

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

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 94103

On 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 X

<u>PROCEEDINGS:</u>	<u>PAGE:</u>
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<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>ALJ</u>
Janette Wipper	30				
Jane Suhr	62	69	91	92	
Michael Brunetti	93				
Janette Wipper	112	156	159		159
Frank Wagner	165				

<u>EXHIBITS:</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>REJECTED</u>
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PLAINTIFF

201 through 223	12	17
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DEFENDANT

101	17	18
102	17	18
106 through 111	17	18
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ADMINISTRATIVE LAW JUDGE

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JOINT

1 through 16	11	12
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P R O C E E D I N G S

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

1
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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 (Joint Exhibit Nos. 1 through
2 16 were received into
3 evidence.)

4 JUDGE BERLIN: Now, for the Plaintiff, OFCCP, the
5 exhibit list has identified Exhibits 200 through 224, that's
6 the amended exhibit list. If I might have a copy of those?

7 Thank you.

8 MR. PILOTIN: And if I may clarify for the record,
9 Your Honor, because this is -- I had a brief discussion with
10 counsel for Google about this issue. I do have -- in Your
11 Honor's possession currently is 201 through 223. 224 is
12 Google's affirmative action plan. And it is a two-binder,
13 voluminous document. At this stage, OFCCP will see whether
14 or not -- we'll see whether it's necessary to admit it into
15 the record. Given it's volume and, I believe, given Google's
16 concerns as to whether or not it should be sealed, this may
17 be the best way to see whether or not we need to even offer
18 it to the Court, because it may not be necessary.

19 JUDGE BERLIN: All right. So I have OFCCP's
20 Exhibits, number 201 through 223.

21 (Plaintiff Exhibit Nos. 201
22 through 223 were marked for
23 identification.)

24 MS. SWEEN: Your Honor, our objections are set
25 forth in our motion for protective order, which is before

1 Your Honor. I'm happy to speak to that, if you would like
2 to.

3 JUDGE BERLIN: Please, because I have not had an
4 opportunity to review it. That just arrived here yesterday
5 afternoon and it came in a large box, which I suspect are the
6 exhibits that you want sealed. But I haven't had a chance to
7 review it.

8 MS. SWEEN: Certainly, Your Honor.

9 Google's motion for a protective order seeks that
10 only a narrow set of exhibits are moved under the protective
11 order and sealed. Those exhibits are Google Exhibit 110,
12 which is comprised of Google compensation practices,
13 policies, training manuals, a variety of proprietary
14 PowerPoints discussing how Google goes about setting
15 compensation.

16 Obviously, this is all in OFCCP's possession,
17 however it's not something that Google -- Google feels very
18 strongly should not be out in the public milieu, for obvious
19 reasons.

20 We are also seeking to seal Plaintiff's Exhibits
21 216, 218, 219, 220, 221, 222, and 224 -- I'm sorry, I
22 understand the AAP is 224, so that may be put aside. And
23 those consist of documents that Google has also maintained as
24 confidential documents relating to employee compensation and
25 similar types of documents contained in exhibit -- in

1 Defendant's Exhibit 110.

2 We have provided the Court the declaration of VP of
3 Compensation, Frank Wagner, who you'll hear from later today.

4 Mr. Wagner will testify -- or has testified through his
5 declaration that Google's dedicated to recruiting and
6 retaining top talent across a variety of fields. And it's
7 able to recruit this top talent, in part, due to its unique
8 compensation policies and practices. A tremendous amount of
9 time has gone into formulating what's contained in those
10 exhibits that I've mentioned. And Google's expended
11 significant efforts toward preventing the disclosure of those
12 documents. They're documents that are accessible only
13 through Google servers and are password-protected. Employees
14 are required to sign non-disclosure agreements and
15 confidentiality agreements to protect those very documents in
16 question.

17 It is imperative that we get an agreement from
18 OFCCP on these points before we proceed today. It is
19 unusual, from our perspective, that OFCCP is willing to
20 maintain the confidentiality of those documents during the
21 compliance review period, but then takes no position when
22 there is litigation.

23 We think there is nothing in the manual that
24 suggests that there is any different confidentiality
25 obligation imposed on the OFCCP in protecting those types of

1 proprietary information simply because it chooses to file a
2 complaint against the federal contractor.

3 And so for those reasons, Your Honor, we'd move
4 that those documents are put under the protective order and
5 sealed in the record. And the Defendants have provided, if
6 the Court is willing to do so, a binder copy for Your Honor,
7 which indicates which of those exhibits -- which would be
8 filed under seal.

9 JUDGE BERLIN: Mr. Pilotin, on the motion to seal
10 and for a protective order?

11 MR. PILOTIN: Thank you, Your Honor.

12 As the Court did yesterday, we also received by
13 electronic mail at 5:39 p.m. Google's motion. As an initial
14 matter, OFCCP's position is that it is untimely, given that -
15 - as Your Honor mentioned previously -- Google was well aware
16 as to which documents would be submitted into the record.

17 We did file a letter last evening to -- sending to
18 Your Honor our preliminary concerns, given the breadth of
19 information that Google sent to us late in the day. We do
20 ask, however, ultimately, Your Honor, that the Court defer
21 deciding this issue until the Agency is able to file an
22 opposition to Google's motion and we request an opportunity
23 to file that opposition by next Thursday.

24 JUDGE BERLIN: All right. As to the timeliness of
25 the motion, I find that it is timely. It could be filed even

1 after the hearing or even a year after the decision comes
2 out. It can be sealed at any time. Or it can also be un-
3 sealed for an appropriate purpose. So, the motion is timely.

4 I haven't had a chance to review it. I have heard
5 from counsel about it. OFCCP has not had a chance to review
6 it and respond. But in view of the seriousness of the
7 asserted reasons, I am going to grant the motion on a
8 preliminary basis as of now. So, this is a protective order
9 that the parties cannot disclose outside of the courtroom the
10 contents of the exhibits that I'm going to list. And if the
11 substance of those exhibits needs to be the subject of
12 questioning or argument, I'll hear at that time any motion to
13 exclude the public from the hearing just for that limited
14 purpose and for that limited period of time.

15 So this refers to Defendant's Exhibit 110,
16 Plaintiff's Exhibits 216, 218, 219, 220, 221, and 22.

17 After I receive OFCCP's brief no later than
18 Thursday next week, I will have an opportunity to review it.

19 It might be possible that my preference, typically, is to
20 require the party seeking protection to develop redacted
21 versions that can be substituted in public record for the
22 sealed document. So I just want you to anticipate that I
23 might ask you to consider doing that, but I'm not making any
24 ruling now other than to grant the protective order and to
25 seal the record with respect to those exhibits.

1 MS. SWEEN: Thank you, Your Honor.

2 JUDGE BERLIN: Okay. Any objections to the
3 admission of the Plaintiff's exhibits?

4 MS. SWEEN: None, other than stated, Your Honor.

5 JUDGE BERLIN: They're all admitted.

6 (Plaintiff's Exhibit Nos. 201
7 through 223 were received
8 into evidence.)

9 JUDGE BERLIN: Now, the exhibits for the Defense,
10 on the amended exhibit list I have 101, 102, 106 through 111,
11 113, 118, and 121 and 122. That's because Google withdrew
12 103 through 105, 112(a) through (c), and 119 and 120, if I
13 understand correctly.

14 So if I may have those exhibits?

15 MS. SWEEN: Yes, Your Honor. And Mr. Raimundo, as
16 he provides you those binders, just for the record, Exhibit
17 110 is in its own binder, for the ease of reference for the
18 Court.

19 (Defendant's Exhibit Nos. 101,
20 102, 106 through 111, 113, 118,
21 121 and 122 were marked for
22 identification.)

23 JUDGE BERLIN: All right. I have before me and
24 have received the exhibits that were described, that I just
25 listed.

1 Mr. Pilotin, any objections to the admission of
2 these exhibits?

3 MR. PILOTIN: No, Your Honor.

4 JUDGE BERLIN: They're all admitted.

5 (Defendant's Exhibit Nos. 101,
6 102, 106 through 111, 113, 118,
7 121 and 122 were received into
8 evidence.)

9 JUDGE BERLIN: At the pretrial, we discussed the
10 sequestration of witnesses. There were requests for
11 sequestration. So I will now ask that if anyone is in the
12 courtroom who understands they will be called as a witness by
13 either party, that you please wait outside until you've had
14 an opportunity to testify. All right.

15 MR. PILOTIN: And just with clarification, Your
16 Honor, this does not include Regional Director Wipper, who is
17 the Agency's representative, is that correct?

18 JUDGE BERLIN: That's correct. Google is entitled
19 to a corporate representative and the Agency is, as well, and
20 they are participants in the entire proceeding, from
21 beginning to end.

22 Okay. I'd like to turn, then, to opening
23 statements of the attorneys, in which you can let me know
24 what I can expect to hear from the witnesses.

25 Mr. Pilotin?

1 MR. PILOTIN: Thank you, Your Honor.

2 OPENING STATEMENT

3 BY MR. PILOTIN:

4 Today, the record will show that Google, a multi-
5 billion tech company that specializes in handling data, will
6 not face an undue burden in producing a discrete set of
7 relevant information OFCCP has requested to conduct its
8 compliance audit of the company's employment practices at its
9 Mountain View headquarters.

10 Let me start out first, though, with some
11 background, as you will hear today in the hearing. As the
12 evidence will show, in 2014, Google added to its then, at
13 least seven year old portfolio of federal business, obtaining
14 a five-year federal contract it valued at \$25 million. As
15 part of that bargain for that \$25 million contract, Google
16 agreed to take on record keeping, access, equal opportunity
17 and affirmative action obligations that do not apply to the
18 general business community.

19 OFCCP is charged with enforcing these additional
20 obligations, which occurs in part through its compliance
21 evaluations. Compliance evaluations that, by regulation and
22 directive, are comprehensive audits of a contractor's hiring
23 and employment practices. Such evaluations are unique to
24 this agency. Unlike its sister agency, the Equal Employment
25 Opportunity Commission, OFCCP has the authority to conduct a

1 full audit of a contractor's establishment absent a complaint
2 to determine whether that contractor is unlawfully
3 discriminating against its employees.

4 Here, as the Court is aware, OFCCP is conducting
5 such an audit of Google's Mountain View establishment. As
6 part of that audit, the evidence will show, that OFCCP
7 requested compensation-related data, job and salary history,
8 and employee names and contact information. Because these
9 items are relevant and Google will not face an undue burden
10 producing them, Google must produce them to the agency, as it
11 agreed it would under its federal contract obligations.

12 Now, with respect to relevance, the Supreme Court
13 in McClain reaffirmed this week long-standing precedent that
14 relevance in the administrative subpoena context must be
15 understood generously in favor of federal agencies and be
16 construed to permit agencies to, quote, "virtually access",
17 quote, "virtually any material that might cast light on the
18 issue under investigation."

19 This analysis, as established Supreme Court
20 precedent, makes clear -- and, as Justice Ginsberg pointed
21 out in McClain -- does not require a particular rise of
22 necessity of access.

23 OFCCP will readily clear this low bar. The
24 testimony the Court will hear today will show that, in
25 addition to being facially relevant to an evaluation of pay

1 practices, the requested information is generally understood
2 to play a role in cases involving evaluation of pay practices
3 and, in fact, are routinely requested in such cases.

4 Fortifying that testimony will be evidence that Google itself
5 said that many of the factors for which OFCCP requested
6 information are relevant to how the company sets pay.

7 You will also hear testimony today that OFCCP
8 requested this information in line with the scheduling letter
9 Google receiving notifying of the compliance evaluation and
10 that publically-available information on OFCCP's directives,
11 it dictates how compliance evaluations are done.

12 As the testimony today will show, both the
13 scheduling letter and the directives reinforce the notion
14 that the items OFCCP requested are relevant to the ongoing
15 compliance evaluation.

16 Because the requested information meets the laxed
17 standard for relevance, under McClain, as the Supreme Court
18 made clear, Google has the burden of showing that it need not
19 comply because of an undue burden. The test for undue
20 burden, as articulate by courts in the majority of the
21 circuits, including the DC Circuit, is whether compliance
22 with the requests would threaten to unduly disrupt or
23 seriously hinder Google's business operations.

24 The evidence --

25 JUDGE BERLIN: You'll have a chance to argue the

1 law later.

2 MR. PILOTIN: Thank you, Your Honor.

3 The evidence presented today will show that Google
4 cannot meet this test or any test related to undue burden. I
5 anticipated Your Honor's concern.

6 First, the evidence in the record shows that
7 Google's only quantification of production costs thus far has
8 been with respect to producing information it needs to
9 extract from source documents, like resumes and interview
10 notes. However, the testimony will show today that OFCCP
11 offered to take on that burden from Google, minimizing its
12 cost.

13 Second, the evidence will also show that Google --
14 one of the local tech giants -- has the financial wherewithal
15 to comply with OFCCP's requests. The evidence shows that
16 Google had almost \$28 billion in income last year. It is
17 wholly unclear thus far as to how producing the requested
18 information, most of which comes from electronic data bases,
19 would unduly disrupt or seriously hinder a business that made
20 \$28 billion last year.

21 For some reason or another, Your Honor, Google
22 wants to hide the pay-related information OFCCP requested and
23 keep the Agency from completing the full and comprehensive
24 evaluation of the company's compensation practices that it is
25 required to do. Whatever that reason is, Google has no legal

1 basis for its obstruction. And, as the evidence will show
2 today, Google must produce the requested materials.

3 Thank you, Your Honor.

4 JUDGE BERLIN: Ms. Sween?

5 MS. SWEEN: Thank you, Your Honor.

6 OPENING STATEMENT

7 BY MS. SWEEN:

8 The evidence from both OFCCP's own witnesses, as
9 well as Google's witnesses, is going to demonstrate to the
10 Court that Google takes its responsibilities under the
11 applicable executive order regulations and statutes very
12 seriously.

13 For the last 18 months, Your Honor is going to see
14 that Google's acted not only in good faith, in attempts to
15 comply with OFCCP's ongoing demands, which began on September
16 30th, 2015, but has produced over 1.3 million data points in
17 response to the Agency's request for over 100 categories of
18 information and documents relating to employee compensation
19 and other requested information. There will be absolutely no
20 evidence that Google has hidden anything.

21 This was all done in the spirit of cooperation and
22 at no small expense.

23 The Court will hear from those who participated in
24 the collection efforts that Google has expended approximately
25 \$500,000 to date on this compliance review and it's not over

1 yet. Unless this Court intervenes, Google will continue to
2 incur substantial ongoing expense -- not only financial, but
3 in manpower hours -- in order to respond to the subject
4 demands.

5 The evidence today will reveal that OFCCP has
6 sought and is seeking now through this action an extreme
7 position -- an atypical position -- not approved of anywhere
8 in the case law and entirely atypical of a compliance review.

9 OFCCP seeks to convince this Court without any basis in law
10 that it -- not you -- have unfettered and unreviewable power
11 to demand any document or information from Google, regardless
12 of its scope or relevance. Contrary to the Government's
13 position, federal agencies don't enjoy such unfettered
14 discretion to obtain irrelevant information about a company's
15 current or even former employees.

16 This Court, as the trier of fact, is the ultimate
17 decision maker with respect to whether the information the
18 Government seeks is sufficiently reasonable in scope and
19 relevant in purpose so that compliance is not unduly
20 burdensome.

21 Contrary to what the OFCCP would like this Court to
22 believe, the Court owes no deference to the OFCCP to
23 determine whether its demands are relevant. That is the
24 decision the Court may make. And the reason is simple,
25 whether a company is a small mom-and-pop or a large

1 corporation like Google, it doesn't surrender its Fourth
2 Amendment rights when entering into government contracts.
3 The Government must not be given unfettered discretion to
4 force a company to waste valuable resources, regardless of
5 its revenues, in order to respond to what amounts to a
6 fishing expedition that has absolutely no relevance to the
7 compliance review.

8 JUDGE BERLIN: Okay. Let's focus on the evidence
9 and not the legal arguments.

10 MS. SWEEN: Google's not advocating that OFCCP must
11 change its process. And it does agree that Google's -- that
12 relevance should be understood generously.

13 Let me quickly summarize the testimony the Court is
14 going to hear today. This compliance evaluation began with
15 OFCCP's reasonable request for considerable records and
16 information. However, it pertained to 21,000 Google
17 employees in the company's Mountain View snapshot -- that's
18 referred to as the current year snapshot.

19 Kristen Zimmerhal, a senior Google discovery
20 manager, will testify that compliance to date has cost
21 approximately \$500,000, which included considerable resources
22 expended by Google engineers to actually build a new tool in
23 order to extract information from certain data bases that
24 were otherwise unsearchable. The facts that Google could do
25 that does not mean that Google should do that, but it did.

1 Second: In April 2016, OFCCP conducted an on-site
2 interview of over 20 Google managers, including the VP of
3 Compensation, Frank Wagner. Mr. Wagner will testify in
4 detail with respect to what actual factors Google considers
5 in setting compensation for new hires. He will testify with
6 respect to what factors Google actually considers when using
7 performance-based metrics for compensation increases. He
8 will testify to Google's processes in determining
9 compensation in conjunction with promotions and compensation
10 changes for employees who transfer to new jobs or new
11 geographic locations. That is what is relevant. Prior job
12 history and salary information for new hires that are recent
13 college graduates, Mr. Wagner will tell you is never
14 considered when setting compensation.

15 Mr. Wagner will tell you that prior salary
16 information for new hires that are not recent college
17 graduates also is regularly not considered, because Google
18 uses a market reference point to set base compensation. A
19 market reference point that well exceeds the median in the
20 tech industry.

21 Thus, for a majority of new hires, a majority of
22 the 21,000 employees Google -- OFCCP is seeking information
23 on, prior job and salary history is simply not even
24 considered when setting compensation. Therefore, how can it
25 be relevant?

1 Mr. Wagner provided this information to the OFCCP
2 during their on-site. Therefore, OFCCP knows this, or
3 should, at least, know it by now, yet they continue steadfast
4 in their demand for information that doesn't relate at all to
5 compensation.

6 On June 1st, 2016, OFCCP sent Google a voluminous
7 request for additional documents and information and these
8 are the requests that are before the Court regarding the
9 subject demands. I won't go through each three, because the
10 Court knows what they are.

11 You will hear testimony that at the time OFCCP
12 issued this June 1st letter, it had not completed even a
13 preliminary analysis of the 2015 snapshot. Yet it was asking
14 for scores of additional information. It was at this point
15 that the facts of this case became unique from other
16 compliance reviews. You will hear that at this point that it
17 became clear to Google that the government was simply
18 overreaching in its demands.

19 Unless OFCCP can satisfy this Court that the new
20 and massive information it requests is sufficiently limited
21 in scope and relevant, its demands should be denied. And
22 you'll hear testimony that they have done neither.

23 And let me just pause here and say to the Court,
24 even under proportionality concepts, whether Google has a \$28
25 billion revenue or not, one piece of paper could be deemed

1 unduly burdensome unless the G.government can demonstrate
2 it's sufficient in scope and reasonable.

3 Google anticipates that the Government will testify
4 that it needs the personal contact information of Google's
5 entire Mountain View workforce of over 21,000 employees so it
6 can shield from Google who the Government who it intends to
7 interview. And Google anticipates that OFCCP will say that
8 it simply cannot narrow this because it would reveal its
9 deliberative process by doing so.

10 Google also anticipates that the OFCCP witnesses
11 will testify that it can't narrow the field without risking
12 some unfounded potential that Google may interfere with
13 witnesses' participation in the compliance review. But as
14 Your Honor will hear, there is simply no evidence that would
15 support that unfounded belief.

16 OFCCP's request for job and salary histories for
17 these same Google employees from 1998 -- since the founding
18 of Google -- to the present simply is not sufficiently
19 limited in scope. Indeed, how can it be more broad?

20 OFCCP has not and will not be able to demonstrate
21 through their witnesses or documents that the requested
22 information is relevant.

23 To sum up, OFCCP witnesses will assert that if this
24 Court either dismisses the complaint or modifies the subject
25 demands, that it will open the flood gates and somehow leave

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 determin
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 JUDGE BERLIN: All right, sir. Thank you very
2 much. You're excused.

3 (Witness excused.)

4 JUDGE BERLIN: Any other witnesses, Mr. Pilotin?

5 MR. PILOTIN: OFCCP does not have any additional
6 witnesses, Your Honor, in its direct case, but we reserve the
7 right for a rebuttal case, of course.

8 JUDGE BERLIN: All right. I normally would not
9 take lunch quite this early, but this seems like an
10 appropriate breaking point. So why don't we take one hour
11 for lunch and be back here five minutes before 1:00. Okay.
12 Off the record.

13 (Whereupon, the luncheon recess was taken from
14 11:53 o'clock a.m. to 12:59 o'clock p.m.)

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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

1 vestiges that still exist today, for example, is that also in
2 the purview of OFCCP when there was no federal contract in
3 1998?

4 So, I'm -- I'm not suggesting what the answer to
5 that question is, but I'm urging people to make a clear about
6 when Google was a federal contractor and when it wasn't. And
7 I am very interested to hear the parties' arguments on this
8 subject, perhaps at the close of the evidence, because you
9 will be giving closing arguments.

10 But I perceive those as issues to be addresses and
11 I'm willing to be convinced that they are not really issues,
12 but I would like to have the parties to be aware that it's a
13 question in my mind, so that you might choose to address it.

14 All right. Let's turn now to the case for the
15 Defense. Ms. Sween, your first witness?

16 MS. SWEEN: Thank you, Your Honor. We do call
17 Janette Wipper, please.

18 JUDGE BERLIN: Ms. Wipper?

19 You're already sworn, so there's no need to do it
20 again.

21 Whereupon,

22 JANETTE WIPPER,

23 having been previously duly sworn, was further examined
24 and testified as follows:

25 JUDGE BERLIN: Ms. Sween?

1 MS. SWEEN: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MS. SWEEN:

4 Q Good afternoon, Ms. Wipper.

5 A Good afternoon.

6 Q Would you agree that as Regional Director of the
7 OFCCP one of your primary obligations is to ensure that the
8 compliance review that you and your department conduct are
9 conducted in a fair and unbiased manner?

10 A Yes.

11 Q Can I ask you to scoot closer to your microphone?

12 JUDGE BERLIN: I'm sorry and someone is here now
13 who is trying to address this, but it could take a while. So
14 it would be good if you could move it close to you.

15 THE WITNESS: Yes.

16 JUDGE BERLIN: Could you hear that?

17 MS. SWEEN: I could.

18 JUDGE BERLIN: All right. Good.

19 BY MS. SWEEN:

20 Q And immediately prior to joining OFCCP I believe I
21 heard you testify that you worked at a firm in which your
22 firm litigated class actions and discriminatory pay practice
23 cases, is that correct?

24 A Yes.

25 Q Okay. And that was a plaintiff's side, correct?

1 You were proceeding on behalf of the plaintiffs?

2 A I've also done some work on the defense side, but,
3 yes, primarily.

4 Q And when you did the defense work, was that at
5 Sanford-Heisler or was that at a prior job?

6 A It was at Sanford-Heisler.

7 Q Okay. What percentage of your practice would you
8 say when you were at Sanford-Heisler was on the plaintiff's
9 side, litigating cases against employers?

10 A The majority.

11 Q More than 50 percent?

12 A I would say yes, because the class action work was
13 primarily on the plaintiff's side and those cases were a lot
14 more complex and required a lot more work. So, from a work
15 load perspective, yes.

16 Q Could it be as much as 90 percent of your case load
17 was plaintiff side, class action, pay disparity cases?

18 A I wouldn't say -- I would say maybe plaintiff's
19 side, but not all pay disparity.

20 Q Okay. So 90 percent of your work was plaintiff's
21 side?

22 A Um-hum.

23 Q With a majority of your practice pay disparity
24 cases?

25 A So, my work was on behalf of employees, which is

1 similar to the mission of the OFCCP, to ensure that
2 discrimination is not occurring against employees.
3 So in that way, yes, it's similar.

4 Q Okay. But my question was specific. Did it relate
5 to pay discrimination practices, for the most part? Was that
6 the majority of your practice included?

7 A I wouldn't -- I had wage and hour cases, as well.
8 So I did pay and promotion discrimination cases, but I
9 wouldn't say it was the majority.

10 Q So wage and hour was not the majority. The pay
11 discrimination practice was the majority?

12 A No, I would say the wage and hour sometimes was the
13 majority of my cases.

14 Q Do you believe as a result of your position at a
15 plaintiff's side lawfirm litigating cases against employers,
16 that you developed any particular bias against employers?

17 MR. PILOTIN: Objection, Your Honor. I don't
18 understand the relevance of this.

19 JUDGE BERLIN: It goes to bias. She can answer it.
20 She's a witness and she can show bias.

21 THE WITNESS: Actually, I think it's the opposite,
22 because I understand the pay practices. I've looked at a lot
23 of pay practices, not only in my former job, but in my
24 current job and I, based on that experience, am able to
25 determine, I think whether there's an issue.

1 I'm also very familiar with research in this area.

2 So I draw from not just the data, but I'm familiar with
3 research on negotiating pay, starting pay, and why starting
4 pay can actually impact an employee's compensation over the
5 lifetime of their career. So I'm -- I actually think it
6 makes me less bias because of my experience and understanding
7 different types of employers and their pay practices.

8 BY MS. SWEEN:

9 Q I just want to explore this for a second. Thank
10 you for that explanation. I'm not quite sure I understand
11 how your experience in this regard affects having no bias
12 against employers. So that's what I'm trying to explore.

13 So, in your practice as a plaintiff's side
14 employment attorney, you regularly litigated cases against
15 employers. And in your experience, did you find in that
16 practice that more times than not, from your opinion, that
17 employers discriminated against their employees?

18 MR. PILOTIN: Objection again, Your Honor. I don't
19 understand the relevance of this, especially since -- as the
20 Court has made clear -- even if Ms. Wipper had any bias, the
21 Court's made clear in its summary judgment motion that motive
22 is not something that plays into relevance.

23 JUDGE BERLIN: I'm going to sustain it, because I
24 don't really think -- I people coming to plaintiffs' lawyers,
25 looking to bring lawsuits are not an average sample of the

1 employee population of the country. And it wouldn't be
2 surprising if more of those people have viable claims than
3 the ordinary person. So it wouldn't show any bias, anyway.

4 MS. SWEEN: Fair enough. I'll proceed.

5 BY MS. SWEEN:

6 Q So you agree it would be entirely inappropriate of
7 you as a Regional Director to express any bias against
8 employers in public statements, wouldn't you?

9 MR. PILOTIN: Objection, Your Honor. I don't see
10 how this goes to the relevance of anything in this case which
11 focuses on the relevance of the documents OFCCP requested or
12 the undue burden Google faces in producing those documents.

13 JUDGE BERLIN: Ms. Sween?

14 MS. SWEEN: Your Honor, if you would allow a quick
15 side bar, I can explain that to you outside the presence of
16 the witness.

17 JUDGE BERLIN: All right. Let's do that. Let's do
18 that.

19 (Off the record.)

20 JUDGE BERLIN: All right. I'm not going to -- the
21 objection is sustained. We had an off-the-record
22 conversation with counsel for both parties and I've concluded
23 that the questions are not aimed at impeaching the witness'
24 truthfulness and veracity, but are aimed at reducing the
25 weight that would be put on her opinion on what's needed,

1 which I find generally not relevant, because the motivation
2 OFCCP has for seeking the information is not the relevant
3 question. There are some other questions that we've all
4 discussed on the record and on the motion for summary
5 decision, but motivation is not one of them.

6 So, the objection is sustained.

7 MS. SWEEN: Thank you, Your Honor.

8 BY MS. SWEEN:

9 Q Ms. Wipper, you testified earlier this morning that
10 there are two different types of affirmative action plans
11 available to a federal contractor to use. One was the
12 establishment model and one was the functional model,
13 correct?

14 A Generally, that was my testimony. There are
15 regulations that talk about the establishment, AAP, which
16 have different types of definitions on how to group the
17 employees within that establishment-based AAP.

18 Q And can you just provide the Court with a very
19 brief, 30,000 foot, understanding of what an establishment
20 model is?

21 A So it's similar to the Equal Pay Act. So, you look
22 at the -- and traditionally with, I guess, manufacturing
23 types of plants, for example, you would have an
24 establishment, a facility, where the employees are located.
25 That would be the default rule of who would be covered by the

1 AAP. But now with, you know, the modern work force and you
2 have people reporting in to a manager at a different site, if
3 that's the case, then that employee would be in their
4 manager's AAP, so the location where the manager is located.

5 And I believe that's what Google did here.

6 Also, you can -- if there's high level employees
7 making selection decisions for lower level, that's also a
8 third option on the establishment-based AAP where you would
9 put those employees in the higher-level selection official's
10 location. On any of those options that are not where the
11 employee is located, it has to be noted in the AAP where they
12 are, if they're not at the place where they work.

13 Q Okay. Distilled down to a very simple explanation,
14 isn't it akin to you have a group of employees at a building.

15 You have to have 50 or more employees in that building or in
16 that campus, and those -- all of those buildings together are
17 the establishment for which the Affirmative Action Plan flows
18 other than what you've testified to with respect to the
19 various different reporting, correct? So, it's essentially a
20 location, right?

21 A It is. However, if a contractor has different
22 addresses for those buildings, sometimes they'll give us an
23 AAP for every address, similar to what they do for an EEO-1
24 report for the physical location or the physical address. We
25 have one review -- I can give you an example. It's a campus,

1 there's five buildings, there's five EEO-1 reports, there's
2 five different AAPs at that same location.

3 Q The other model you referred to is the functional
4 model. And can you briefly explain to the Court what the
5 functional model is?

6 A So, the functional model is an exception to the
7 establishment model. And so the way that works -- it's also
8 in the same regulation. I believe it's 41 CFR 612, I think.

9 So, anyway, so for the FAP, is what it's called, you could
10 be -- the contractor has the option to organize their AAP by
11 function or business unit.

12 So, for example, Google could do engineering
13 nationwide and put them all -- you know, across all states,
14 put them all in one FAP. In order to do that, they would
15 need approval from the Director of the Agency in Washington,
16 D.C., and some contractors do it. It tends to be less
17 burdensome on the review, because they couldn't be scheduled
18 separately throughout the country. They would rather just do
19 one review all together for one functional unit.

20 Q Thank you. So, absent getting government approval
21 or permission, rather, a contractor has no choice how to
22 structure its AAP, correct?

23 A Well, in the establishment-based model, they could
24 -- with a separate address, a separate building, have a
25 separate AAP.

1 If they could -- I know the Google EEO-1 reports,
2 for example, are broken -- okay.

3 Q If Google had applied for and received permission
4 to prepare functional AAPs, as you sit here today, you have
5 absolutely no knowledge or you don't know the size of those
6 AAPs or that those sizes would be any smaller than the
7 establishment-based AAP that Google uses, isn't that correct?
8 So you just gave an example for -- you gave the example of
9 engineers across the country. As you sit here today, you
10 have absolutely no idea whether if they had gone the
11 functional route for engineers across the country, whether
12 that would be any more or any less than their establishment-
13 based plan in effect right now?

14 A I do know if they did the address-based approach,
15 that --

16 Q That's not my question, Ma'am.

17 A -- they would have 2,500 at the current addresses.

18 Q That's not my question.

19 MR. PILOTIN: Your Honor, I'd ask Counsel not to
20 interrupt the witness while the witness is talking.

21 JUDGE BERLIN: You need to answer the question that
22 was asked.

23 THE WITNESS: Okay.

24 JUDGE BERLIN: So, is it correct that you do not
25 know how many employees would be covered if the AAP has been

1 done by function rather than establishment?

2 THE WITNESS: The reason I don't know is because
3 the function would be defined by Google and not by us. And
4 do I believe, based on the data that we have, that there are
5 functions that are much smaller than engineering? I do. And
6 nationwide, I think they would be below 20,000, but, again,
7 who defines the functional unit is the contractor, so I
8 couldn't answer that.

9 BY MS. SWEEN:

10 Q So, in other words, it's pure speculation on your
11 part whether if Google chose to use the functional route
12 rather than the establishment route -- say, for example, for
13 engineers across the country -- you have absolutely no idea
14 as you sit here today definitively that that would be any
15 less than the establishment model that's in effect. Isn't
16 that true?

17 MR. PILOTIN: Objection, Your Honor, that
18 mischaracterizes the last answer Ms. Wipper gave.

19 THE WITNESS: For which function?

20 BY MS. SWEEN:

21 Q Let's use software engineering as an example.

22 A Well, that would be the largest function. So for
23 software engineering, probably it would be comparable.

24 Q Okay. Thank you.

25 A But for the others, it would be less.

1 Q So your earlier testimony that Google's Mountain
2 View AAP is so large because Google chose to make it that way
3 is really not true, is it?

4 A No, it is.

5 Q You have no idea as you sit here today if they went
6 the functional route, whether it would be -- for software
7 engineers -- whether it would be smaller or larger?

8 A If they can make it smaller with the establishment
9 route. So if they would have chosen only the people who
10 actually work at 1600 Amphitheater -- is it? -- then
11 according to their EEO-1 report, that's only 2,500 employees
12 at that location.

13 Q But they could have selected -- they could have
14 requested permission from the government to use a functional
15 model. And if they had done that within their choice and
16 with the government's permission, as you sit here today, you
17 don't know if the AAP, for example, software engineers
18 nationally, would be any less than the establishment model
19 used at the Mountain View facility, correct?

20 A Well, could you break that down? Because there's a
21 lot of assumptions buried in your question. So, it depends on
22 the function.

23 Q Okay.

24 A And in terms of the establishment model, I think
25 that -- forget about the FAP -- the establishment model, they

1 could have created it under the options on the establishment
2 model with a smaller work force.

3 So -- and in terms of the FAP, it would depend on
4 the functional unit. Since it's a software engineering
5 company, sure, the functional unit of software engineering
6 could be more. But the other -- the support functions --
7 legal, for example, would probably be less.

8 But, again, it would be defined by Google.

9 Q But you don't know one way or the other as you sit
10 here today, correct?

11 A I do know that if they used the establishment by
12 address, it would be less. That's the only thing I can say
13 that I know.

14 Q Okay. Thank you very much.

15 So I want to talk a little bit about the compliance
16 review that OFCCP has done specific to Google.

17 A Okay.

18 Q With these questions, I'm not interested in what
19 your general experience is in compliance review. I want to
20 focus my questions and your answers on what specifically went
21 into the compliance review at issue here. Okay?

22 So, to take a step back, can you just explain for
23 the Court the phases of a compliance review?

24 A Sure. So there's, you know, in our regulations we
25 have -- it's defined with three phases. So there's the desk

1 audit review, there's the on-site review and there's an off-
2 site analysis.

3 Q And isn't it true that the OFCCP does not actually
4 have to undertake every phase in each review? They can
5 select which of those that they want to do?

6 A No, that's not true.

7 Q So is it your testimony that in every single
8 compliance review each of those three steps that you just
9 testified to are taken in each compliance review?

10 A The only time the -- it would not go beyond desk
11 audit is if there were no issues to further investigate.
12 So, if there are issues to investigate, then all three phases
13 would be included.

14 Q In a typical compliance review, doesn't the OFCCP
15 conduct a preliminary analysis of the data before requesting
16 additional information?

17 A There is a desk audit, so, yes.

18 Q And so typically would a desk audit be complete
19 before additional information is requested from the
20 contractor?

21 A It depends if the initial data provided was
22 complete.

23 Q Is a desk audit what the OFCCP generally refers to
24 as a preliminary analysis?

25 A No. A preliminary analysis could be broader than

1 that.

2 Q Broader than a desk audit?

3 A Um-hum.

4 Q Can you give me an idea of what a preliminary
5 analysis -- how it would be broader than a desk audit?

6 A Depending on the review, additional data could be
7 necessary. Other sources of information could be looked at.

8 There's -- you know, as you know, the first one -- one of
9 the first steps we do before we use a desk audit is we
10 contact EEOC -- and in California it would be DSCH -- to
11 understand what pending charges are against a contractor
12 under review. For Google, for example, there's quite a few
13 pending charges that, you know, had been filed against
14 Google. So we had to look into that. That's beyond just the
15 data at the desk audit.

16 There is also information that's provided
17 publically about issues about compensation at Google where
18 employees were complaining about pay transparency and
19 disparities at Google. That's something we'd also look at in
20 a desk audit.

21 So, you know, we're doing investigations about the
22 contractor. We're looking into pending complaints. We're
23 also looking at the AAP. So here with Google, there was a
24 lot more to look at than just the AAP.

25 Q You just referred to public information that was

1 disclosed by Google employees. What were you referring to?

2 A Well, one thing, there's a site that Google has,
3 "Rework" that talks about their pay structure. It's
4 available to the public. Laszlo Bock, who is the SVP of
5 People Operations, who we tried to interview at the on-site,
6 but Google did not make him available. I believe Frank
7 Wagner reports to someone who reported in to him. He also
8 has a lot of publically-available information about pay
9 equity and tainted variables or things that could have a
10 disparate impact on women, such as considering a prior pay
11 because of the anchoring bias that's associated with it.

12 There was quite a lot of coverage about -- from a
13 female engineer. Her name is Erica Baker, I believe -- about
14 a spreadsheet that she created at Google a few months before
15 our scheduling letter went out, where she was promoting a pay
16 equity and transparency and then alleged that Google
17 retaliated against her when her peers nominated her for a
18 peer bonus.

19 And so, you know, we do our due diligence at the
20 desk audit stage.

21 Q Are you aware of any complaints that were lodged
22 with the OFCCP on any of these issues?

23 A I'm aware of complaints lodged at the EEOC and at
24 the DFSC, because that's in every compliance evaluation we
25 get the pending charges and there are quite a few against

1 Google.

2 Q And are any of those pending charges within the
3 compliance two-year scope period that you testified to
4 earlier?

5 A I believe so, but I -- I know there was also a
6 pending age discrimination case against Google, too.

7 I don't have them all memorized. Given the volume,
8 I would say yes.

9 Q None of these complaints, however, were lodged with
10 OFCCP, correct?

11 A We work together with the EEOC on our reviews, so
12 they -- as far as what's been filed with us, since we opened
13 the review, I'm not aware of anything that's been filed.
14 But, again, we don't have -- we haven't had the ability to
15 speak with employees the way we typically do, because Google
16 has withheld contact information from us.

17 MS. SWEEN: Your Honor -- thank you.

18 Your Honor, can you ask the witness just to answer
19 my question, please?

20 JUDGE BERLIN: Just try to keep it brief, because
21 OFCCP wants to conclude today, so.

22 BY MS. SWEEN:

23 Q So, Ms. Wipper, it's a yes or no question. Are you
24 aware of any complaints that any employee from Google has
25 lodged with the OFCCP during the two-year compliance review

1 period?

2 A No, because we haven't spoken to many employees.

3 Q Would you, as Regional Director, have the ability
4 to determine whether or not there are any complaints lodged
5 with the OFCCP by a Google employee without having talked --
6 without having spoken to the employee?

7 A I believe we log our complaints in a data base.
8 So, yes, I could have looked at the data base.

9 Q And did you do that?

10 A No.

11 Q You testified earlier that typically the OFCCP
12 would request a second snapshot --

13 A Um-hum.

14 Q -- if it found systemic discrimination from the
15 data it had received from the current year snapshot. Do you
16 remember that testimony, generally?

17 A Um-hum.

18 Q So, did you actually do the analysis on the current
19 year snapshot before requesting a second year snapshot?

20 A Without reviewing deliberative process, we did do a
21 lot of analyses.

22 Q So, I'm asking you did you do it before you
23 requested the second year snapshot?

24 A The first year snapshot was produced at the end of
25 2015 and the second year snapshot was requested in June 2016.

1 So, yes.

2 Q So just to be very clear, is it your testimony to
3 this Court that you conducted a preliminary analysis -- a
4 complete preliminary analysis -- of the first year snapshot
5 before asking for the second year snapshot?

6 A So, the complete preliminary analysis is not what I
7 said. Did we analyze the initial snapshot that was produced
8 at the end of 2015? Yes.

9 JUDGE BERLIN: And did you do that before
10 requesting the second snapshot?

11 THE WITNESS: Yes.

12 BY MS. SWEEN:

13 Q Can you just briefly describe for the Court what it
14 meant by the Item 19, as it relates to the compliance
15 evaluation?

16 A So the Item 19 is part of the itemized listing that
17 is attached to the scheduling that the OFCCP approved.

18 JUDGE BERLIN: Direct me to an exhibit. I just
19 wanted to see the item.

20 MR. PILOTIN: To be helpful, Your Honor, it is --

21 JUDGE BERLIN: I know we looked at it before.

22 MR. PILOTIN: To help everybody, it's Exhibit 5.

23 JUDGE BERLIN: Thank you. So it's Exhibit 5, the
24 attachment, and I have paragraph 19 now. It's Joint Exhibit
25 5-006.

1 MS. SWEEN: May I proceed, Your Honor?

2 JUDGE BERLIN: Please.

3 BY MS. SWEEN:

4 Q Okay. Ms. Wipper, what type of analysis does OFCCP
5 typically conduct on Item 19 data?

6 A There's various analyses that we -- it could be
7 anything from descriptive analysis to regression analysis and
8 everything in between. But I don't know if we would reveal
9 all of the analyses, because it's privileged.

10 Q So I'm not asking you to reveal the analyses. I'm
11 asking you what types of analyses are done.

12 In this instance, did you conduct a regression
13 analysis on the Item 19 data before requesting the second
14 snapshot?

15 MR. PILOTIN: Objection, Your Honor, this goes to
16 deliberative process and the investigative files privilege.
17 Whether -- you know, the nature -- we've litigated this issue
18 regarding the nature of the analysis that OFCCP has done.
19 And, again, I don't see how this information is relevant,
20 either to whether the requested items are relevant or as to
21 the undue burden.

22 JUDGE BERLIN: Sustained. The witness has
23 testified that it was analyzed -- that the first snapshot was
24 analyzed before the second was requested and I think that
25 that's sufficient.

1 MS. SWEEN: Thank you.

2 BY MS. SWEEN:

3 Q Ms. Wipper, in your region -- in the Western Region
4 -- does the OFCCP typically request the complete salary
5 history for all employees in an AAP -- in conducting
6 compliance reviews?

7 A We have requested it and we have received it
8 without objection from contractors.

9 Q My question is a little bit different.

10 A Um-hum.

11 Q I'm asking whether it's typical for you to request
12 the complete salary history for all employees in an AAP?

13 A If prior pay and anchoring bias is at issue, yes.

14 Q In your region, does OFCCP typically request the
15 complete job history for all employees in an AAP?

16 A It would be the same answer, because we cannot
17 really analyze the initial pay without looking at the job
18 that or the initial assignment of their job and the other
19 factors. So, they go together.

20 Q So your answer is it is typical?

21 A My answer is when prior pay and anchoring bias and
22 negotiation is at issue at the start, yes, we ask for it.

23 Q And when you are talking about negotiation and
24 anchoring bias with respect to the compliance review that's
25 at issue here, did you find that it was necessary to request

1 the job history for all employees in the Mountain View AAP
2 because of those two factors? So what I'm really trying to
3 get at is, I understand typically you ask for this
4 information if there are certain indicators that lend you to
5 believe it would be helpful. In the Google compliance
6 review, did you find indicators that caused you to believe
7 that the job history for all employees in the AAP would be
8 helpful to your analysis?

9 MR. PILOTIN: Objection, Your Honor. This again
10 goes to the deliberative process and the investigative files.

11 Ms. Sween is asking for the indicators that have been the
12 topic of much discussion before the Court. And, again, I --
13 in addition to objecting on those grounds, I don't see the
14 relevance of this as to the relevance of the information
15 requested in Google's undue burden.

16 JUDGE BERLIN: So let me ask you a yes or no type
17 of a question. I mean, you can add, if you want, but you
18 don't have to.

19 Did OFCCP give any consideration to making the
20 breadth of the request less than the entire work force? Was
21 that something you even considered?

22 THE WITNESS: Yes. If the indicators were limited,
23 we would have to a certain -- if the indicators were the
24 policies at issue were limited to a certain sector, we would
25 consider limiting it. But in this case, that wasn't what we

1 were seeing at this point. We saw indicators that were
2 consistently adverse to women and we also saw policies that
3 were impacting -- potentially impacting.

4 Now, without looking at the history, we cannot
5 pinpoint exactly where the disparities are, you know,
6 stemming from. But we did see a widespread-enough issue that
7 it wasn't -- there wasn't a need to narrow it.

8 Also, we consider the burden, because it was
9 electronically stored. So, with respect to hiring data, it's
10 a lot more burdensome to produce hiring data, generally. You
11 know, the applications, the resumes usually are stored in
12 separate files. I'm just talking generally in our reviews.
13 But compensation data is usually centrally stored,
14 electronic. It's not applicants, it's their actual
15 workforce. So the burden issues don't -- are not as
16 concerning for us with compensation as they are for hiring.
17 Hiring is much -- it's just -- there -- even in this review,
18 it's hundreds of thousands of applicants in the hiring, as
19 opposed to we're just looking at the 20,000 or 21,000 for
20 compensation. So hiring actually presents a much bigger
21 burden in this matter and in most of the matters that we look
22 at.

23 JUDGE BERLIN: All right. So the objection to the
24 question and the form of the question that was asked, the
25 question you asked, Ms. Sween, is sustained. But I hope that

1 answer got it where you were going.

2 BY MS. SWEEN:

3 Q Did I hear you say that the burden in compensation
4 is not as -- is higher than in -- you know, the opposite?
5 What leads you to believe that?

6 A Because in hiring you're looking at applicants.
7 So, you're looking at --

8 Q I'm asking you specifically with respect to Google.
9 So, I'm not asking you in general. I'm asking what about
10 Google led you to believe that seeking compensation data is
11 less burdensome than applicant data?

12 A Because with compensation we're only asking for
13 employees' data. Okay? We're not asking for applicant data
14 where the company has partial data. Maybe you have an
15 application, maybe you have a resume. We don't have both.

16 Also, it's contained in electronic format, in
17 centralized data bases. The regulations for other federal,
18 you know, agencies like IRS, Wage and Hour --

19 Q I'm talking about Google right now.

20 A No, I'm talking about Google.

21 I'm just saying that what the compensation or the
22 regulations that cover compensation -- I'm telling you why
23 the burden -- you asked me about burden with compensation.
24 So IRS requires compensation to be maintained for 15 years
25 under some of their regulations.

1 So there's compensation data is maintained and
2 highly regulated in a way that hiring is not.

3 Also, the applicants -- the size of the applicant
4 pools -- even in this -- as far as what I know -- in this
5 review is hundreds of thousands of applicants. In the
6 compensation context, it's 21,154 employees.

7 Q As you sit here today, you have absolutely no
8 personal knowledge, however, of how burdensome it would be on
9 Google to extract all categories of compensation data that
10 the OFCCP has requested, isn't that true?

11 A The OMB scheduling letter says that it should take
12 27 hours to produce the Item 19 table.

13 Q That's not my question, Ma'am.

14 A And from the statements that I read at the on-site,
15 from the Workday manual, from the online instructions for
16 gComp -- from all of that, and including several of the
17 notes, you know, and the statements made to four federal
18 officials during the onsite interview, I could say with
19 confidence that what we've asked for is not burdensome.

20 Q Do you have any idea as you sit here today how many
21 manpower hours it would take to extract the information that
22 the OFCCP has requested from Google's data bases?

23 A According to Workday, it would be an export of a
24 compensation report. So I would say a day, you know, based
25 on that. And based on Google's capabilities, probably less.

1 Q And when you say a day, are you referring to eight
2 hours?

3 A There was someone who testified or who gave a
4 statement at the -- Yionus (phonetic), I believe his name was
5 -- he said he could write a query and pull the data out of
6 the data base.

7 Q But, Ma'am, please answer the question I'm asking
8 you.

9 You just told me you think it would take a day to
10 extract all of the information requested by the subject
11 demands related to compensation. My question is very simple:
12 Is that your assumption or do you know that?

13 A Based on my experience and the evidence in this
14 case, that's my answer.

15 Q That's your assumption, correct?

16 A Well, the OMB letter says 27 hours. So, that's --
17 maybe it's 27 hours.

18 Q Okay. But you don't know one way or the other?
19 You don't know one way or the other and you didn't answer.

20 JUDGE BERLIN: She'll have to answer the question.

21 THE WITNESS: No, I haven't -- we tried to look at
22 the HRIAS system during the on-site and Google wouldn't allow
23 us to do so. So, no. We weren't able to get a demo of the
24 HRIAS system that we asked for.

25 BY MS. SWEEN:

1 Q In your region does the OFCCP typically request the
2 prior salary history for all employees in an AAP?

3 A I think I already answered that question.

4 Q Oh, I'm sorry. The question you answered was about
5 salary history. I'm not asking about prior salary. So I'm
6 talking about the salary that the employee had immediately
7 prior to coming to Google.

8 In your region, does the OFCCP typically request
9 the prior salary for all employees in the AAP?

10 MR. PILOTIN: Your Honor, I'm going to start
11 objecting to these types of questions, only because whether
12 OFCCP typically does it, I just don't see how that's relevant
13 as to whether the current requests are relevant. And I'm
14 just mindful of the time today.

15 JUDGE BERLIN: Overruled. You can answer.

16 THE WITNESS: If the contractor puts something at
17 issue, we will ask for it. So, on prior pay, we asked for it
18 in this review, because it was a G-non-VR (phonetic), so that
19 prior pay is considered when setting salary for new hires.

20 BY MS. SWEEN:

21 Q You weren't at that on-site, were you?

22 A I read notes from everyone who was there.

23 Q You weren't at the on-site, were you, Ma'am?

24 A No, I was not.

25 Q Okay. And so you're relying on notes that your

1 direct reports prepared, correct?

2 A Google counsel prohibited us from getting
3 signatures.

4 MS. SWEEN: Your Honor, could you please instruct
5 this witness to answer my questions?

6 JUDGE BERLIN: You were relying on notes you wrote,
7 right?

8 THE WITNESS: Yes.

9 BY MS. SWEEN:

10 Q In your region, does the OFCCP typically request
11 the names and personal contact information for all employees
12 in the AAP?

13 A We ask for employee contact information for the
14 employee groups subjected to the policies and practices at
15 issue.

16 Q The question is does OFCCP typically do that? Does
17 it typically request the names and contact information of all
18 employees in the AAP?

19 A If we're looking at all of the employees in the
20 AAP, yes.

21 Q Under -- so is that the only circumstance in which
22 you would ask for all contact information, for all employees
23 in the AAP?

24 A Yes. I mean, you know -- yes. If we're looking at
25 the entire work force in the AAP, then we would -- and those

1 employees are subject to the indicators that we're
2 investigating, yes.

3 Q How often do you typically look at the entire work
4 force?

5 MR. PILOTIN: Objection, Your Honor, again. This -
6 - I'm not sure why all of these typical questions regarding
7 "typically" are relevant to whether or not these current
8 subject items are relevant.

9 JUDGE BERLIN: I'm going to allow this one, but I
10 think we need to conclude about this typicality.

11 MS. SWEEN: This is my last question on that.

12 JUDGE BERLIN: All right.

13 THE WITNESS: Could you restate your question?

14 BY MS. SWEEN:

15 Q Sure. I asked you earlier was it typical for the
16 OFCCP to request the names and personal contact information
17 of everyone in the AAP and you told me that if you had reason
18 to believe you needed it, you would ask for it. And my
19 question is -- my question was do you do that typically?

20 JUDGE BERLIN: So what I understood was your answer
21 was that if the data suggested a possibility of
22 discrimination that affected all of the employees, you would
23 ask for the names of all of the employees. And then I
24 thought your question was --

25 MS. SWEEN: How often.

1 JUDGE BERLIN: -- do you typically ask for -- do
2 the investigations typically extend to all of the employees.

3 Was that --

4 MS. SWEEN: Yes, Your Honor.

5 THE WITNESS: The typical review is much smaller
6 than this. We often ask for it for applicants, as well. So
7 are you asking about applicants?

8 BY MS. SWEEN:

9 Q No, I'm asking about compensation.

10 A Compensation? If it's -- it's the same answer. It
11 depends on -- and the indicators. I mean, if it's impacting
12 the entire work force in the AAP, then, yes, we would.

13 Q I want to move now to Google's compliance review.
14 As we've talked about earlier today in, I believe, it's
15 Exhibit 6 -- yeah, Exhibit 6 is the June 1st, 2016, letter
16 that OFCCP sent to Google requesting a variety of additional
17 information on the attachment, would you agree -- do you have
18 that exhibit in front of you, Ma'am?

19 A Yes.

20 Q Okay. Would you agree that the amount of
21 information requested in that attachment was almost the same
22 amount as that had been requested in the initial request to
23 Google?

24 A When you say "initial," do you mean the Item 19?

25 Q Correct.

1 A In terms of the number of data points, I mean I
2 would say that because job history is in this attachment, and
3 salary history, and that would depend on how long the
4 employee worked there, so, you know, it's hard to tell. So,
5 I don't know.

6 Q So, based on your testimony, Attachment A could
7 actually result in thousands of additional data points,
8 correct?

9 A Well, what do you mean by "data points"?

10 Q You just referred to "data point," Ma'am.

11 A So, do you mean the salary or the the date of the
12 pay change?

13 Q My question is very specific and limited at this
14 point in time and then I will get more details, okay?

15 A Um-hum.

16 Q The attachment that is attached to the June 1st,
17 2016, letter, would you agree that it is almost the same
18 amount of requests that were made in the initial request?

19 A I don't know.

20 Q Would it be fair to say that what you are
21 requesting in Attachment A is an amount of information, or at
22 the very least a large amount of information?

23 A Based on what context?

24 Q Based on the number of categories set forth on
25 Attachment A, would you agree that if Google were to produce

1 what was attached on Attachment A, that would result in
2 thousands of data points for the OFCCP to consider in its
3 compliance review?

4 A I don't know.

5 Q In fact, Google did produce almost everything that
6 was on Attachment A. Isn't that correct?

7 A No, because most of Attachment A is the issues
8 we've been discussing concerning prior salary and salary
9 history and job history. So the starting -- you know, it's
10 repetitive in some way. So, the starting salary, starting
11 position, starting organization, that all would be obtained
12 within this job history. So it is -- that wasn't produced.

13 So, actually, a lot of -- I don't think -- maybe --
14 I'd have to guess, but there was a lot of it that wasn't
15 produced, because the job history and the salary history and
16 the prior salary at issue were not.

17 Q You heard earlier from Ms. Suhr, correct? You were
18 in the room when she testified?

19 A Yes.

20 Q And when I was asking her questions about which on
21 Attachment A hadn't been produced, you were in the courtroom
22 during that testimony, correct?

23 A Yes.

24 Q And is there any reason to believe that Ms. Suhr
25 didn't provide accurate testimony during that section of the

1 examination?

2 A You'd have to remind me of her testimony, because I
3 don't know exactly what she testified to.

4 Q As you were sitting here today listening to her,
5 did you find her testimony to be truthful?

6 A I didn't memorize everything that she said, so I
7 don't know.

8 Q Okay.

9 A I would say I work with her and I would assume that
10 she testified truthfully, but you'd have to read back the
11 testimony if you want me to give you a specific answer.

12 Q You didn't sign the September 30th, 2015,
13 scheduling letter sent to Google's Mountain View's facility,
14 did you?

15 A No.

16 Q Would it be fair to say that your consideration
17 about what is relevant is, in part, based on your general
18 experience in conducting compliance reviews?

19 A Not completely. I think, yes, I am informed by the
20 reviews that we do and, particularly, certain industries have
21 very similar compensation structures that I know they work
22 together to set and structure. So, in that respect, yes.

23 So if you're looking at one industry that uses, you
24 know --

25 Q You've answered my question, Ma'am.

1 A Okay.

2 Q So, my first question is you didn't sign the
3 scheduling letter on September 30th.

4 A Um-hum.

5 Q And you also didn't sign the June 1st, 2016, letter
6 that's Exhibit 16 -- or Exhibit 6, correct?

7 A Um-hum.

8 Q Did you direct that those letters be sent to
9 Google?

10 A No.

11 Q Did you direct that Ms. Huang, who is the author of
12 Exhibit 6, include any of the items sought in that letter?

13 MR. PILOTIN: Objection. This goes to the
14 deliberative process within the Agency and how the Agency
15 makes decisions. I'll leave it at that.

16 JUDGE BERLIN: Ms. Sween, why is this relevant?

17 MS. SWEEN: Sure, Your Honor.

18 I'm not asking her why they chose to include these
19 in Attachment A. I'm asking her whether she directed that
20 they do, based on her testimony that she -- part of what she
21 deems relevant is based on her general experience in
22 collecting -- in conducting compliance reviews. I think it's
23 relevant, Your Honor.

24 JUDGE BERLIN: I'm not sure where this is going.
25 I'm going to allow this, but we'll see if there's any

1 follow-up.

2 You can answer that.

3 THE WITNESS: So, my understanding -- so, I wasn't at the
4 on-site, as you previously stated. So, the June 1st letter,
5 I believe, was sent out in response to Google's
6 representations at the on-site interviews as to what was
7 relevant to pay, decisions at Google. So this was created by
8 the on-site team, if that's what you're asking.

9 BY MS. SWEENEY:

10 Q Well, it wasn't what I was asking.

11 My question was did you direct Ms. Huang to include
12 any of the items sought in Exhibit 6?

13 A I believe I reviewed it before it went out and I
14 don't remember whether we spoke about any individual items on
15 this. Is there one in particular?

16 Q No, Ma'am.

17 A Okay.

18 Q I'm just asking if you have any recollection of
19 asking her to include any specific item included on this
20 list.

21 A I don't recall. But I did review it before it went
22 out.

23 Q And you testified earlier you didn't participate in
24 the on-site on April 2016. Isn't it true that the first
25 time, the first time your name appears in any correspondence

1 in this matter is September 16th, 2016, in the show-cause
2 notice? Isn't that correct?

3 A That's typical for a compliance evaluation. I
4 never sign the scheduling letters and I don't submit data
5 requests. That's not -- it's usually the local office that
6 does that. So -- and I do the show-cause -- the Regional
7 Director signs all show-cause notices.

8 Q And other than those people who interviewed the
9 Google managers on April 2016, you're not aware of any other
10 interviews that have taken place relative to the compliance
11 review, correct?

12 MR. PILOTIN: Objection to the extent that this
13 goes to the investigative files privilege, Your Honor.

14 MS. SWEEN: Let me ask --

15 MR. PILOTIN: There's an ongoing compliance
16 evaluation.

17 MS. SWEEN: Let me ask a different question.

18 BY MS. SWEEN:

19 Q You didn't participate in any of the on-site
20 interviews, right?

21 A The on-site interviews?

22 Q Correct. Correct?

23 A Correct, I was not at the on-site.

24 Q So you're not in a position, really, to testify
25 what Google representatives actually told the OFCCP

1 investigators during that on-site interview, isn't that
2 right?

3 A I read all of the statements.

4 Q You have no personal knowledge of what happened
5 during those on-site interviews, isn't that correct?

6 A I wasn't there, so since that's what you're asking,
7 I wasn't there.

8 Q At any point in time, did you review the materials
9 that Google provided to the OFCCP with respect to its
10 compensation policies, practices, or principles?

11 MR. PILOTIN: Objection, Your Honor. I just don't
12 see the relevance of this.

13 JUDGE BERLIN: I'm not sure if it's going to prove
14 whether she read it herself, but you can answer about whether
15 you've read it.

16 THE WITNESS: I have read the investigative file.

17 BY MS. SWEEN:

18 Q Have you read the documents that Google has
19 provided to the OFCCP, specifically with respect to its
20 compensation policies, practices, and principles?

21 A I believe I have read a compensation policy at some
22 point. I definitely read the manual online instructions on
23 Workday and gComp. And I can't recall what else.

24 Q Based on those readings, would you say you're
25 familiar with Google's compensation principles and practices?

1 A Based on the interview statements, I learned a lot
2 about Google's compensation practices.

3 Q That's not my question, Ma'am.

4 A Okay.

5 Q I'm asking based on what you did personally. So
6 whether you read -- whether you personally read Google's
7 compensation practices and policies and you said you have
8 read some, but not all, right?

9 A I said I don't recall. I know that the initial
10 production of what they provided us wasn't an actual policy.

11 It was a cut-and-paste from different online guidances,
12 which came out in the on-site interviews. So I'm not sure if
13 we have the actual policies or we just have portions of it.
14 So it's hard for me to answer your question.

15 Q Would it be accurate to say that you don't have
16 personal knowledge of Google's compensation policies and
17 practices?

18 A That's why we're doing the review. We're trying to
19 get the information so we can complete it.

20 Q So you don't have that personal understanding,
21 right?

22 A I have what they have provided to us.

23 Q Okay. So, did you ever ask anyone or can you
24 explain to me why prior job history at Google, going back as
25 far as 1998, is relevant to the OFCCP's review of salaries

1 included in the Item 19 data?

2 A When you say prior -- did you say prior job salary?

3 Q Prior job history.

4 A History?

5 Q Going back to 1998.

6 A Yeah. So, I know I testified about this on direct.
7 Again, it goes to the issues that were raised on negotiation
8 at hire. The fact that Google, both compensation managers
9 stated that -- to four federal officials in an audit that
10 they beat prior salary from 10 to 20 percent. That was
11 consistent, you know, in both statements.

12 So -- and the anchoring bias issue, as well as
13 research about the impact against women when there's a
14 negotiation at hire throughout their career -- because when
15 you have a merit increase that's set by the market at four
16 percent and you're making \$100,000, instead of 150,000,
17 you're behind for the rest of your career.

18 So, because of those issues, yes, we have
19 sufficient information to request the job history and the
20 salary history, which really go together.

21 Q And you're making that determination based on
22 interviews that you didn't participate in, correct?

23 A No, I'm making it based on statements in the media
24 by Google officials, by either public -- you know, the Re-
25 work site, and I'm making it based on the information we

1 gathered. So, you know, am I -- to give you every piece of
2 information that we have, I don't -- we have a deliberative
3 process and we have other privileges that we can't -- we're
4 not free to disclose every source of information that we
5 have.

6 Q So the information that you just provided me
7 included, at least in part -- in relevant part, in the
8 majority part, generalized research. I'm asking specifically
9 what you learned from Google managers at the on-site that led
10 you, the Regional Director, to believe that prior job history
11 at Google going back as far as 1998 -- so not generalized
12 research, not principles of anchoring -- what did you learn,
13 personally, that led you to believe that going back with
14 respect to job history to 1998 is relevant to compensation
15 during the relevant compliance period?

16 MR. PILOTIN: I'm going to object, Your Honor. I
17 mean, we've been on this for a while. This is getting into
18 deliberative process. There is an ongoing compliance
19 evaluation and the investigated party is seeking to
20 understand the inner-workings of an ongoing investigation.
21 And I find this entire line of questioning -- which I've let
22 go, so that the opposing party could get enough information
23 that it thinks is relevant -- but I can't stress enough,
24 there is an ongoing compliance evaluation and this is
25 improper.

1 MS. SWEEN: Your Honor, can I just be heard before
2 you make your ruling?

3 JUDGE BERLIN: Yes.

4 MS. SWEEN: This witness has been put on as OFCCP's
5 chief witness with respect to why these requests are
6 relevant. I think I'm entitled to determine to what extent
7 she's relying on either her personal knowledge, generalized
8 research, conversations she's having with her staff. I think
9 she is their chief witness with respect to why these requests
10 are relevant, and I think I should be able to inquire as to
11 what bases she has determined the relevancy of these
12 requests.

13 JUDGE BERLIN: The objection is sustained.

14 BY MS. SWEEN:

15 Q You testified earlier, I believe, that the names
16 and personal contact information is relevant to analyzing
17 compensation so that you can interview these witnesses,
18 correct?

19 MR. PILOTIN: Objection to the extent that it
20 mischaracterizes the testimony. I don't know which witnesses
21 we're talking about.

22 BY MS. SWEEN:

23 Q You've asked for the names and personal contact
24 information of all 21,000 employees in the AAP as of 2015,
25 correct?

1 A Yes.

2 Q And you have testified that the need for that
3 information is so that the OFCCP can interview witnesses,
4 correct?

5 A Yes.

6 Q Is it typical -- or, we asked that question
7 already.

8 I believe you stated earlier that whether or not
9 you ask for an entire work force or not just depends,
10 correct?

11 MR. PILOTIN: Your Honor, objection. We're going
12 over material that has already been covered and we are
13 running late in the day.

14 JUDGE BERLIN: Sustained.

15 BY MS. SWEEN:

16 Q Is it one of the OFCCP's -- is it the OFCCP's
17 intention to interview all 21,000 employees?

18 MR. PILOTIN: Objection, Your Honor, this goes --
19 there's an ongoing compliance evaluation and they are getting
20 into how the Agency is conducting that investigation.

21 JUDGE BERLIN: I'll allow it.

22 THE WITNESS: We would want to interview the
23 employees that are impacted by the practices that we're
24 investigating.

25 JUDGE BERLIN: You're not going to review all

1 21,000 employees, are you?

2 THE WITNESS: Well, hopefully not that we wouldn't
3 need to talk to all of them to get the information. That
4 would be the goal. But we don't want to force anyone to
5 speak with us if they don't want to. And we want to protect
6 their identity, also.

7 So, no, we wouldn't want to talk to all of them.
8 But it could be that we go through the list and there's only
9 a small percentage that actually wants to share information.

10 JUDGE BERLIN: I may be misunderstanding OFCCP's
11 argument here. I thought your argument is that you want the
12 interviewed employees basically to be hidden in plain sight.
13 You have 21,000 people listed, maybe 100 of them get
14 interviewed. Who knows who they were when there are 21,000
15 that they could be. Isn't that -- you're not going to
16 interview 21,000 people, are you?

17 THE WITNESS: Yeah. No, we wouldn't want to do
18 that. In order to get the information, we would want to talk
19 to a sufficient amount of people -- a sample. But --

20 JUDGE BERLIN: You don't have the resources to
21 interview 21,000 people, do you?

22 MR. PILOTIN: And I don't know if you want to hear
23 me on that, Your Honor.

24 JUDGE BERLIN: No, no. I just want to make sure
25 that I understood where this was going from OFCCP's

1 viewpoint.

2 BY MS. SWEEN:

3 Q Isn't it true that with the exception of the
4 subject demands, Google's provided all of the information
5 sought by the OFCCP?

6 A No, I can't answer that question. But I know that
7 Google has produced hiring information and, for some reason,
8 objects to compensation. So if you -- the hiring
9 information, we've gotten a lot more hiring information from
10 Google.

11 Q No, Ma'am.

12 A But I don't know if every single piece requested --
13 if that's what you're asking -- has been produced.

14 Q Okay. What portions of the subject demands do you
15 think -- I'm sorry. What, other than what's set forth in the
16 subject demands, do you believe Google hasn't produced?

17 A I believe that the W-2 data was not produced. I
18 believe that employee complaints -- internal complaints --
19 were not produced.

20 Q And do you see either of those items on Attachment
21 A in Exhibit 6, either W-2 information or internal
22 complaints?

23 A No.

24 Q Isn't it true that Google permitted OFCCP access to
25 its premises for on-site interviews of numerous managers?

1 MR. PILOTIN: Objection, Your Honor. I think we've
2 already established that.

3 MS. SWEEN: She can answer the question.

4 I'm almost done, Your Honor.

5 JUDGE BERLIN: Good -- thank you. But good faith
6 is not an issue. And no matter how much Google has complied,
7 even if it's with every single thing, then the question
8 remains the same. Does it have to comply with these
9 additional things?

10 MS. SWEEN: Yes, Your Honor, except to the extent
11 your earlier question indicated that OFCCP has taken the
12 position that if we don't provide 21,000 names, that they
13 have a fear that we may interfere with the process. And so
14 I'm trying to get from this witness to what extent we have
15 agreed to comply up to this date and acted in good faith --
16 which is not an issue. But it's certainly relevant to
17 whether or not we have -- they have any evidence that we
18 would ever interfere with anything.

19 JUDGE BERLIN: Do you have any other evidence that
20 they would interfere in your efforts to interview employees?

21 THE WITNESS: Well, we asked to speak with some
22 employees at the on-site -- Laszlo Bock, who was working
23 there at the time and actually published an opinion piece in
24 the Washington Post the day after the on-site about anchoring
25 bias and priori pay and he was not made available. And I

1 believe there were others, but I can't speak to every single
2 one, because I wasn't at the on-site.

3 MS. SWEEN: Just one last series of questions, Your
4 Honor.

5 BY MS. SWEEN:

6 Q Earlier Your Honor asked if you were aware of any
7 data -- the Judge asked you if you were aware of any data
8 breaches. Do you remember that line of questioning from the
9 Court?

10 A Yes.

11 Q And you were a government employee in 2015,
12 correct?

13 A Yes.

14 JUDGE BERLIN: Well, I was. So I'm very aware of
15 what happened.

16 BY MS. SWEEN:

17 Q Were you notified at that time that a number of
18 federal government entities, including the Office of
19 Personnel Management, suffered a major data breach?

20 A Yes. And OFCCP -- I thought the question was about
21 OFCCP's data breaches, so not the entire federal government.

22 Q But you're aware that the federal government has
23 suffered serious data breaches as early as 2015 -- or as soon
24 as 2015, correct?

25 MR. PILOTIN: Objection, Your Honor. I don't see

1 BY MR. PILOTIN:

2 Q Ms. Wipper, there's been some talk of the request
3 for employee contact information. Do you recall that
4 discussion?

5 A Yes.

6 Q Why has OFCCP requested information for the Google
7 work force -- contact information for the Google work force,
8 even though it's not going to -- likely not going to
9 interview the entire Google work force?

10 A Well, the main reason is to protect the identity of
11 the employees who choose to speak with us. There's an
12 informant's privilege, you know, that applies throughout the
13 government, to encourage -- that the policy behind it is to
14 encourage the public to provide information to the
15 government. And in exchange for that, we protect their
16 identity to ensure that there's no potential consequences --
17 adverse consequences to them for providing us information.
18 So we take that very seriously and we don't see another way
19 of doing it, other than having them provide the information
20 to us and then we contact the employees directly.

21 Q How could pay decisions in 1998 have any relevance
22 to pay during the review period?

23 A So, going back to what we said about starting
24 salary, so if an employee, you know, doesn't negotiate well
25 and, unfortunately the research says that that has more of an

1 impact on women than men, and that as a result that employee
2 comes in at the same job at a lower salary, it's been shown
3 in studies that that employee will be behind their colleagues
4 that were better negotiators for their entire career.

5 So they're not just missing out on the pay that
6 they would have received that year, but every time there's an
7 increase -- and I know that Google's HR compensation
8 representatives said they will market their merit increase or
9 they'll target it to the market. So if the market is
10 providing a four percent increase, then they will provide a
11 four percent increase. But if your salary is set lower
12 because negotiation had a disparate impact on you, that four
13 percent is going to be less. And then that's going to grow
14 over the time of your career.

15 So, it will, today -- your pay level today is a
16 combination of all of the pay decisions that occurred from
17 your starting salary at your current employer. So, all --
18 every time there's a pay change, which starts -- and it's
19 usually most significant at hire, it goes with disparity, it
20 will never leave you.

21 Q Okay. Ms. Wipper, does Directive 307 -- the
22 publically-available directive that the Agency has -- have
23 any guidance as to whether OFCCP conducts the same analysis
24 with respect to compensation as to every contractor that
25 OFCCP reviews?

1 OFCCP to conduct non-confidential interviews.

2 MR. PILOTIN: Objection, Your Honor. This goes to
3 the whole "typically and usually." I don't see how this is
4 relevant.

5 JUDGE BERLIN: She can answer.

6 THE WITNESS: I can't speak for the whole agency.
7 I know in our region, we -- because of the reasons I've
8 stated about the informant's privilege and the
9 confidentiality, we do everything that we can do protect the
10 employees in an identity when we conduct an interview. So
11 even if there are interviews conducted on-site, there's many
12 others that are conducted off-site.

13 BY MS. SWEEN:

14 Q So are you saying that in your region where you're
15 Regional Director, that in every instance you always conduct
16 confidential interviews and you never coordinate with a
17 federal contractor to arrange for those interviews?

18 MR. PILOTIN: Objection, Your Honor. Again, this
19 goes to the way that the Agency investigates matters.

20 JUDGE BERLIN: You may answer.

21 THE WITNESS: So, to answer a question that says
22 "every" and "never," I'm not going to do that. So, do I have
23 personal knowledge of every single thing happening right now?
24 I'm not involved with every.

25 BY MS. SWEEN:

1 Q Okay. Let me just make it really easy.

2 A Um-hum.

3 Q Do you typically request confidential interviews or
4 have there been instances that you are aware of that you've
5 coordinated with a federal contractor to set up employee
6 interviews?

7 MR. PILOTIN: Same objection, Your Honor,

8 JUDGE BERLIN: Overruled.

9 THE WITNESS: If we did do that, it was because the
10 contractor would not provide us with the information that we
11 needed to conduct the interviews. So, if we have interviewed
12 employees on-site, I'm sure we also asked for the employee
13 contact information.

14 BY MS. SWEEN:

15 Q I'm a little bit confused on your answer, so I'm
16 just going to ask you until I'm not confused. Are you saying
17 that there are instances in which you coordinate with a
18 federal contractor to set up employee interviews?

19 MR. PILOTIN: Objection, Your Honor. This has
20 already been answered.

21 JUDGE BERLIN: Please answer, if you know.

22 BY MS. SWEEN:

23 Q It's just a yes or no question.

24 A Yeah, I don't know.

25 Q So you can't tell me, as Regional Director, being

1 in charge of compliance reviews in your region, that you are
2 aware of any instance that you have personal knowledge of in
3 which you or your team has coordinated with a federal
4 contractor to set up employee interviews?

5 MR. PILOTIN: Objection, Your Honor. We've asked
6 this question and now it's becoming argumentative.

7 JUDGE BERLIN: Yeah, I believe she testified that
8 there have been instances where the employer would not
9 cooperate. And rather than sitting in a courtroom like this,
10 they interviewed some people on-site, which would then not be
11 confidential. But then they also interviewed other people
12 from that employer not on-site that were confidential. So
13 she did concede that much.

14 BY MS. SWEEN:

15 Q Okay. Other than in those instances where you're
16 not getting cooperation, as you have described it, are you
17 aware of any other instances in which your region has
18 coordinated employee interviews with a federal contractor?

19 A Non-management interviews?

20 Q Yeah.

21 A I'm not aware of it, no, other than the instances
22 that the Judge noted, that they would not cooperate.

23 Q Is it possible that that's happened?

24 A Given that we're here today and we've been asking
25 for the contact information from Google and they haven't

1 complied, I'm sure that in our investigations we don't want -
2 - this is a last resort to have to do this. It's very rare
3 that we have to file a denial of access case. So, yes, I
4 could see -- if you're asking me to guess -- I could see
5 where a compliance --

6 JUDGE BERLIN: Well, don't guess. If you don't
7 know, just say that you don't know.

8 BY MS. SWEEN:

9 Q No, I'm asking you very specifically, in those
10 instances where you're not headed to the courtroom, where
11 there isn't, from your perspective, a denial of access issue,
12 are you aware of any instance in which your region has
13 conducted -- has conducted employee interviews -- non-
14 managerial employee interviews -- with the coordination of
15 the federal contractor?

16 A My answer is the same.

17 Q Which is what?

18 A My answer is we would ask for the contact
19 information --

20 JUDGE BERLIN: No, if they cooperate and give you
21 what you want, are there instances where you coordinate the
22 interviews with the employer, anyway, for the non-managerial
23 employees?

24 THE WITNESS: Generally, no. We have done employee
25 interviews on-site. So that has happened. The circumstances

1 which, you know, gave rise to that, I can't testify to every
2 single circumstance, whether we asked for the information,
3 they wouldn't give it to us. We decided to have the
4 interviews, anyway.

5 JUDGE BERLIN: But if I'm understanding Ms. Sween's
6 question correctly, these are instances where they have
7 cooperated and they gave you the contact information.

8 THE WITNESS: Right.

9 JUDGE BERLIN: Are there instances where OFCCP
10 called the employer and says, "We'd like to Bill, Joe, and
11 Sally, can you arrange to have them in your conference room?

12 I know we have their name, address, and phone number, but
13 we'd prefer" --

14 THE WITNESS: No, no. If we have their contact
15 information, we would contact them separately. So, as
16 opposed to talking to them on-site. It's also a resource
17 issue. It's a lot easier to talk to the employees, you know,
18 separately from the on-site, because so much has to happen at
19 the on-site that it just doesn't make sense to do it all at
20 one time.

21 MS. SWEEN: I have no further questions, Your
22 Honor.

23 JUDGE BERLIN: Mr. Pilotin?

24 MR. PILOTIN: I have no questions, Your Honor.

25 JUDGE BERLIN: All right. Ma'am, at this time,

1 you're really done, so you may step down.

2 (Witness excused.)

3 MS. SWEEN: Your Honor, we're going to switch seats
4 here. Would it make sense to take a quick bio-break?

5 JUDGE BERLIN: Sure, say 10 minutes.

6 (Off the record.)

7 JUDGE BERLIN: We'll go back on the record.

8 Ms. Sween, your next witness?

9 MS. SWEEN: Thank you, Your Honor. I'd like to
10 call Frank Wagner, please.

11 Whereupon,

12 FRANK WAGNER,

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

15 JUDGE BERLIN: Have a seat.

16 Ms. Sween?

17 MS. SWEEN: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MS. SWEEN:

20 Q Good afternoon, Mr. Wagner. Could you please state
21 and spell your name for the record?

22 A My full name, my legal name?

23 Q Yes, sir.

24 A Francis, F-r-a-n-c-i-s, Howard, H-o-w-a-r-d,
25 Torrance, T-o-r-r-r-a-n-c-e, Wagner, W-a-g-n-e-r, the Fourth,

1 I-V.

2 Q Thank you, Mr. Wagner.

3 Are you currently employed by Google?

4 A I am.

5 Q What was your date of hire?

6 A April 23rd, 2007.

7 Q What was the job you were hired into?

8 A Director of Compensation.

9 Q Have you held any other positions at Google since
10 2007 and Director of Compensation?

11 A No, except my current title is Vice President of
12 Compensation.

13 Q Can you please describe briefly your educational
14 background?

15 A I have an undergraduate degree in business
16 administration, specializing in accounting and finance from
17 the University of California, Berkeley, with highest honors.

18 I have an MBA in finance from the University of California,
19 Berkeley.

20 Q Can you briefly describe your employment history
21 before joining Google in 2007?

22 A Would you like it in reverse or chronological
23 order?

24 Q Whichever is easiest for you.

25 A Immediately prior, I was for 20 years a consultant

1 with Hewitt Associates, an international compensation
2 benefits firm of which I was a partner.

3 And I worked for three other organization]s before
4 that, but two of which were in the compensation field and one
5 in the finance field.

6 Q Would you say that a majority of your work
7 experience is in the compensation field?

8 A Over 90 percent. So, yes.

9 Q Are your job duties as VP of Compensation
10 substantially similar to your job duties that you held when
11 you were Director of Compensation?

12 A Yes.

13 Q Can you briefly describe your job duties as VP of
14 Compensation for Google?

15 A I'm responsible for the design, the delivery --
16 which is the allocation of compensation to employees -- and
17 the implementation our compensation philosophy for all Google
18 employees below the top 200 executives.

19 Q You just mentioned Google's compensation
20 philosophy. Can you briefly describe what that compensation
21 philosophy is?

22 A Yes. Our compensation philosophy follows
23 essentially three distinct principles. Those principles are
24 that we wish to attract and retain the world's best talent.
25 And it manifests itself on that feature by paying highly

1 relative to the market. So we target well above the market
2 point.

3 The second is we want to foster innovation and
4 performance, so that any incremental compensation -- once
5 someone joins Google, whether it is a salary increase or a
6 bonus award or a stock grant, would all be based off of
7 performance.

8 And the third principle that we follow is that we
9 wish to share our results -- our success with employees
10 broadly. So employees are all eligible for bonus awards, as
11 well as stock grants. And, of course -- and the proportion
12 of that grows that's variable and based on Google's
13 performance with the level of their role.

14 Q Were these principles or philosophies in place or
15 in effect from 2013 through 2015 at Google's Mountain View
16 location?

17 A Yes.

18 Q Who at Google sets compensation for new hires?

19 A The compensation team.

20 Q Does a manager ever set compensation for a new hire
21 right out of college?

22 A No.

23 Q When the compensation team is made aware of their
24 need to set compensation for a new hire, are they given the
25 candidate's name?

1 A No.

2 Q Are they given the candidate's gender?

3 MR. PILOTIN: Objection, Your Honor, these are
4 leading questions.

5 JUDGE BERLIN: I'll allow them.

6 You can answer.

7 THE WITNESS: So, was gender the question that you
8 said?

9 BY MS. SWEEN:

10 Q Sure.

11 A No.

12 Q How about race or ethnicity?

13 A No.

14 Q Did Google have compensation procedures in place
15 during the 2013/2015 time period?

16 A Yes.

17 Q Can you briefly describe what those compensation
18 procedures were for new hires that were recent college
19 graduates?

20 A This will be a somewhat lengthy explanation, if
21 that's okay. Let's take an example an entry level software
22 engineer, which we call Job Code 3403. So, for an entry
23 level software engineer, we gather market data for that role
24 and we review that market data every single year. We set a
25 target for that job based on a percentile of the market.

1 Many companies target the middle of the market,
2 which they call the median of the market -- the middle. But
3 we get -- there's a distribution that we get from our salary
4 surveys and we target the 90th percentile. That is, the top
5 of the market -- we call it the top of the market, the top 10
6 percent of the market. And we set that as our target.

7 So in the example of a software engineer -- and
8 this is -- I'll use round numbers for illustration. Let's
9 say the market median is 60,000. The 90th percentile might
10 be 100,000. When we bring in a new college grad, we bring
11 them in at our baseline offer, which is 80 percent of that
12 market reference point.

13 So in the case if our market reference point is
14 \$100,000, we bring new college graduates in at approximately
15 80,000. And these numbers are illustrative.

16 Q So if I understand correctly, all new hires that
17 are college graduates, are they paid the same starting salary
18 for the same job and the same location?

19 A That is correct.

20 Q Is prior job history -- and by that phrase, I mean
21 all jobs that a new hire held prior to joining Google -- is
22 prior job history a factor that the compensation team
23 considers when setting the base salary for new hires that are
24 recent college graduates?

25 A Well, we base it off the market reference point for

1 the job. So irrespective of what that individual as a new
2 college graduate would be earning, most likely they don't
3 have a job. So we bring everyone up to the minimum or the
4 standard offer baseline, which is 80 percent. And the
5 philosophy behind bringing people in at 80 percent is that we
6 want to bring them in below anyone who is already in the job,
7 so that they can earn incremental compensation and salary
8 increase based on performance.

9 Q Let me just give you an example. For a recent
10 college graduate who maybe their last job was a life guard,
11 would that ever play any role in what Google decides to set
12 as their base compensation?

13 A No, not for any job.

14 Q Okay. So prior job history for a new recent
15 college graduate, does that play any factor when Google
16 considers setting base salary for new hires that are college
17 graduates?

18 A Well, new college graduates, we endeavor to treat
19 them all the same and consistent within each job category.

20 Q This question also goes to recent college
21 graduates: Is prior salary history -- and by that I mean all
22 pay that they've received from prior jobs -- a factor that
23 Google considers when setting their base salary?

24 A Again, for new college graduates, you're asking?

25 Q Yes.

1 A No.

2 Q So now I want to turn to compensation for new hires
3 that are not new college grads, okay?

4 A Um-hum.

5 Q Can you please summarize for the Court Google's
6 compensation procedures from 2013 to and including 2015 with
7 respect to setting the base salary for new hires that are not
8 recent college graduates?

9 A We would generally follow the same principle. We
10 would endeavor to bring them in as -- at our baseline rate of
11 80 percent. And so the intent is we would try to bring in
12 folks at our baseline, regardless of their current salary.

13 So, in that prior example, let's say someone was
14 making the market median of 60,000, we would give them the
15 80,000 minimum. If they're making less than the market
16 median, or 50, we'd give them 80. If they were making 70, we
17 would give them 80. If they were already making 80, we might
18 give a modest or small increase to bring them in.

19 The principle is we try to bring them in as low as
20 possible within our salary below the current employee, so
21 that they can earn future increases based on performance.

22 JUDGE BERLIN: And if they were making 90?

23 THE WITNESS: If they were making 90, we would
24 endeavor to bring them certainly no more than 90, because we
25 don't want them to -- we use the term "leap frog." We don't

1 want them to leap past the current employees who are already
2 in that job and performing well.

3 BY MS. SWEEN:

4 Q And candidates -- new hire candidates typically
5 offered 80 percent of the market reference point?

6 A I would say the majority of cases.

7 Q And could a candidate be offered less than 80
8 percent of the market reference point?

9 A We wouldn't, no.

10 Q And could a candidate -- I think you just mentioned
11 at least one instance in which a candidate could be offered
12 more than 80 percent of the market reference point. Are
13 there any other circumstances, other than what you've
14 described, in which a candidate might be offered more than 80
15 percent of the market reference point?

16 A It would be -- if someone was -- had a high salary
17 already, they were already at the top of the market. For
18 instance, 95,000 or 90, we might try to offer them 90 or even
19 slightly less.

20 Q Does negotiation play any role in setting a new
21 hire's base salary?

22 A Candidate negotiation?

23 Q Yes.

24 A No.

25 Q Is a job family the same thing as a job code?

1 A No.

2 Q What is a job family?

3 A A job family is a professional category of job at
4 Google. So those that are doing similar job duties and
5 responsibilities, but stratified at different levels of
6 capability or skill sets. So a job family could be a
7 software engineer. It could be a product manager. It could
8 be a financial analyst. And there would be different levels
9 within Google within that family.

10 Q And what is a job code?

11 A A job code is the numeric identifier we have for a
12 job family at a specific level. So, in my prior example, a
13 software engineer at Level 3, which is what we call our
14 entering new college grad, is Google Job Code 3403. Level 4
15 is 3404 and Level 5 is 3405, et cetera.

16 Q Is the market reference point that you explained
17 earlier ever tied to a job family?

18 A No.

19 Q Is the market reference point ever tied to -- what
20 is a job level?

21 A A job level can be thought of as a salary grade.
22 And using common compensation vernacular, it is a level at
23 which the people at that job are performing like level of
24 duties and responsibilities within that job family.

25 Q And is a job level ever tied to the market

1 reference point?

2 A A job level? No, no.

3 Q Is the job code tied to the market reference point?

4 A Not by itself. It's a combination of job code and
5 location. So job code and location for the Bay Area has a
6 market reference point. A job code and location for London
7 would have a separate market reference point.

8 Q So we were just talking about base salary for new
9 hires that are not recent college grads. Is the prior job
10 history a factor that Google considers when considers base
11 salary for new hires that are not recent college grads?

12 A We only consider their current compensation.

13 Q Is the compensation team even made aware of a new
14 hire's job history when setting new hire compensation?

15 A No.

16 Q Is prior salary history a factor Google considers
17 when setting base salary for new hires that are not recent
18 college graduates?

19 A No.

20 Q Is it ever relevant to what Google pays them, their
21 prior salary history?

22 A No.

23 Q And why is that?

24 A We only base -- what we offer new hires what
25 they're currently making at the time we send the offer to

1 them.

2 Q Is there ever a circumstance where a new hire
3 candidate's most recent salary with another employer -- so
4 the salary that exists just before they come to Google -- is
5 there ever a circumstance in which their most recent salary
6 would be relevant to their starting pay at Google?

7 A If the current -- if it's the current salary for
8 the job that they're in, is that what you mean?

9 Q Yes, sir.

10 A Yes, that would be relevant.

11 Q And how would that be relevant?

12 A That would be relevant if -- if they are exceeding
13 our baseline offer of 80 percent of MRP -- or market
14 reference point. Sorry, that's our vernacular.

15 Q And you testified to that earlier with the examples
16 of if they would be already at 80 percent or 90 percent,
17 correct?

18 A Correct.

19 Q Are there circumstances where a Google candidate
20 was offered above 80 percent of the market reference point,
21 but it had absolutely nothing to do with his or her salary
22 with another employer?

23 So, for example -- well, I'll just ask you the
24 question.

25 A Could you repeat that?

1 Q Sure. Are there any circumstances you can think of
2 where a Google candidate was offered above 80 percent of the
3 MRP, but it had nothing to do with their immediate, prior
4 salary?

5 A No, I wouldn't think so. I can't think of a
6 circumstance.

7 Q I want to turn now to the process by which Google
8 employees' compensation may change over time. And we're
9 going to first talk about promotions and then we're going to
10 talk about transfers.

11 A Um-hum.

12 Q How did that work? So, how does an employee's
13 compensation change over time -- actually, let's talk about
14 performance increases first. How does an employee's
15 compensation change over time with respect to metric-based
16 performance increases?

17 A So, we do performance-based salary increases at
18 Google on an annual basis. It is based off a formula that we
19 have and it's probably best, again, to do an illustration.

20 It is based off of the employee's performance
21 ratings and then their current ratio to the market reference
22 point. So, let's illustrate and say that we have employees
23 in that prior example who are at 80 percent of the market, or
24 \$80,000. We have several performance ratings. The most
25 common of which is "meets expectations."

1 If one meets expectations, we may increase that
2 person's salary, say from \$80,000, say, up to \$82,000 or
3 \$83,000. So that might be a two and a half to three percent
4 increase.

5 If they're at that same rate of pay, but they're at
6 the next level of performance, which we call "exceeding
7 expectations," that same person might be allocated a five
8 percent salary increase and that might go to 84,000.

9 The next highest level is called "significantly
10 exceeding expectations." And if that person is at \$80,000 at
11 that level of pay, they may get a six or \$7,000 increase.

12 And our highest level is called "superb," and that
13 person might get a 10 percent salary increase at that point.

14 We do have a low performance rating, called "needs
15 improvement," and that person would not be allocated a salary
16 increase.

17 Now, if those -- let's assume that person was paid
18 much higher, they're at 90 percent of MRP. We can go through
19 that same category. At 90 percent of MRP, we stop funding
20 our people who meet expectations. So they would be allocated
21 a zero percent salary increase. A person who exceeds, may
22 get two to three percent or four percent salary increase.
23 "Significantly exceeds" might be five or six. "Superb" might
24 get eight or 10.

25 And what we're trying to do in this philosophy is,

1 A, have whatever rate of pay people are at, their performance
2 affects the magnitude of the increase, But, also, we want
3 to move people in to get them consistent with categories of
4 comparable performance. So if we have people who are meeting
5 expectations, the goal is to move those people together in a
6 cadre and "exceeds," we move them up into a separate cadre.
7 And "significantly exceeds" and "superb" and so forth.

8 Q Does prior job history either prior job history
9 prior to joining Google or prior jobs held at Google have any
10 bearing on what an employee receives in their merit
11 increases?

12 A No.

13 Q And does their prior salary history -- base salary
14 -- either to joining Google or in salaries -- or the salary
15 they held in jobs at Google have any bearing on merit
16 increases?

17 A No.

18 Q So, does the history of an employee's merit
19 increase over time have any relevance to their most recent
20 merit increases?

21 A No.

22 JUDGE BERLIN: Does the -- do the merit increases
23 top out when you hit, say, the 90th percentile of the market
24 reference point?

25 MR. PILOTIN: Only for "meets expectations." But

1 if someone exceeds expectations, we continue funding them at
2 a lesser and lesser amount until they -- but we always will
3 fund people who exceed expectations, significantly exceed
4 expectations at at least one half of how much the market is
5 moving.

6 So, for example, in the United States pay levels in
7 general have been moving about three percent. We always
8 allocate one and a half percent to people, regardless -- who
9 exceed or significantly exceed, regardless of how much
10 they're paid. And in our superb category, we continue to
11 fund them aggressively until we hit 110 percent of the market
12 reference point, but then we allocate them only whatever the
13 market is moving, the three percent.

14 So, people -- we never fully cap out people, except
15 those who meet expectations or those who need improvement.

16 BY MS. SWEEN:

17 Q Does compensation ever look backwards? Does the
18 compensation team ever look backwards to learn an employee's
19 historical merit increase in order to determine what they
20 should be given in a current year?

21 A No.

22 Q So, for example, would a 2008 performance-based
23 merit increase have any impact on a pay decision made during
24 the 2013 through 2015 time period?

25 A None whatsoever.

1 Q I want to now move to promotions. Can you please
2 describe the compensation process as it relates to
3 promotions?

4 A Well, we treat promoted employees who are moving
5 into a new job in the same way that we treat new hires from
6 the outside. What we do is we move them from their level --
7 their current level -- to the next level. But say that the,
8 in this case, from the level three software engineer to the
9 level four software engineer, and we automatically move them
10 up to 80 percent of the next job -- the job into which
11 they're promoted, that market reference point.

12 So, let's say, for example -- I wish I could do the
13 math and make it somewhat simple. Let's say -- and this is
14 an extreme example, let's say the next level was \$150,000 was
15 the market reference point, we would move them up to 120,000,
16 because that's 80 percent of that number.

17 And the only caveat is it is subject to -- during
18 this time frame, it was subject to a minimum and maximum in
19 the United States of a minimum five percent and a maximum 20
20 percent salary increase. But only a small fraction of
21 employees would hit either the mins or the maces.

22 So if you think about that, it's only that person
23 that might be already at or above their current MRP who gets
24 promoted that might hit above the 80 percent at the next
25 level, they might get the minimum five percent.

1 Q For those employees whose compensation increases
2 are due to a promotion, is their job history at Google taken
3 into consideration in setting compensation?

4 A No.

5 Q And why is that?

6 A Well, we believe that we're rewarding people with a
7 promotion for performance at Level N, but they have not
8 performed yet to the expectations at Level N plus one, the
9 job into which they're promoted. So what we want to do,
10 philosophically, is treat them just like we would treat a new
11 intern into that job and allow -- bring them to a minimum and
12 allow them to earn future increases based on performance into
13 this new job that they're being placed into.

14 Q For those employees whose compensation increase is
15 due to a promotion, is their salary history -- and by that I
16 mean each of the salaries associated with each of the jobs
17 they've previously held at Google -- taken into consideration
18 in setting compensation?

19 A No, we have a -- we call it a formula or an
20 algorithm that says they get to move up to 80 percent,
21 regardless of their history or what they're currently paid.

22 Q Is their compensation in the job that they held
23 immediately before the promotion taken into consideration
24 when setting compensation?

25 A No.

1 Q Are there any instances in which that might happen?

2 So the job they held immediately before the promotion taken
3 into consideration when setting their compensation?

4 A No, I can't think of any.

5 Q Can you think of any circumstance in which an
6 employee's job or salary from two years prior to the
7 promotion decision would ever be relevant to setting their
8 compensation in their new job?

9 A No.

10 Q I want to move to a new topic and that is the on-
11 site interview that took place at Google in April of 2016.
12 Were you part of that on-site interview process?

13 A Yes.

14 Q And do you recall being interviewed by an OFCCP
15 representative during that time?

16 A Yes, I do.

17 Q Do you happen to recall who you were interviewed
18 by?

19 A I'm bad with name, but if you said the name I'd
20 probably recall it.

21 Q Was it Jane Suhr?

22 A I don't recall.

23 Q That's all right. Were you under oath during that
24 interview?

25 A No.

1 Q But you understand you're under oath today,
2 correct?

3 A Yes.

4 Q Did Jane Suhr ask you the level and detail of
5 questions that I've asked you today with respect to job
6 history and salary history and their impact on compensation?

7 MR. PILOTIN: Objection as to relevance, Your
8 Honor.

9 JUDGE BERLIN: I'll allow it. Let's see where it
10 goes.

11 THE WITNESS: No, she did not.

12 BY MS. SWEEN:

13 Q Do you recall being interviewed by Carolyn McHam-
14 Menchyk?

15 A I remember the name "Carolyn," yes.

16 Q Okay. And did Ms. Menchyk ask you the types of
17 questions that I've asked you today, for example with respect
18 to job history and salary history as they pertain to recent
19 college grads, recent hires, promotions?

20 A She did not ask me questions about salary history.

21 Q Did she ask you any questions about job history?

22 A She did not ask about job history.

23 Q During your interview with the OFCCP during the on-
24 site, do you recall saying anything to Ms. Menchyk or any
25 other OFCCP representative that is inconsistent with your

1 testimony today?

2 A I -- let me make sure I answer this correctly. I'm
3 testifying consistent with what I recall I told them back in
4 -- when they interviewed me.

5 Q Thank you.

6 Can you tell the Court who Ajit Naimbiar is?

7 A Ajit Naimbiar is -- reports to me directly. He is
8 a Director of Compensation and he manages the day-to-day
9 consulting activities with the different business units at
10 Google.

11 Q Do you know if he was interviewed by the OFCCP
12 during the on-site?

13 A Yes, he was.

14 Q And how do you know that?

15 A He told me.

16 Q Do you have any reason to believe that during his
17 interview with the OFCCP that he said anything to the OFCCP
18 representatives regarding how Google sets its compensation
19 that's inconsistent with what you've testified to today?

20 MR. PILOTIN: Objection, Your Honor, calls for
21 speculation.

22 JUDGE BERLIN: You'll need to lay a foundation.

23 MS. SWEEN: Sure.

24 BY MS. SWEEN:

25 Q Did Mr. Ajit tell you about his conversations with

1 the OFCCP representatives?

2 A He did.

3 Q And did he tell you that they asked him questions
4 with respect to whether job history or salary history is
5 relevant to setting compensation?

6 A I don't recall discussing job history or -- or that
7 the questions related to job history to Ajit. Rather, he
8 told me that they asked questions related to the structure
9 and operation of our compensation program.

10 Q And did you ask him what he told the OFCCP in
11 response to those inquiries?

12 A No.

13 Q And just to clarify, during the on-site interview,
14 just to be very clear, Ms. Menchyk didn't ask you any
15 questions with respect to whether prior job history with
16 respect to new hires was relevant to compensation, did I
17 understand your testimony correctly?

18 A Yes, you understand it correctly.

19 Q And she didn't ask you any questions whether
20 Google's job history was relevant to compensation at Google,
21 is that correct?

22 A She did not ask that.

23 Q Did she ask you any questions about whether prior
24 salary history was relevant to compensation at Google?

25 A No, he didn't.

1 Q Did she ask you -- oh, at any time prior to or
2 after the OFCCP on-site, have you spoken to any current or
3 former OFCCP representatives about any matter?

4 A No.

5 MS. SWEEN: Your Honor, I'm going to ask -- I've
6 been given some information that is significant that I need
7 to confer with my counsel on before I can close this
8 testimony. Would you give me two minutes?

9 JUDGE BERLIN: Certainly.

10 MS. SWEEN: Thank you.

11 (Off the record.)

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

13 I had a conference with Counsel off the record and
14 an issue has surfaced which raises potential questions about
15 the process within the department on this particular
16 investigation and what stage it's at. The information
17 includes some hearsay quotes from people. I don't know how
18 reliable the information is. And it can be understood in
19 different ways. It has a certain level of ambiguity to it,
20 which I'm not going to make any attempt to resolve at this
21 point.

22 But I believe that it is potentially significant
23 enough that it has to be resolved before we can proceed.

24 I understand that Google might have a motion that
25 they might choose to make concerning this information. And

1 so I'm going to ask Google to have whatever motion it wants
2 to file on file in this office under seal no later than this
3 coming Wednesday.

4 I'll give OFCCP and the Department one week to
5 respond, under seal.

6 And then I'll give them an opportunity -- and you
7 should go serve each other with just attorneys only, not the
8 entire service list, just counsel on this case.

9 And once I've received these, I've reviewed them
10 and see what I think we need to do next, I think I'll just
11 issue an order and maybe we'll resume the hearing at that
12 point, maybe something else will be needed. I really have no
13 idea, because I don't even know what the motion would be. So
14 I don't want to suggest what my ruling might be on this.

15 So, I have tried very hard to get this expedited
16 and completed and I've resisted things that caused even minor
17 delays in the process and tried to bring it to a conclusion
18 at the hearing today. So, I've done my best in that regard,
19 but I just don't think I can do anything more and I think my
20 only choice is to adjourn and to allow the motions to -- the
21 motion, if any, to be heard.

22 Ms. Sween, if Google decides that no motion is
23 needed and we can just resume, please just alert me and the
24 Solicitor to your choice. But, otherwise, I'll look forward
25 to your motion by Wednesday.

1 Any --

2 MS. SWEEN: Can I -- a point of clarification?

3 JUDGE BERLIN: Yes. Well, I was going to say does
4 anyone want to be heard?

5 MS. SWEEN: Yes, Your Honor.

6 JUDGE BERLIN: Yes?

7 MS. SWEEN: Two things. One, would it be possible
8 for you to give the moving party an equal amount of time as
9 the opposition party? If you're giving them a week, can we
10 have until Friday to get the motion to Your Honor?

11 JUDGE BERLIN: Yes.

12 MS. SWEEN: Number two, Your Honor had also
13 requested additional briefing that was due next week. Can we
14 get a stay on that?

15 JUDGE BERLIN: Yes.

16 MS. SWEEN: Thank you, Your Honor.

17 JUDGE BERLIN: That deadline is vacated. All
18 right.

19 So I was asked to review a document with respect to
20 this issue. Counsel are aware of what the document is. I've
21 marked that document as ALJ-3 for the record.

22 (Administrative Law Judge
23 Exhibit No. 3 was marked for
24 identification and received into
25 evidence.)

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REPORTER'S CERTIFICATE

TITLE: Office of Federal Contract Compliance Programs,
US Department of Labor versus Google, Inc.

CASE NUMBER: 2017-OFC-08004

OWCP NUMBER: N/A

DATE: APRIL 7, 2017

LOCATION: SAN FRANCISCO, CALIFORNIA

This is to certify that the attached proceedings
before the United States Department of Labor, were held
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complete, true and accurate transcript which has been
compared to the reporting or recording accomplished at the
hearing.

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