if we go through Google to talk to
25 employees, Google will be informed of the identify of the

1 employees that we're talking to, and that undermines the
2 integrity of the investigation. It also, potentially, puts
3 employees at risk for whether real or perceived potential
4 retaliation for talking to us. So that's something that we
5 take very seriously and we would try to avoid, while at the
6 same time try to comply with our regulations and doing a
7 comprehensive review and confidential employee interviews as
8 part of that.

9 Q Does the Agency have an understanding as to where
10 employee contact information is stored at Google?

11 A From the manual provided, some of the -- I it's
12 there in the exhibits -- the Workday has a Google profile on
13 the employees, which includes their personal contact
14 information. So that would be centrally located in that data
15 base.

16 Q I just want to go back to the September 1st, 2014,
17 snapshot. Did OFCCP make any accommodations to Google with
18 respect to burden for that request?

19 A Yes. So, my understanding is during the on-site
20 interviews, there was discussion where prior salary was
21 stored and competing offers were stored. So, they -- the
22 recruiters and also someone from HR said they believed it was
23 stored in gHire and interview notes. And we knew that it was
24 relied upon, because they stated not only that they looked at
25 it when setting compensation for industry hires, but they had

1 set parameters. And the two compensation HR professionals
2 told us the same thing, that they best prior salary from 10
3 to 20 percent. And, actually, I think it was Frank Wagner
4 that said they would go beyond that -- beyond the parameters,
5 if they need to. They would try to offset it with equity,
6 but they will beat the prior salary and they will,
7 essentially, exceed it, if necessary.

8 So, that was important for us to look at. We don't
9 often ask for prior salary, because there's a lot of research
10 that shows that it shouldn't be considered, particularly
11 because of the potential to have an adverse impact on women.

12 And so we don't generally think it is a legitimate factor.
13 However, it was emphasized so much within the on-site
14 interviews by the two HR representatives, that we thought in
15 order to do our due diligence, we needed to request it and
16 look at it.

17 And so we did and during one of my conversations
18 with opposing counsel, I offered that they could just give us
19 the interview notes and we could sift through it and identify
20 whatever factors we needed to out of that production and put
21 it into the data base.

22 So, they did not. They said that they didn't want
23 to do that. I believe they wanted to do an attorney review
24 of the interview notes before they were produced to us.

25 Q My last question is -- for now -- is what

1 safeguards does OFCCP have in place to protect data that
2 Google produces?

3 A So, our regulations state that all information
4 provided in the compliance evaluation would be kept
5 confidential. In the event that we receive any sort of FOIA
6 request, we -- as part of practice and it's noted in the
7 regulations -- we will go to the contractor before disclosing
8 any information. And we will ask whether they object. They
9 have the right to object.

10 So, not only do you have the FOIA exemptions, which
11 would, basically, entitle us to withhold the conversation
12 data and the employee names, but we also have the added
13 protection that we ask the contractor for their opinion and
14 whether they want to object to any disclosures that aren't
15 subject to the FOIA exemptions.

16 Q Okay.

17 MR. PILOTIN: Your Honor, we have no further
18 questions at this time.

19 JUDGE BERLIN: Is OFCCP aware of any data breaches
20 in any of this kind of confidential data?

21 THE WITNESS: I'm not, no.

22 JUDGE BERLIN: You're not?

23 THE WITNESS: No.

24 JUDGE BERLIN: Ms. Sween, cross-examine or did you
25 want to wait until your case in chief?

1 MS. SWEEN: I'm going to wait for our case in
2 chief, Your Honor, many of my direct examinations, cross-
3 examinations. I think it will be more efficient if we just
4 allow the Government to put on their case and then I can go
5 ahead.

6 JUDGE BERLIN: Ms. Wipper, you understand I allowed
7 the defense instead of calling you as a witness -- an adverse
8 witness as part of their own case -- to do all of their
9 questioning at the same time, instead of in parts. So we'll
10 need to have you come back as part of the defense case. But,
11 for now, you can step down.

12 THE WITNESS: Okay. And I'll leave these up here?

13 JUDGE BERLIN: Yes, please.

14 (Witness excused.)

15 MS. SWEEN: Your Honor?

16 JUDGE BERLIN: Yes?

17 MS. SWEEN: Just as a point of reference, does the
18 Court plan on taking a break at any point in time?

19 JUDGE BERLIN: Sure, that's what I was about to
20 mention. So, I think this would be a good time for the mid-
21 morning break. I'll also expect to take a full hour for
22 lunch and to have a mid-afternoon break, as well. Is 10
23 minutes enough?

24 Don't rely on that clock. At the very least, it's
25 on standard time. Off the record.

1 (Off the record.)

2 JUDGE BERLIN: Let's go back on the record.

3 Mr. Pilotin, your next witness, please?

4 MR. PILOTIN: Thank you, Your Honor. OFCCP would
5 like to call Jane Suhr.

6 Whereupon,

7 JANE SUHR,

8 having been first duly sworn by the Administrative Law Judge,
9 was examined and testified as follows:

10 JUDGE BERLIN: Mr. Pilotin?

11 MR. PILOTIN: Thank you, Your Honor.

12 DIRECT EXAMINATION

13 BY MR. PILOTIN:

14 Q Good morning, Ms. Suhr.

15 A Good morning.

16 Q Would you please spell your name for the record?

17 A Sure. It's Jane, J-a-n-e, Suhr, S-u-h-r.

18 Q Ms. Suhr, are you currently employed?

19 A Yes, I am.

20 Q And who's your current employer?

21 A The US Department of Labor, Office of Federal
22 Contracts Compliance Programs -- OFCCP.

23 Q And what is your current position with OFCCP?

24 A I'm currently the Deputy Regional Director of the
25 OFCCP's Pacific Region.

1 Q And for how long have you held that position?

2 A I've been in this position for about three years.

3 Q And if you would, could you summarize briefly your
4 duties in that position?

5 A In my role, I oversee the enforcement, outreach and
6 personnel actions of the region. I also act as Acting
7 District Director for several offices that have vacant
8 District Director positions.

9 Q Which district offices do you serve as Acting
10 District Director at this time?

11 A Currently, it's the Los Angeles District's office
12 and the Seattle District office.

13 Q And in your role as -- can you summarize your
14 duties as the Acting Director of the Los Angeles District
15 office?

16 A As the Acting District Director, I direct and
17 monitor the enforcement, outreach and personnel actions of
18 the District Office.

19 Q Prior to your current position, what was your
20 position?

21 A Prior to this role, I was the District Director of
22 the Los Angeles District office.

23 Q And for how long were you in that role?

24 A About five years.

25 Q And prior to that, what was your position?

1 A Prior to that, I was the Assistant District
2 Director of the Los Angeles District office.

3 Q And for how long?

4 A For about three years.

5 Q I'm terrible at math. When did you begin, just as
6 a time line, as Assistant District Director of the Los
7 Angeles office?

8 A 2005.

9 Q And prior to being Assistant District Director of
10 the Los Angeles office, what was your position?

11 A I was the compliance officer in the same office,
12 Los Angeles District office.

13 Q And when did you begin that position?

14 A 2001.

15 Q So how long has Google been a federal contractor?

16 A I'm aware of four to five evaluations of Google,
17 the earliest one being in 2007 with the Mountain View
18 facility.

19 Q And does that suggest that Google has been a
20 federal contractor since 2007?

21 A Yes. So one of the first action items when a case
22 is opened is to check contract coverage for jurisdiction, so
23 that would have happened at that time.

24 JUDGE BERLIN: So are you testifying that at all
25 times since 2007 Google has been a federal contractor at all

1 times?

2 THE WITNESS: I wouldn't know for the entire time.

3 But when the reviews were happening -- so 2007, there was a
4 review in 2010, '11, and '12. And the current review in
5 2015. So at least for those times, they were a federal
6 contractor.

7 JUDGE BERLIN: So this contract that is the basis
8 for the compliance review was awarded on June 2, 2014?

9 THE WITNESS: Yes.

10 JUDGE BERLIN: Are you testifying that they were
11 already a government contractor on a different contract
12 immediately prior to this award?

13 THE WITNESS: My guess would be yes.

14 JUDGE BERLIN: But don't guess. You must know the
15 answer or say you don't know.

16 THE WITNESS: Immediately prior to? So, in 2012 --

17 JUDGE BERLIN: As of June 1, 2014, were they a
18 government contractor? Do you know?

19 THE WITNESS: Yes, I know they were a contractor in
20 2014.

21 JUDGE BERLIN: As of June 1?

22 THE WITNESS: June 1? Yes.

23 BY MR. PILOTIN:

24 Q Did OFCCP find any violations as part of any of
25 these evaluations that you've referenced?

1 A In terms of violations, I'm aware of the Santa
2 Monica establishment -- Santa Monica review that resulted in
3 a violation. In that case, which was scheduled in 2010, a
4 show of cause notice was issued for Google not submitting the
5 required personnel activity data. And after that, a
6 violation notice was issued for data discrepancies, record
7 keeping violations.

8 MS. SWEEN: Your Honor, I'd like to move to strike.
9 I don't know how this testimony is relevant to the issues
10 with respect to past compliance reviews.

11 JUDGE BERLIN: Mr. Pilotin?

12 MR. PILOTIN: This goes to Google's understanding
13 of its obligations as a federal contractor, which relates to
14 our argument that they cannot claim undue burden at this
15 juncture, given that they understand what its obligations are
16 for well over 10 years.

17 JUDGE BERLIN: The objection is sustained. You can
18 move on.

19 MR. PILOTIN: Okay.

20 BY MR. PILOTIN:

21 Q Ms. Suhr, did you attend the on-site -- the limited
22 on-site -- has there been a limited on-site visit of Google
23 as part of the current compliance evaluation?

24 A Yes.

25 Q And did you attend that limited on-site?

1 A Yes, I was at the on-site.

2 Q What topics were covered as part of that -- when
3 did that on-site visit occur?

4 A It was April 27th and 28th of 2016.

5 Q And what topics were discussed as part of that
6 limited on-site visit?

7 A We interviewed Google's HR personnel, compensation
8 director, recruiter, hiring managers, to determine or get a
9 better understanding of Google's hiring and compensation
10 process policies.

11 Q I'd like you to turn -- there should be a binder on
12 the stand and I'd like you to turn to Exhibit 6.

13 JUDGE BERLIN: Is this from the Joint Exhibits?

14 MR. PILOTIN: Yes, Your Honor.

15 JUDGE BERLIN: Thank you. Is that the only -- are
16 those the only exhibits that are on the witness stand, the
17 Joint Exhibits?

18 MR. PILOTIN: I believe so.

19 JUDGE BERLIN: Okay.

20 THE WITNESS: Okay.

21 BY MR. PILOTIN:

22 Q Have you seen this letter before?

23 A Yes.

24 Q On the attachment of that exhibit there are various
25 factors identified. Do you see those?

1 A Yes.

2 Q Which of these items did Google identify as being
3 relevant to its compensation practices during the on-site
4 visit you attended?

5 A During the on-site and based on the interviews
6 conducted during the on-site, several of these items were
7 mentioned as relevant to pay. Such as: Competing offer.

8 JUDGE BERLIN: Not "such as." Your answer should
9 include each item that was mentioned or however -- you just
10 explained what happened at the on-site. So do answer with
11 each item, and do not include any item that shouldn't be on
12 the list.

13 THE WITNESS: Okay. The items mentioned by Google
14 as relevant to pay are bonus, bonus period, campus hire or
15 industry hire, competing offer, current comp ratio, current
16 job code, current job family, current level, current manager,
17 current organization, department hired into, education,
18 equity adjustment, hiring manager, job history, locality,
19 long term incentive, eligibility and grants, market reference
20 point, market target, performance rating for past three
21 years, prior experience, prior salary, referral bonus, salary
22 history, short-term incentive, eligibility and grants,
23 starting comp ratio, and starting job code, starting job
24 family, starting level, starting organization, starting
25 position, starting salary, target bonus. Those items were

1 mentioned as relevant to compensation.

2 MR. PILOTIN: I don't have any further questions at
3 this time, Your Honor.

4 JUDGE BERLIN: Ms. Sween?

5 MS. SWEEN: Sure, Your Honor. I would like to
6 cross Ms. Suhr, so we can let her go, because we don't have
7 too many questions for her, if that's okay.

8 JUDGE BERLIN: All right.

9 CROSS-EXAMINATION

10 BY MS. SWEEN:

11 Q Ms. Suhr, you testified as to Exhibit 6 in the
12 Joint Exhibits, the June 1st, 2016, letter, correct?

13 A Yes.

14 Q And were you responsible for participating in the
15 OFCCP's analyses to date prior to the issuance of the June
16 1st, 2016, letter?

17 A Can you clarify what do you mean "responsible for"?

18 Q No. Did you participate in the analyses by the
19 OFCCP -- I'll restate the question.

20 You understand that there was data produced in
21 response to a 2015 -- September 2015 snapshot, correct?

22 A Yes.

23 Q Okay. And did you participate in the review or
24 analyses of the data that was produced in response to the
25 September 1st, 2015, snapshot?

1 A I reviewed the analysis.

2 Q Did you participate in making any of the
3 conclusions in the analysis?

4 A No.

5 Q Do you know when specifically any of the analyses
6 that were made in light of the September 1st, 2015, snapshot
7 were made?

8 MR. PILOTIN: Objection, Your Honor. This goes to
9 the Agency's deliberative process and investigative files and
10 the way that the Agency performs its investigation.

11 JUDGE BERLIN: So the question is do you know and
12 you can answer that question. Do you have the question in
13 mind?

14 THE WITNESS: No.

15 JUDGE BERLIN: You can answer it yes or no.

16 THE WITNESS: Okay. So, if I understand you
17 correctly, am I aware that an analysis was conducted based on
18 that data?

19 BY MS. SWEEN:

20 Q No. The question is do you know when the OFCCP
21 completed its preliminary analysis of the data included in
22 the September 2015 snapshot?

23 A Well, I don't know the exact date, but the standard
24 practice is that we would conduct a desk audit of the
25 information submitted.

1 JUDGE BERLIN: So your answer is no, you don't
2 know, am I correct?

3 THE WITNESS: No.

4 BY MS. SWEEN:

5 Q Okay. And you were just going through all of the
6 items in Attachment A of Exhibit 6, and my question is which
7 of those items has Google not produced to the OFCCP to date?

8 A I don't know every item that it's not produced.

9 Q Can you identify any items on that list that Google
10 has not produced to date?

11 A Yes. I'm aware that competing offer information
12 was not provided. Education information was not provided.
13 Job history was not provided. Prior experience was not
14 provided. Name was not provided. Prior salary was not
15 provided. Salary history was not provided. And the starting
16 comp ratio information was not provided. Starting job code
17 was not provided. Starting job family was not provided.
18 Starting level was not provided. Starting organization was
19 not provided. Starting position title was not provided.
20 Starting salary was not provided.

21 And on the following page, the compensation data
22 base for the 2014 snapshot was not provided.

23 Q Anything else?

24 A To the best of my knowledge, that's what I recall.

25 Q Okay. You testified earlier that Human Resource

1 managers and compensation mangers that were interviewed
2 during the on-site specifically told the OFCCP that the items
3 that you advised the Court were indicated as relevant to an
4 employee's current compensation. Was that your testimony?

5 A Compensation in general, not just current
6 compensation, but their compensation.

7 Q Who at Google specifically told the OFCCP that a
8 competing offer was relevant to compensation?

9 A That would be Frank Wagner, the Director of
10 Compensation.

11 Q And what did he tell the OFCCP in that regard?

12 A During the interview he told us that Google will
13 try to match any competing offers that an employee has or
14 that the applicant has.

15 Q Did he identify any particular type of employee
16 that they would try to match? So, for example, did he tell
17 you that if a recent college grad had a competing offer,
18 would Google try to match a recent college grad's competing
19 offer? Was he that granular?

20 A He didn't mention to that specificity. But he did
21 mention that competing job information would be stored in the
22 HR system, the applicant tracking system.

23 Q Okay. So, whether it's stored or not is a
24 different issue. My question is very specifically, did he
25 tell you that the competing offer information was actually a

1 consideration that Google used in setting compensation?

2 A In setting compensation, yes.

3 Q And for what group of people, if you know, did he
4 refer that?

5 A I don't know, he didn't specify.

6 Q Was it all of Google's entire work force in which
7 competing offers were relevant to compensation?

8 A He didn't say.

9 Q The next item that you indicated that hadn't been
10 produced was education.

11 A Yes.

12 Q Who at Google advised you that education is a
13 relevant factor in determining compensation?

14 A I believe it was the hiring manager.

15 Q Do you have a name?

16 A No, I don't recall.

17 Q Are you aware of there being just one hiring
18 manager or was this a hiring manager --

19 A There were several, I believe.

20 Q Okay. But as you sit here today, you can't tell us
21 which hiring manager told you education is a component that
22 is considered in setting compensation?

23 A I can't recall, but I remember that education and
24 experience will set what level you'll be paid at.

25 Q I'm not talking about experience. I'm talking

1 about education, specifically.

2 A Right. So it's a factor in determining what level
3 an employee would be hired as.

4 Q And who told you that?

5 A The hiring manager. I don't recall the name.

6 Q The next item that you listed that hadn't been
7 turned over is job history. What do you understand "job
8 history" to mean as the OFCCP listed it on this attachment?

9 A The employee's job history at Google.

10 Q Okay. So we're not talking about the prior jobs
11 they held prior to coming to Google, correct?

12 A Not to my knowledge.

13 Q Okay. So, in this list "job history" means the
14 history of jobs they held while an employee at Google?

15 A Yes.

16 Q Okay. And who told you that an employee's job
17 history is relevant to their compensation?

18 A Job history information was provided by Mr. Wagner
19 -- Frank Wagner.

20 Q Isn't it true that Mr. Wagner told you that perhaps
21 only the immediate job may be considered, but an entire job
22 history of an employee is not relevant? Isn't that true?

23 A No, I don't think he was that specific.

24 Q So you don't recall him --

25 A I don't recall.

1 Q -- you don't recall him being specific to that
2 level, correct?

3 A Correct.

4 Q You indicated a name was not provided. I'm
5 assuming that that is not relevant to compensation, that goes
6 to the ability for the OFCCP to investigate, correct?

7 A To investigate the employee's compensation, yes.

8 Q Prior experience, who told you that prior
9 experience is relevant to setting an employee's compensation
10 at Google?

11 A I don't recall the name, but it was a hiring
12 manager.

13 Q Did you ever confirm with Mr. Wagner, who's the
14 Vice President of Compensation, whether in fact that is true
15 when you spoke with him?

16 A No, we didn't have an opportunity to speak to him
17 again.

18 Q You also indicated that prior salary was told as a
19 relevant component to setting compensation. Who told you
20 that?

21 A I was told by Mr. Wagner.

22 Q And when you referred to prior salary in this
23 attachment, what are you referring to?

24 A The prior salary of the applicant.

25 Q While at Google?

1 A Before starting the position at Google.

2 Q Okay. So in this instance, prior salary does not
3 mean salary history while at Google. It means the salary the
4 individual held before coming to Google, is that correct?

5 A Yes.

6 Q And did Mr. Wagner tell you that that individual's
7 entire employment history with respect to salary was relevant
8 to setting compensation at Google?

9 A No.

10 Q What did he tell you?

11 A He said Google tries to beat the prior salary of
12 the individual by 10 to 20 percent.

13 Q And, again, that's prior salary of the job that
14 they're immediately coming from?

15 A Yes.

16 Q And did he say this with respect to every single
17 Google employee that they seek to hire?

18 A He did not specifically say that.

19 Q Okay. So, again, in this instance, he didn't
20 articulate any specific subgroups where that wouldn't apply,
21 correct?

22 A Correct.

23 Q Did you ever ask him that question?

24 A No.

25 Q Also listed is salary history. What do you

1 understand "salary history" to mean?

2 A The pay history at Google.

3 Q And who told you that the pay history or salary
4 history at Google was relevant in determining compensation?

5 A The Director of Compensation, Mr. Wagner.

6 Q And what did he tell you in that regard?

7 A Salary history will be relevant because every time
8 there's a salary change or promotion or merit increase, that
9 person's market target is looked at. So every time there's a
10 change, you're looking at what the person is making compared
11 to the market at that time.

12 Q Isn't it true that Mr. Wagner told you that there
13 may be instances, such as in promotions, where the immediate
14 salary prior to the promotion may be relevant?

15 A I don't recall.

16 Q Okay. Did he discuss with you in any granular
17 detail beyond promotions when salary history might be
18 relevant or is that just an assumption that the Government is
19 making?

20 A I don't recall.

21 Q Starting compensation ratio, who told you that the
22 starting compensation ratio is relevant to setting
23 compensation?

24 A Mr. Wagner and Mr. Nambiar.

25 Q And Mr. Nambiar is on Mr. Wagner's compensation

1 team, correct?

2 A Yes.

3 Q And what did Mr. Wagner tell you with respect to
4 starting compensation ratio with respect to its relevance, if
5 at all, to compensation setting?

6 A He indicated that when you -- for new hires, you
7 try to bring the person in at the 85 percent of the market
8 target.

9 Q Did he tell you that that applies to new hires
10 other than recent college grads? In other words, did he
11 define in any sort of detail when a starting compensation
12 ratio may apply and when it may not apply?

13 A He did not go into detail.

14 Q And did you ask him that question?

15 A No.

16 Q Did Mr. Nambiar give you any information on that
17 topic with respect to when starting compensation ratio may or
18 may not apply?

19 A Similar to -- yes. Similar to Mr. Wagner's
20 interview, he indicated that the person's comp ratio is
21 looked at to determine where that person is within the market
22 range.

23 Q Did he tell you if there are any specific
24 categories of Google employees where starting compensation
25 ratio is not looked at?

1 A No, he didn't.

2 Q Did you ask him that question?

3 A No.

4 Q Starting job code, what do you understand that to
5 mean?

6 A We learned during the on-site that the job code --
7 a job code is tied to someone's job title. The job code
8 would indicate the person's position.

9 Q So, for example, software engineer 1, software
10 engineer 2, something like that?

11 A Yes.

12 Q Is that your understanding?

13 A Yes.

14 Q And who told you that the starting job code of an
15 employee at Google is relevant to compensation?

16 A Mr. Wagner.

17 Q What did he tell you in that regard?

18 A So, he explained that the market target and the
19 market range is determined by the salary surveys and you try
20 to target an employee's starting pay within the 85 percent of
21 that target.

22 Q Can you please tell the Court, however, how a
23 starting job code relates to what you just testified to?

24 A Well, the market target is set by the job code and
25 the job family and locality of the employee.

1 Q So, again, I'm trying to find out, did Mr. Wagner
2 specifically tell you that someone's starting job code has
3 any relevance on their compensation?

4 A Did you say "specifically"?

5 Q Yes, Ma'am.

6 A No.

7 Q The same question with starting job family, what do
8 you understand "starting job family" to mean?

9 A Starting job family is the job family that the
10 employee belongs to, for a start.

11 Q Can you give me an example?

12 A Engineering family.

13 Q And who told you that the starting job family an
14 employee begins in has any bearing on their compensation?

15 A Mr. Wagner.

16 Q And what did he tell you in that regard?

17 A He said starting salary, starting pay, is based on
18 the market target and market target is based on the job
19 family.

20 Q And my question specifically, though is did he tell
21 you how a starting job family? So, for example, maybe you
22 have an administrative assistant and that's her starting job
23 family -- or his starting job family. And he goes to night
24 school and he becomes an engineer and he gets transferred
25 into an engineering position. Did he explain to you in that

1 type of example how their starting job family as an
2 administrative person has any bearing on their compensation
3 as a software engineer?

4 A He did explain it that way.

5 Q Did you ask him those types of questions to try to
6 determine whether or not a starting job family did, in fact,
7 have any relevance to compensation?

8 A Well, when he explained the market target, he said
9 the family determined their range.

10 Q I understand your testimony. My question is a
11 little bit different. Did you ever ask him whether a
12 person's starting job family -- say, for example, if they
13 were in a completely different job family than they were
14 currently in, had any bearing whatsoever on their
15 compensation?

16 A The range would be different based on the job
17 family.

18 Q Did you ask him that question is my question.

19 A That's how he explained it. So he stated that the
20 range -- the pay range would be different based on job
21 family.

22 Q I want to make sure I'm understanding you, okay?
23 So I'm sorry if my questions seem repetitive, but I don't
24 think I'm understanding your question.

25 Did Mr. Wagner provide any sort of example to you

1 in which a starting job family would not be relevant?

2 A He didn't provide examples.

3 Q Did you ask him to provide any such example of when
4 a starting job family might not be relevant?

5 A No.

6 Q What is your understanding of which indicator is
7 dictated by the market reference code? Is it the job code or
8 the job family?

9 A I don't understand the question.

10 Q So, earlier you testified you told the Court that
11 you understood that the starting job code was the indicator
12 for the market reference point, correct?

13 A Yes.

14 Q Okay. And you have no information as to whether
15 the starting job family has any indicator with respect to the
16 market reference point, correct?

17 A No, I explained that the market reference point is
18 determined by one's job family.

19 Q Are you interposing "job family" and "job code" in
20 that testimony or did someone specifically tell you that
21 other than job code, that job family interplays with the
22 market reference point?

23 A Yes, job family was mentioned.

24 Q As an indicator with respect to the market
25 reference point?

1 A Yes.

2 Q And who told you that?

3 A Mr. Wagner.

4 Q What do you understand "starting level" to mean?

5 A That is the starting pay level of the employee. So
6 within a job family, there are nine pay levels and each pay
7 level has a different market reference point and market
8 target.

9 Q Who told you that an employee's starting job level
10 had any bearing on their compensation level?

11 A The hiring manager.

12 Q That's the hiring manager whose name you don't
13 know?

14 A Right.

15 Q Did you speak with more than one hiring manager?

16 A There were at least two.

17 Q Men? Women?

18 A Female.

19 Q Both female?

20 A One female that I spoke with. Another one, I can't
21 recall -- I think male.

22 Q And with the hiring managers that you're referring
23 to, that was a female?

24 A Yes.

25 Q What do you understand "starting organization" to

1 mean?

2 A It was explained to me during the on-site that the
3 organization indicates the type of project or team that they
4 belong to.

5 Q And is it your testimony that someone told you
6 specifically that the starting organization plays any bearing
7 on an employee's compensation?

8 A To the best of my knowledge, I was mentioned that
9 organization may impact your pay.

10 Q And did somebody explain how that could be? How a
11 starting organization could impact pay?

12 A I don't recall.

13 Q Do you recall anything about what they told you in
14 that regard?

15 A I don't recall.

16 Q The starting position or title, is that different
17 than the other indicators that we've already talked about?

18 A The starting position and title? Different from
19 which indicators.

20 Q It's another item listed on this sheet and I'm
21 interested, is that different than what we've already talked
22 about?

23 A This would be the position that the employee
24 started with at the company.

25 Q Okay. And who told you that their starting

1 position or title plays any bearing on compensation?

2 A That would be the hiring manager.

3 Q The female that you spoke with?

4 A Yes.

5 Q And what did she say?

6 A She said based on your experience and education,
7 for each job title there's different levels and that impacts
8 what pay you'll be brought in at the company.

9 Q Did she ever tell you that the compensation team is
10 responsible for making starting salary determinations?

11 A Did you ever ask Frank Wagner or anyone on his team
12 about whether or not starting position or title has any
13 bearing on compensation?

14 A I don't recall.

15 Q Do you know as you sit here today who sets starting
16 compensation for a new employee at Google?

17 A Who sets starting compensation?

18 Q Yes, Ma'am.

19 A I think it's the compensation team.

20 Q Okay. So when a hiring manager is giving you
21 information with respect to issues regarding starting level,
22 starting job family, starting job code -- those types of
23 things -- did you ever confirm with anyone in the
24 compensation team whether the information you were receiving
25 was accurate?

1 A No, I did not.

2 Q Is it your testimony that job code, job family, and
3 job title are tied to the market reference point?

4 A To the best of my knowledge, yes.

5 Q And it's your -- that's based on conversations you
6 had with Frank Wagner?

7 A And other individuals involved in compensation.

8 Q Which other individuals?

9 A Mr. Nambiar.

10 Q Anyone else?

11 A No.

12 Q As you sit here today, do you know for sure if job
13 code is specifically tied to a market reference point?

14 A To the best of my knowledge, yes.

15 Q Do you know as you sit here today for sure that job
16 family is tied to the market reference point?

17 A Yes.

18 Q Do you know for sure as you sit here today that job
19 title is tied to the market reference point?

20 A Yes, to the best of my knowledge.

21 Q The Court asked you a question with respect to your
22 understanding of the history of Google as a federal
23 contractor and I just want to make sure I understand your
24 testimony. As you sit here today, do you know for sure that
25 on June 1st, 2014, the day before the Ames contract was

1 awarded, that on that day Google was a federal contractor?

2 MR. PILOTIN: Objection, Your Honor. I don't know
3 as to how this is relevant, especially since -- as I
4 understood it -- the Court struck this portion of the
5 testimony.

6 JUDGE BERLIN: Overruled.

7 THE WITNESS: I don't have the contract information
8 in front of me, so I couldn't say.

9 BY MS. SWEEN:

10 Q So you don't know one way or the other if Google
11 was, in fact, a federal contractor on the day before the Ames
12 contract was awarded, correct?

13 A So that is June 1st?

14 Q The contract was awarded on June 2nd, 2014.

15 A I don't know for sure.

16 Q As the Assistant Regional Director, is it OFCCP's
17 contention that Google has violated its obligations as a
18 federal contractor by asserting a request for the OFCCP to
19 disclose which items they believe are relevant to
20 compensation?

21 MR. PILOTIN: Objection, Your Honor. I'm not sure
22 as to the relevance of this and if she's asking about
23 deliberative process and deliberations internal to the
24 Agency, it should not be allowed.

25 JUDGE BERLIN: Sustained. We're not finding any

1 violations.

2 BY MS. SWEEN:

3 Q Do you know how much revenue, in fact, Google has
4 taken in under the Ames contract to date?

5 A No, I don't.

6 Q So, I believe you provided -- I'll come back to
7 that, Your Honor.

8 Were you on a conference call with Ms. Wipper
9 during which there was an offer for Google -- for OFCCP to
10 accept resumes and interview notes in lieu of Google
11 harvesting that information?

12 A No, I wasn't.

13 Q As you sit here today, do you have any idea of the
14 cost estimate to Google to pull and produce resumes and
15 interview notes for over 25,000 employees?

16 A I don't.

17 Q Can you explain -- is it the OFCCP's position that
18 resumes and interview notes shed light upon Google's
19 compensation system?

20 MR. PILOTIN: Objection, Your Honor, this goes to,
21 again, deliberative process and the investigative analyses of
22 the Agency.

23 JUDGE BERLIN: There has been a lot of testimony
24 about the relevancy of the items requested, but the items
25 you're asking about, I don't see being requested. So the

1 objection is sustained.

2 BY MS. SWEEN:

3 Q Do you have any knowledge whether Google maintains
4 personal contact information? And by that I mean email, home
5 address, home telephone number, for all 21 -- over 21,000 of
6 its employees at the Mountain View facility as of September
7 1st, 2015? Do you have that knowledge?

8 A Can you repeat the question?

9 Q Sure. Do you know, as you sit here today, that
10 Google, in fact, maintains the personal contact information
11 of all 21,000 employees? And by that I mean specifically
12 each of their home phone, home address, and personal email
13 address?

14 MR. PILOTIN: Your Honor, objection to the
15 relevance of this question. I've been relatively quiet,
16 allowing Ms. Sween to ask these types of questions. But I am
17 not certain as to whether or how Ms. Suhr's knowledge as to
18 whether or not Google keeps it is relevant to whether Google
19 keeps it at all.

20 JUDGE BERLIN: So, does the OFCCP concede that if
21 Google doesn't have the information, it doesn't have to ask
22 the employee for it to provide it to you?

23 MR. PILOTIN: Your Honor, if Google certifies that
24 it does not have the information, OFCCP is not going to ask
25 Google to go and collect the personal contact information.

1 Of course, we assume that -- you know, in providing W-2s to
2 its employees, it likely has this information. But if Google
3 represents it does not, the Agency is not going to request
4 that the company go out and get that information.

5 JUDGE BERLIN: On that basis, the objection is
6 sustained.

7 MS. SWEEN: Thank you, Your Honor.

8 BY MS. SWEEN:

9 Q Do you know one way or the other whether Google
10 maintains a searchable data base for the information
11 regarding employees' personal contact information?

12 MR. PILOTIN: The same objection, Your Honor. And,
13 also, this is far -- this is starting to go beyond the scope
14 of the direct that I provided.

15 JUDGE BERLIN: You can answer if you -- the
16 question is do you know?

17 THE WITNESS: Yes, I do.

18 BY MS. SWEEN:

19 Q How do you know that?

20 A From the on-site interviews that were conducted
21 with the HR system person.

22 Q Who told you that it maintains a searchable data
23 base for each of the personal contact information items that
24 Google has requested -- that OFCCP has requested?

25 A I don't know about the "each" of the items, but

1 personal contact information, we learned from the search-and-
2 park interview that employees' personal information is
3 maintained electronically in the HR systems.

4 Q Did that person tell you what they were referring
5 to by way of personal contact information?

6 A What exactly? No.

7 MS. SWEEN: Thank you, Your Honor, that's all I
8 have. Thank you.

9 JUDGE BERLIN: Mr. Pilotin?

10 MR. PILOTIN: I have only one question -- well, I
11 don't want to commit, Your Honor.

12 JUDGE BERLIN: I never believe lawyers when they
13 say that, anyway.

14 MR. PILOTIN: That's exactly why I stopped myself,
15 because I don't believe lawyers, too, when they make that
16 comment.

17 REDIRECT EXAMINATION

18 BY MR. PILOTIN:

19 Q Good morning, Ms. Suhr, how are you?

20 A Good morning.

21 Q If we could take a look at Exhibit 6 one last time
22 and it may be open already? Can you look at the first page
23 of the attachment?

24 Has Google provided data on any of these factors
25 with respect to its September 1st, 2014, snapshot?

1 A No.

2 MR. PILOTIN: I have no further questions, Your
3 Honor.

4 JUDGE BERLIN: Ms. Sween?

5 RE-CROSS-EXAMINATION

6 BY MS. SWEEN:

7 Q Ms. Suhr, do you understand that the scope of the
8 compliance interview or the compliance review is a two-year
9 scope?

10 MR. PILOTIN: Objection, Your Honor. This is
11 outside of the scope of my redirect.

12 JUDGE BERLIN: Sustained.

13 MS. SWEEN: Nothing further, Your Honor.

14 JUDGE BERLIN: All right. Ma'am, thank you very
15 much. You can step down.

16 (Witness excused.)

17 JUDGE BERLIN: Mr. Pilotin, your next witness?

18 MR. PILOTIN: Yes, Your Honor. The OFCCP would
19 like to call Michael Brunetti.

20 MS. SWEEN: Your Honor, just a point of
21 clarification, Mr. Brunetti was supposed to be a rebuttal
22 witness, but we haven't put on any --

23 JUDGE BERLIN: Well, during the pretrial, I advised
24 OFCCP that I scrutinize carefully offers of evidence as
25 rebuttal when arguably they belong in the case in chief, and

1 I urged them to present in the case in chief first, since
2 they generally bear the burden in this case. And I was not
3 going to decide about the burden question -- the burden of
4 proving whether there's been an unreasonable burden requested
5 of information. So, I do want to hear from Dr. Brunetti at
6 this point.

7 MS. SWEEN: Thank you, Your Honor.

8 Whereupon,

9 MICHAEL BRUNETTI,

10 having been first duly sworn by the Administrative Law Judge,
11 was examined and testified as follows:

12 MR. PILOTIN: Before the examination begins, Your
13 Honor, may I approach the witness with the Plaintiff's
14 exhibit binders?

15 JUDGE BERLIN: Yes.

16 MR. ELIASOPH: And, Your Honor, this is Ian
17 Eliasoph. I plan to handle the questioning of this witness.

18 JUDGE BERLIN: All right. Thank you.

19 DIRECT EXAMINATION

20 BY MR. ELIASOPH:

21 Q Can you state your name --

22 JUDGE BERLIN: Just a moment. Let's let him get
23 the exhibits. Do you have enough space for that all? They
24 may want you later to look at those, too.

25 So, Mr. Eliasoph?

1 BY MR. ELIASOPH:

2 Q Good morning, Mr. Brunetti. Could you please state
3 and spell your name for the record?

4 A Michael Brunetti, M-i-c-h-a-e-l B-r-u-n-e-t-t-i.

5 Q Thank you. And I should be saying Dr. Brunetti.
6 Dr. Brunetti, who do you work for?

7 A I work for a company called Associated Veterans and
8 I'm a contractor for OFCCP.

9 Q Can you explain that?

10 A Associated Veterans hired me to do work for the
11 OFCCP.

12 Q So, Associated Veterans has a contract with OFCCP?

13 A Correct.

14 Q And is your work for OFCCP all you -- pretty much
15 what you are hired to do?

16 A Yes.

17 Q Okay. And have you been retained or specifically
18 employed by OFCCP to provide expert testimony in this case?

19 A No.

20 Q What are your regular duties?

21 A My regular duties are to conduct compensation,
22 promotions and hiring analyses.

23 Q And what's your educational background starting
24 with undergraduate?

25 A I have a bachelor's degree in economics from UC San

1 Diego that I earned in 1995.

2 Q And what about any master's level?

3 A I have a master's degree in statistics from UC
4 Berkeley in 1999 and I have a PhD in economics from UC
5 Berkeley, 2003.

6 Q And -- go ahead.

7 A I also have a master's degree in taxation from
8 Golden Gate University in 2014.

9 Q Thank you. And starting with after you obtained
10 your PhD, what is your professional experience?

11 A After I finished my PhD, I went to a company called
12 ERS Group and I worked in -- it is an employment and labor
13 litigation firm that provided expert testimony. So, my
14 duties were to conduct statistical analysis and to calculate
15 economic damages for primarily large class action lawsuits.

16 Q And after that, what did you do next?

17 A After that, I went to work for Ernst & Young for
18 eight and a half years. My duties there were to build
19 financial models, to help large corporations make financial
20 decisions, essentially.

21 Q What types of financial models?

22 A For example, I worked on projects where there would
23 be a large -- it could be a foreign holding company and then
24 a US subsidiary company. And if the parent loaned money to
25 the U corp, when the US corp sent the money back to the

1 parent, part of that would be taxable -- would be a tax
2 deduction in the US. So it would be a way of minimizing
3 taxes. But the IRS had certain requirements for that type of
4 transaction to be valid, one of which is to make sure that
5 it's at arms' length. The other part is they want to make
6 sure they had the debt capacity to actually pay it back.

7 So I would take the company's financial
8 information, build balance sheet, cash flow and income
9 statement going forward, and then assess whether they had the
10 capacity to pay back the loan to the holding company parent.

11 Q Thank you. After you left Ernst & Young, what did
12 you do next?

13 A I then went to work for a statistical consulting
14 company called JP Research. And that -- my duties there
15 were, again, to conduct statistical analysis, economic damage
16 analysis, for litigation cases, primarily in the consumer
17 products and automotive industries.

18 Q And is your current position the next position
19 after that?

20 A Yes. Then -- yeah, correct.

21 Q Have you reviewed financial reports as part of your
22 professional duties in those prior positions?

23 A Yes, I have.

24 Q And in what context?

25 A In the context -- many contexts. One is the

1 example I just gave. I also built models where a corporation
2 -- or partnerships, primarily, had not properly tracked their
3 book and tax capital accounts. So I'd have to reconstruct --
4 go back in time and reconstruct their capital accounts and
5 balance sheets.

6 I also worked on, you know, things like with large
7 oil and gas companies, determining how the proceeds should be
8 distributed to investors.

9 Q And in terms of financial reports, would those
10 include 10Ks?

11 A Yes.

12 Q And can you just explain to the Court what a 10K
13 is?

14 A A 10K includes a balance sheet, a cash flow
15 statement, income statement. It's required by the SEC that
16 publically-traded corporations file it. And it also
17 typically includes information about the environment in which
18 -- the risks that the company has. It will discuss things
19 about the future and other things that the company is trying
20 to do.

21 Q And are 10Ks generally considered reliable?

22 A Yes.

23 Q Why?

24 A Because they're required by the SEC. They're
25 typically audited by a big four accounting firm.

1 JUDGE BERLIN: Mr. Eliasoph, did you want to move
2 the witness as an expert and in what field?

3 MR. ELIASOPH: Your Honor, the witness is simply --
4 I'm just establishing that he is very familiar with 10Ks, so
5 that he can highlight portions of the 10K that may be
6 relevant to these proceedings.

7 JUDGE BERLIN: You don't want to have him qualified
8 as an expert?

9 MR. ELIASOPH: To that -- in that limited extent,
10 he is qualified and we'd be happy for the Court to qualify
11 him.

12 JUDGE BERLIN: So, you're asking that he be
13 qualified as an expert in reading 10Ks?

14 MR. ELIASOPH: Yes.

15 MS. SWEEN: Your Honor, if I may? I don't think we
16 need an expert to be qualified in reading 10Ks. The 10K is
17 what it is. It is a publically-available document. Most
18 people understand how to read a 10K. I don't think we need
19 an expert opinion on how to read a 10K.

20 JUDGE BERLIN: Okay. Well, then, I think Mr.
21 Eliasoph was right on that point and let's just move along.

22 MR. ELIASOPH: Thank you.

23 BY MR. ELIASOPH:

24 Q Have you reviewed the financial -- any financial
25 reports related to Google?

1 A Yes, I have.

2 Q And what have you reviewed?

3 A I reviewed the 2015 10K for Google, Inc. and the
4 2015 10K -- sorry, 2016 10K for Alphabet.

5 Q Okay. And you mentioned an entity named Alphabet.
6 Can you describe what that is?

7 A Alphabet is the parent holding company of Google,
8 Inc., and then other subsidiaries which are referred to as
9 other bets.

10 Q And when was it formed, do you know?

11 A October 2015.

12 Q And how do you know that?

13 A From the 2015 10K.

14 Q Okay. You have some exhibits labeled Plaintiff's
15 Exhibits. I'd like you to look at Plaintiff's Exhibit 201
16 and Plaintiff's Exhibit 212.

17 A Okay.

18 Q Were you able to look over those exhibits?

19 A Yes.

20 Q And have you reviewed those documents before?

21 A Yes.

22 Q And what are they? Starting with Exhibit 201.

23 A 201 is the Alphabet 2016 10K.

24 Q And Plaintiff's Exhibit 212?

25 A 212 is the 2015 10K.

1 Q Okay. Just generally in your professional
2 experience, what do you look at to determine the financial
3 health of a company?

4 A Well, I would look at a few factors. Along with
5 the available cash on hand, which is on the balance sheet in
6 the 10K, I would also look at a company's equity, which is
7 sort of a measure of their net worth. I would also look at
8 the profitability by looking at the income that the company
9 has.

10 Q Looking at the 2015 10K, which is marked Exhibit
11 212, are you able to make any conclusions about Google's
12 finances as distinct from Alphabet's finances?

13 A Yes.

14 Q Okay. Sir, again, for Exhibit 212 -- the 2015 10K,
15 can you tell how much cash Google, Inc. had in 2015?

16 A Yes.

17 Q And what is that?

18 A If you look at page 53 of the 2015 10K, it has the
19 consolidated balance sheet for Google, Inc.

20 Q And?

21 A And at the very top, the first line is cash and
22 cash equivalents. You'll see as of December 31st, 2015,
23 Google had \$16.549 billion in cash.

24 Q And why do you say that's Google and not Alphabet?

25 A Because it says "Google, Inc." at the very top.

1 It's Google's balance sheet.

2 Q Okay. For 2015, are you able to determine Google's
3 total equity?

4 A Yes.

5 Q And where would you find that and what is it?

6 A If you look at the bottom of that same page, the
7 second line from the bottom, you can see that it says, "Total
8 stockholders' equity." And Google has \$120 billion in
9 equity. So equity is the difference -- if you add up the
10 value of all of Google, Inc.'s assets and subtract all of its
11 liabilities, it has \$120 billion left over.

12 Q Okay. And for 2015, are you able to determine from
13 this report what Google's net operating income is?

14 A Yes. If you -- so if you turn to page 54 in the
15 same document, this is the income statement for Google, Inc.
16 At the very top, it indicates that Google had \$74.9 billion
17 of revenue. And if you go down a few lines to "total costs
18 and expenses," they had \$55.6 billion of costs. And the
19 difference is \$19.36 billion of operating income.

20 Q Thank you. I want to turn now to Exhibit 201.
21 Now, with respect to Exhibit 201, which is the 2016 10K, are
22 you able to determine how much revenue Google had as distinct
23 from Alphabet?

24 A Yes.

25 Q And where do you obtain that information?

1 A Okay. So if you look at page 80 of that document?
2 So, again, this 10K now is Alphabet's, but page 80 breaks
3 down Google, Inc.'s revenues separate from other bets. So,
4 the revenues in 2016 were \$89.4 billion.

5 Q And that's for Google, Inc.?

6 A Google, Inc.

7 A few lines down, the next table, operating income
8 for Google, Inc. is \$27.89 billion.

9 Q Okay. So, are you able to determine Google's costs
10 in 2016?

11 A You can derive it from the revenue and operating
12 income. So if you subtract \$89.4 billion minus \$27.89,
13 you're going to get a number around \$62 billion for Google,
14 Inc.'s operating costs.

15 Q So, based on this 10K, can you determine what
16 Google's net operating income is for 2016?

17 A I'm sorry, you said Google, Inc.'s?

18 Q Yes.

19 A Yes. It's \$27.89 billion.

20 Q Okay. And based on your analysis of these
21 financial statements, what impact would a \$1 million
22 regulatory burden have on Google's business?

23 MS. SWEEN: Objection, Your Honor. That's pure
24 speculation.

25 MR. ELIASOPH: It's based on these reports and his

1 background.

2 JUDGE BERLIN: I won't allow a lay opinion on this.

3 He apparently is not an expert.

4 MR. ELIASOPH: I'd like to qualify Mr. Brunetti as
5 an expert for this purpose.

6 MS. SWEEN: Mr. Brunetti was not proffered for that
7 purpose, Your Honor.

8 MR. ELIASOPH: I believe our witness statement
9 states that Mr. Brunetti would be testifying on this topic.

10 JUDGE BERLIN: I thought that he'd be testifying
11 about what the 10K said, but let's just look.

12 MR. ELIASOPH: We indicated he would be testifying
13 on the 10K and that, among other things, it would be proving
14 that Google's purported costs of production is insignificant
15 compared to its total operating costs.

16 MS. SWEEN: That's not what they're asking him,
17 Your Honor.

18 JUDGE BERLIN: It says, "The testimony will prove
19 that Google's purported cost of production is insignificant
20 compared to its total operating costs." But that's a
21 statement of what the testimony would prove, not the
22 testimony -- what the testimony would be. This is one where
23 I can actually draw my own inferences.

24 MR. ELIASOPH: That's fine, Your Honor.

25 JUDGE BERLIN: All right.

1 MR. ELIASOPH: Our preference would be to have the
2 witness testify on the topic. But if you want to draw your
3 own conclusions, we will be satisfied.

4 JUDGE BERLIN: I'm going to allow it for what it's
5 worth, but I think I can pretty much reach my own conclusion
6 irrespective of the testimony.

7 You can answer.

8 THE WITNESS: Can you repeat the question?

9 BY MR. ELIASOPH:

10 Q Yes. Based on your analysis of Google's
11 financials, what impact would a \$1 million regulatory burden
12 have on Google's business?

13 A It would have no meaningful impact on its business.

14 Q And why do you say that?

15 A Because they have sufficient cash to make a \$1
16 million payment. They have \$120 billion of equity. They
17 have \$16 billion of operating income and just as an example,
18 on this page 80, if you look at Google's operating income,
19 it's 27.892. That's \$27,892 million. That would be 27,891.
20 So it's one number off of what's presented in the table.

21 MR. ELIASOPH: Thank you. I have no further
22 questions for this witness.

23 JUDGE BERLIN: Ms. Sween?

24 MS. SWEEN: Yes, Your Honor, just a few questions
25 of Mr. Brunetti..

CROSS-EXAMINATION

1

2 BY MS. SWEEN:3 Q You don't know anything about how Google maintains
4 its employment records, correct?

5 A That's correct.

6 Q And you're not familiar with any of the data or
7 network systems that Google maintains, correct?

8 A Correct.

9 Q And you have no information with respect to what
10 tools exist or don't exist to extract information, correct?

11 A Correct.

12 Q Do you know anything about -- so you can't possibly
13 testify how difficult or burdensome it actually will be on
14 Google to respond on these requests, other than in a monetary
15 sense, correct?

16 A Correct.

17 Q And in your opinion, does money alone correlate to
18 burden?

19 A No.

20 Q Thank you.

21 MS. SWEEN: Nothing further, Your Honor.

22 JUDGE BERLIN: Mr. Pilotin? Oh, I'm sorry. Mr.
23 Eliasoph?24 MR. ELIASOPH: No problem, Your Honor. I have
25 nothing further.

1 AFTERNOON SESSION

12:59 O'CLOCK P.M.

2 JUDGE BERLIN: Back on the record. After the lunch
3 hour, I wanted to make sure one thing is clear and then I
4 have some questions I want to raise and then we can continue
5 with the defense case.

6 So --

7 MS. SWEEN: Your Honor, just as a point of
8 clarification, we do have a witness in the courtroom. I
9 don't know if that makes --

10 JUDGE BERLIN: I think it would be -- I'm not sure
11 where the conversation will lead, so I think it would be
12 helpful if the witness could wait outside.

13 MS. SWEEN: Your Honor, also, if there a way we can
14 either turn down the air -- I'm having a little trouble
15 hearing you -- or turn up the PA system?

16 JUDGE BERLIN: Let me see what I can do about that.

17 MS. SWEEN: I'm sorry, I should have asked you at
18 the lunch hour.

19 JUDGE BERLIN: Yeah, this has happened before.

20 MS. SWEEN: Thank you, Your Honor.

21 (Off the record.)

22 JUDGE BERLIN: So I've asked them to do what they
23 can to fix that. It has happened before and they've been
24 able to address it pretty fast. Don't be surprised if
25 someone on a ladder shows up soon, so we'll just bear with

1 it.

2 If anyone can't hear me, just let me know. One
3 thing we might be able to do is turn up the amplification.
4 Are we even able to do that, if we want?

5 THE REPORTER: Not from here.

6 JUDGE BERLIN: But from -- okay. If this was the
7 Supreme Court, that would be the roping room, but it sure
8 doesn't look like that.

9 Anyway, so there was a question about whether there
10 was a federal contract prior to -- immediately prior to this
11 one. Mr. Pilotin objected that I had foreclosed questions
12 similar on an objection by the defense.

13 I want to be clear about this. There was a line of
14 questions from OFCCP about previous compliance reviews,
15 previous violations, and when I asked what the relevance was,
16 what my understanding was, it was relevant to show that OFCCP
17 knows -- I'm sorry, that Google knows what's required to
18 comply with these sorts of compliance reviews. And I
19 sustained the objection.

20 So I want to be clear. I do not find relevance
21 what happened on previous compliance reviews. I do think it
22 might well be relevant when Google was a federal contractor.

23 That's a different question.

24 Then Ms. Sween's question was directed towards the
25 second point: Was there a contract before?

1 So one of the issues I perceive is to me the role
2 of OFCCP is about enforcing non-discrimination provisions and
3 affirmative actions provisions to which the federal
4 contractor voluntarily agrees. OFCCP, as I understand it,
5 does not have authority to do compliance reviews for non-
6 discrimination of private contractors who do not have
7 government contracts. That's entirely in the provence of the
8 EEOC and some state employment practice agencies. Just a
9 moment, and then I'll ask for your thoughts.

10 So, if someone has a five-year government contract
11 and three years into the contract, OFCCP initiates an
12 investigation and wants information going back two years, the
13 entire two-year period is during the time that the employer
14 was a federal contractor.

15 So let's take an absurd example where someone signs
16 a federal contract on a Tuesday and on Wednesday OFCCP
17 announces a compliance review and wants data going back two
18 years, during which the employer was a federal contractor
19 only one day. Is that something that's correctly within the
20 purview of OFCCP or should it only go back to the beginning
21 of the contract period? I'm not suggesting an answer, I'm
22 asking a question.

23 Then, when it comes to requesting data going back
24 to the formation of the corporation in 1998, because
25 something that's happened in 1998 might have discriminatory