

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,
May 26, 2017

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

The above-entitled matter came on for hearing,
pursuant to notice, at 9:00 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
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On behalf of the Defendant:

LISA BARNETT SWEEN, ESQ.

DANIEL DUFF, ESQ.

ANTONIO RAIMUNDO, ESQ.

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San Francisco, California 94104

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WITNESSES:DIRECTCROSSREDIRECTRECROSSALJ

Frank Wagner

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Kristin Zrmhal

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EXHIBITS:IDENTIFIEDRECEIVEDREJECTEDPLAINTIFF

(None marked, nor received.)

DEFENDANT

(None marked, nor received.)

ADMINISTRATIVE LAW JUDGE

(None marked, nor received.)

JOINT

(None marked, nor received.)

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P R O C E E D I N G S

(9:00 o'clock a.m.)

JUDGE BERLIN: This is a resumption of the hearing that began on April 7th. And when we were at the hearing on April 7th, the parties requested sequestration of witnesses who have not testified. So if there are any people here in the courtroom who understand that they will be testifying, who have not yet testified, at this time I will ask you to wait outside, if there's any one -- any witness here. All right.

I believe we left off during Mr. Wagner's testimony. So why don't we resume there? Mr. Wagner?

Good morning. And why don't I swear you again, since it's been over a month? If you'll raise your right hand?

Whereupon,

FRANK WAGNER,

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

JUDGE BERLIN: All right. Have a seat.

And why don't I also take the appearances of counsel again this morning, just so that we'll have it for the record?

1 know, because we've got a fan there, okay?

2 A Okay.

3 Q Just to set the context, on the first day of the
4 hearing you testified that for newly-graduated applicants --
5 and I may just back and forth between newly-graduated
6 applicants or refer to them as campus hires. Do you
7 understand those two things to be the same thing?

8 A Yes.

9 Q Okay. That for newly graduated applicants, that
10 prior salary is not relevant to setting starting salary. Do
11 you remember that testimony, generally?

12 A That's right, yes. I remember and that is
13 correct.

14 Q Okay. And can you remind me why is it that
15 starting salary is not a relevant component for newly -- I'm
16 sorry, why prior salary is not a relevant component to
17 starting salary at Google?

18 A Well, we want to pay those new graduates for the
19 job into which we're hiring them for Google. And we also
20 want to treat them cadre for whatever job they're going
21 into. So we pay them the same.

22 Q Does Google allow these new grads or campus hires
23 to negotiate their salary?

24 A No.

25 Q And why is that? Or why not?

1 A Because we want them to all be paid the same and
2 have the same entry salary.

3 Q Are you aware of what percentage of the employees
4 in the September 1st, 2015, snapshot were campus hires or
5 new grads?

6 A I believe it's approximately 20 percent.

7 Q So would it be fair to say that 20 percent of the
8 employees on the September 1st, 2015, snapshot, that neither
9 prior salary nor the ability to negotiate impacted their
10 starting salary at Google?

11 A I would say for those 20 percent, there was no
12 negotiation and prior salary was not considered.

13 Q Thank you.

14 And besides campus hires or new grads, are there
15 any other situations where all new hires receive the exact
16 same starting salary?

17 A Yes.

18 Q And what types of jobs would those be?

19 A We have certain types of support roles, such as
20 information technology -- IT -- help desk folks, and they
21 all get the same starting pay.

22 Q Now, I want to turn to what I refer to as an
23 industry new hire. Do you know what I mean by "industry new
24 hire," in Google terms?

25 A Yes.

1 Q Okay. What is an industry new hire?

2 A An industry new hire would be someone who is not
3 coming from a college campus, but, rather, from another
4 company or from the industry.

5 Q For industry new hires, is their specific prior --
6 so the amount of money they are actually earning in the job
7 they are coming from -- their specific prior salary --
8 relevant to their starting salary at Google?

9 A Well, for about half of those folks, we will give
10 them at least what we call our minimum salary, which you may
11 recall, what I said before, was 80 percent of our market
12 target, what we call the market reference point, MRP. And
13 that we would pay that minimum for that cadre, regardless of
14 whether they're making half or two-thirds or three-quarters
15 or whatever it might be.

16 Q So, if I understand that correctly, the actual
17 amount of their prior salary plays no impact for that 50
18 percent of the group?

19 A It doesn't affect it, no.

20 Q Are there situations where an industry new hire
21 might try to negotiate a higher starting salary than was
22 offered?

23 A Yes.

24 Q And what instances would that happen?

25 A Yeah. And, to be clear, we get requests for

1 salary negotiations on a regular basis. However, we only do
2 -- negotiate that salary when we're provided new
3 information, such as a competing offer.

4 Q And can you describe how that competing offer
5 piece of information might impact Google's decision making
6 regarding starting salary at Google?

7 A Yes, it's possible. If there is a competing offer
8 with a higher salary than our initial offer, we will
9 typically match that salary. However, we try to curtail the
10 new salary that we offer at 90 percent of our MRP or below.

11 Q And do you know what percent of industry new hires
12 receive a higher starting salary as a result of negotiation
13 in the context of a competing offer situation?

14 A I would estimate that at approximately 10 to 15
15 percent of the -- that cadre.

16 Q I want to go back for just a moment to Google's
17 promotion policies, practices, and philosophies. We talked
18 a little bit about that on day one. And just, again, to set
19 the context, what is Google's policy regarding promotional
20 increases?

21 A During the time period we're discussing, we bring
22 anyone who is promoted up to 85 percent of their new market
23 reference point. And the policy -- the reason why we do that
24 is to align them with their new peers, who are meeting
25 expectations for that job.

1 Q Are there circumstances in which employees in the
2 promotional context, that their new salary, due to
3 promotion, is not at 85 percent of the MRP?

4 A Yes, there's a couple variations -- a few
5 variations.

6 The first is we -- regardless of the person's --
7 if a person goes to 85 percent of MRP and they don't get at
8 least a five percent salary increase, we will increase their
9 salary up to a five percent increase from their prior
10 salary, in line for our pay-for-performance philosophy, one
11 or more people who are being promoted with a minimum.

12 Q So, in that instance, they're going to get at
13 least a five percent increase, is that correct?

14 A That's correct.

15 Q Okay. And is there another situation where they
16 may not be at 85 percent?

17 A Yeah. Also, they're subject to a maximum. So,
18 the maximum model increase that we would propose would be 20
19 percent as -- even if it doesn't get them to 85 percent. So
20 it could be below 85 of MRP, with the 20 percent, in mind
21 that we don't want to give too large of an increase followed
22 by, in subsequent cycles, too small of a performance-based
23 increase.

24 Q And is there any other situation in which a
25 starting or a promoted employee would not be at 85 percent

1 MRP?

2 A So, yes. So people are brought -- and we call it
3 modeled -- for a post-promotion salary increase. Most of
4 them are at the 85 percent level. Some are higher than
5 that, because they're getting the minimum five percent
6 increase. And others are below that, because they get the
7 20 percent maximum.

8 And then the managers can adjust that the proposed
9 or modeled increase, but with the guidance that they should
10 be aligning the salaries of these newly-promoted folks with
11 their new peers.

12 Based on a recent analysis that I've looked at of
13 those salaries, in over 90 percent of the cases the
14 adjustment that the manager makes, when we look at the final
15 salary, it's no more than one percent of a variation of our
16 proposed or modeled amount.

17 JUDGE BERLIN: I just want to back up a moment.
18 You've testified about a lot of this before. And when you
19 were testifying before about the industry new hires, I
20 believe you said that in addition to competing offers, which
21 could result in a different starting salary, prior
22 compensation of the job the person was leaving to come to
23 Google could also have a similar result. Is that right?

24 THE WITNESS: Yes. If they were above the 80
25 percent minimum offer, yes, their prior could be. And --

1 yes.

2 BY MS. SWEEN:

3 Q Going back to the managerial discretion you were
4 just talking about, what's the philosophy around allowing
5 managers some adjustment discretion?

6 A It's to align the pay with folks in the new peer
7 group so that they will -- so that their pay is aligned
8 appropriately in the new job. So it's a prospective look as
9 to that alignment.

10 Q And can you think of any situation in which the
11 manager would look backwards to prior salary for the purpose
12 of making the adjustment in this discretion category we're
13 talking about?

14 A No, the manager would not be looking at past
15 salary. We want them to look prospectively at the new
16 group.

17 Q So, in the three circumstances you just described
18 in which the employee's new salary due to promotion is not
19 at the model 85 percent of MRP, in how many situations would
20 an employee's immediate prior salary impact or may impact
21 their salary after promotion?

22 A So, it would be the people who are either subject
23 to the five percent or the -- minimum -- or the 20 percent
24 max, which is approximately 20 percent of promoted
25 employees. And, of course, conversely, that means that 80

1 percent are not affected by prior salary.

2 Q Ms. Wipper of the OFCCP testified on Day One that
3 Google managers have the discretion to award promotional
4 increases between five percent and 20 percent. Is that
5 accurate, based on your understanding of Google's pay
6 practices and philosophies?

7 A No, that would not be accurate. It would
8 mischaracterize our approach.

9 Q And can you explain to me again why that wouldn't
10 be accurate?

11 A Well, managers don't have discretion between five
12 and 20 percent. They have a modeled amount, which is
13 typically 85 percent of their MRP, in most cases, and they
14 have the ability to adjust that amount. But as I've noted
15 before, that in most of those adjustments, the final salary
16 is within one percent of the model amount in over 90 percent
17 of all cases.

18 Q And can an employee's salary history at Google --
19 so beyond their most immediate salary that they're sitting
20 in -- can their salary history at Google influence their
21 promoted-to salary?

22 A Their history?

23 Q Correct.

24 A Only those -- the immediate salary prior to the
25 promotion for the people subject to the five percent minimum

1 and the 20 percent maximum.

2 Q Thank you.

3 MS. SWEEN: That's all the questions I have, Your
4 Honor.

5 JUDGE BERLIN: Mr. Pilotin?

6 MR. PILOTIN: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. PILOTIN:

9 Q Good morning, Mr. Wagner.

10 A Good morning.

11 Q Now, as part of your preparation for today, have
12 you discussed with anybody your testimony at the April 7th
13 hearing?

14 A Yes.

15 Q And as part of those discussions, have you been
16 made aware of anything that was stated by a witness in court
17 at the April 7th meeting -- hearing?

18 A Could you clarify what you mean by that?

19 Q Sure. So, as part of your discussions regarding
20 your preparation for today, have you been made aware of any
21 testimony that was given during the April 7th hearing?

22 MS. SWEEN: And, Your Honor, I'm just going to
23 object and instruct the client to be mindful of the
24 attorney/client communication privilege and that is just a
25 plain yes or no answer.

1 JUDGE BERLIN: You should answer just yes or no.

2 THE WITNESS: Yes.

3 BY MR. PILOTIN:

4 Q And did your -- was your testimony that was given
5 today affected in any way by the knowledge of the testimony
6 that was given in Court on April 7th?

7 A As far as I -- did I modify my testimony? I don't
8 understand what you mean.

9 Q My question is because you were not supposed to
10 learn about anything, given the sequestration order, about
11 what was said during the hearing on April 7th, my question
12 is whether anything that you said today was informed by the
13 knowledge that you gained about what was stated during the
14 April 7th hearing.

15 A My answer to that would be no. I'm testifying
16 based on what I know about Google compensation practices.

17 Q Okay. Now, you've made a distinction between
18 college and non-college hire, correct?

19 A Yes.

20 Q In most recent years, the majority of Google's
21 hires have been industry hires, correct?

22 A Yes.

23 Q From 2014 to 2015 more than 80 percent of the
24 hires -- or more than 85 percent of the hires into the
25 technical and engineering professional job groups have been

1 industry hires, correct?

2 MS. SWEEN: Your Honor, I'm just going to object
3 on the grounds he hasn't been called as a person who is
4 knowledgeable on this topic and I think this is beyond the
5 scope of the direct.

6 JUDGE BERLIN: If you know the answer, I'll allow
7 it, but don't guess. You can give an estimate.

8 THE WITNESS: I can't -- I don't know enough to
9 give -- to answer that specifically.

10 BY MR. PILOTIN:

11 Q Do you have any sort of estimate with respect to
12 the technology and professional groups?

13 A No, only to the regard that I was aware that
14 approximately 20 percent were -- overall were new grads of
15 our snapshot.

16 Q Now, the distinction that you have made today and
17 at the April 7th hearing between college hires and non-
18 college hires is that college hires always get the standard
19 offer with respect to salary, correct?

20 A That's correct.

21 Q And your testimony is that they always get that
22 standard offer?

23 A As far as I am aware they get the standard offer.

24 JUDGE BERLIN: I just want to clarify about
25 something. I've been hearing mostly about new grads from

1 college as one group of hires, industry hires is another
2 group. But probably a number of the industry hires went to
3 college. So, there might be some hires who are non-college
4 hires into positions that don't require a degree. But this
5 seems -- I'm hearing a slightly different category now:
6 college versus non-college. I just want to make sure we're
7 all still talking about the hires newly out of college
8 versus industry hires, as opposed to those who have degrees
9 and those who don't.

10 MR. PILOTIN: Understood, Your Honor. So I will
11 use the phrase as -- or the terminology that Ms. Sween used:
12 college versus industry hires.

13 JUDGE BERLIN: Okay.

14 BY MR. PILOTIN:

15 Q And the standard offer that's provided to college
16 hires is 80 percent of the market reference point for that
17 particular job, correct?

18 A Approximately, yes.

19 Q Now, your testimony back on April 7th was that
20 with new college graduates, "We endeavor to treat them all
21 the same and consistent with each job category."

22 Do you recall that testimony?

23 A I don't recall saying that specifically, but it
24 would be accurate.

25 Q Now, there's no consideration of competing offers

1 for college hires?

2 A There is consideration of competing offers for
3 college hires.

4 Q And what effect does that consideration have with
5 respect to the college hires hiring?

6 A Well, it doesn't affect salary.

7 Q Does it have any effect on any portion of any
8 compensation offer made to that college hire?

9 MS. SWEEN: Your Honor, this is beyond the scope
10 of the direct. We have been talking just about salary,
11 because the OFCCP's requests are just about salary.

12 So, I think now a discussion about compensation
13 goes well beyond the scope of the direct.

14 MR. PILOTIN: Your Honor, we're focusing on
15 compensation practices, which we made clear throughout this
16 case. Salary is one portion of compensation. And I believe
17 Mr. Wagner was going, maybe talking about another portion of
18 a compensation offer given to a college hire.

19 MS. SWEEN: Your Honor, the subject demands make
20 absolutely no reference to anything beyond salary, in the
21 compensation context.

22 MR. PILOTIN: Your Honor, there's information --
23 there are requests that are made in the subject items that
24 pertain to equity grants and equity, as I understand it, is
25 a portion of a compensation offer.

1 JUDGE BERLIN: And the bonuses, as well. The
2 objection is overruled.

3 THE WITNESS: Could you repeat the question?

4 BY MR. PILOTIN:

5 Q I wish I have the memory to do that. Let me try
6 to reform it.

7 We were talking about competing offers with
8 respect to college hires. And you testified that there is
9 consideration of competing offers with respect to college
10 hires. Do you recall that?

11 A Yes.

12 Q And what consideration is given to competing hires
13 with respect to a compensation package given to a new
14 college hire?

15 A We look at the magnitude of the competing offer.

16 Q And by "magnitude," that means amount?

17 A Total amount, yes.

18 Q And with respect to the compensation package
19 that's offered to a college -- new college hire, what effect
20 does that amount have on what Google offers the new hire?

21 A We could -- if the amount is higher, we could
22 increase the stock component or the sign-on component.

23 Q And what would be -- what magnitude would -- what
24 effect would that have -- well, let me back up.

25 What is the target offer for a college hire with

1 respect to a stock grant?

2 MS. SWEEN: Objection to the extent that the
3 question is vague. If you understand the question.

4 JUDGE BERLIN: Could you reform the question,
5 please?

6 MR. PILOTIN: Sure.

7 BY MR. PILOTIN:

8 Q For a college hire, we spoke about a standard
9 offer that's given with respect to salary, correct?

10 A Yes.

11 Q What is the standard offer given to a college hire
12 with respect to stock?

13 A Well, there are many, because they vary by the
14 job.

15 Q Okay. With respect -- so each stock grant, as I
16 understand it, depends on the job that the college hire is
17 being hired into, correct?

18 A That's correct.

19 Q And what effect would a competing offer have on
20 whatever standard offer that may be with respect to stock?

21 A It might increase it.

22 Q Is there a maximum by which that stock offer will
23 be increased?

24 A In -- there's no policy. But in practice, there
25 would be a maximum.

1 Q And what would that maximum be?

2 A I can't recall the specific number that we would
3 use.

4 Q Is there a minimum by which that stock offer will
5 be increased?

6 A No.

7 Q Will that -- okay.

8 So it's true, then, with respect to college hires
9 on competing offers are considered with respect to that
10 college hire's compensation package, correct?

11 A Yes. On the total of the compensation package,
12 not the salary.

13 Q Is prior --

14 JUDGE BERLIN: I think earlier you testified that
15 when there are these competing offers, if it would make the
16 salary too high you try to emphasize giving stock or some
17 sort of equity grant, rather than adjusting the salary?

18 THE WITNESS: Yes.

19 JUDGE BERLIN: Was that for both new hires and
20 industry hires?

21 THE WITNESS: Correct.

22 JUDGE BERLIN: Okay.

23 BY MR. PILOTIN:

24 Q Now, we've spoken about competing hires with
25 respect to college hires or competing offers with respect to

1 college hires. Does prior salary in any way have an effect
2 on a college hire's stock grant?

3 A No.

4 Q Are there any other portions of the compensation
5 package that are offered to college hires other than
6 starting salary and an equity grant?

7 A Yes.

8 Q And what are the other portions of that
9 compensation package that's offered to a college hire?

10 A Their bonus and potentially a sign-on bonus.

11 Q Would a competing offer have any effect on the
12 bonus that is being offered as part of the compensation
13 package for a starting college hire?

14 A It could.

15 Q Would prior salary have any effect on the bonus --

16 A I'm sorry. When you say "bonus," did you mean --
17 I'm sorry. To clarify, can I ask a question?

18 Q Absolutely.

19 A So when you said "the bonus," did you mean the
20 company regular bonus or the sign-on bonus?

21 Q I'm using "bonus" as you mentioned it earlier.
22 You said bonus and sign-on bonus.

23 A Then I'd like to correct that and say since that
24 would be the annual bonus for a company plan person or a
25 sales bonus, that doesn't change.

1 Q Okay. And to clarify with that, then, when it
2 comes to the annual bonus that's offered as part of the
3 compensation package to a college hire, what do you mean by
4 the annual bonus?

5 A All employees at -- or employees at Google have to
6 participate in the company bonus plan or a sales bonus plan.
7 About 85 percent of our employees are in the company bonus
8 plan, which is paid annually. Another -- about 15 percent
9 of our company is on what we call a sales bonus plan that's
10 based on the sales results and that's paid quarterly.

11 Q And they're informed of that at hire, is that
12 right?

13 A That's correct, yes.

14 Q Okay. So then with competing offers, then, based
15 on your testimony, will have an effect on college hires'
16 sign-on bonus, correct?

17 A It could.

18 Q Okay. And what effect could it have on the sign-
19 on bonus?

20 A It could increase it.

21 Q Is there a standard sign-on bonus that's offered
22 to all new hires in the same way that there is a standard
23 salary offered to all new college hires?

24 A No.

25 Q What is the sign-on bonus then based on?

1 A It is based on job or -- so, the job code, the job
2 into which they are going. Or it is used to offset a higher
3 salary in a competing offer.

4 JUDGE BERLIN: So, you're discussing with a new
5 hire candidate the compensation rate and you -- in order to
6 match a competing offer, decide to offer the candidate
7 stock. Is that a one-time offer, always, or is it an
8 ongoing package every year?

9 THE WITNESS: It would be a one-time offer at the
10 time of hire.

11 JUDGE BERLIN: So it's more like a signing bonus
12 than a salary increase, am I right?

13 THE WITNESS: That's correct. The concept we have
14 is that we are conservative when it comes to providing
15 salary, because that's ongoing. But -- so we use things
16 like a cash sign-on or equity grant that dissipate over
17 time.

18 JUDGE BERLIN: So by "dissipate over time," you
19 mean it repeats at a declining level or?

20 THE WITNESS: So, stock grants -- to clarify, the
21 sign-on bonus is a one time, at time of hire, and is not
22 repeated in any way. An equity grant typically vests or is
23 delivered to the employee over a multi-year period, but it
24 stops at the end, typically, of four years.

25 BY MR. PILOTIN:

1 Q And just to clarify your prior testimony based on
2 the sign-on bonus, either a competing offer or prior salary
3 would have an effect on the magnitude -- could have an
4 effect on the magnitude of that sign-on bonus, correct?

5 A Are we talking about new grads? That would not be
6 the case. I thought we were talking about new grads.

7 Q Okay. Then I misunderstood your testimony.

8 I'm only talking about college hires right now, so
9 new grads. And with respect to new grads, as I understand
10 it, then, only competing offers would have an effect on the
11 sign-on bonus for that new grad, correct?

12 A That's correct.

13 Q Prior salary will not have an effect?

14 A No.

15 JUDGE BERLIN: So, these double negatives get very
16 confusing. So, could you state in a sentence what it is
17 about prior salaries and their effect on sign-on bonuses?

18 THE WITNESS: So, we're talking new college grads,
19 only. We do not look at their compensation in any prior job
20 for a new grad, period, ever. We only look at -- we only
21 look at competing offers, because it's all based off of
22 competing offers into a job that would be similar to what
23 we're offering at Google and what jobs that were held prior
24 to someone graduating from college are irrelevant regarding
25 that. They just aren't part of our calculation.

1 BY MR. PILOTIN:

2 Q Now, with respect to competing offers, does Google
3 ask whether or not the -- as part of the hiring process, ask
4 whether or not a college hire has a competing offer?

5 MS. SWEEN: I think the question is hopelessly
6 vague and overbroad. Is he asking as a policy or as a
7 practice?

8 JUDGE BERLIN: If you know whether there is such a
9 policy or practice, you can answer. Otherwise, you should
10 say you don't know.

11 THE WITNESS: I don't know.

12 BY MR. PILOTIN:

13 Q Do you know more often than not is it the college
14 hire who's raising the competing offer to negotiate the
15 additional compensation?

16 JUDGE BERLIN: If you know.

17 THE WITNESS: I'm not involved in the interaction
18 that staffing has with the candidate, so I would have to say
19 I don't know.

20 BY MR. PILOTIN:

21 Q Now, as I understand it, for college hires the
22 compensation package is -- consists of salary, correct?

23 A Yes.

24 Q An equity grant, correct?

25 A Correct.

1 Q And a sign-on bonus, correct?

2 A Not -- it may, but not necessarily.

3 Q Okay. So potentially a sign-on bonus, correct?

4 A Yes.

5 Q And a disclosure of what that individual's annual
6 bonus will be at the company?

7 A Annual company bonus or quarterly sales bonus.

8 Q Anything else?

9 A They're -- typically in an offer, we might include
10 relocation reimbursement, but I'm not -- that's not part of
11 the compensation offer. That's not what the compensation
12 team generates. We only generate the items that you
13 mentioned before.

14 Q Okay. Now, I want to turn to industry hires, and
15 I'll be careful to use that terminology. So with industry
16 hires, does the same apply? Is it the same compensation
17 package that's given, starting salary, an equity grant, you
18 know, the disclosure of what the annual bonus may be -- or
19 will be -- and potentially a sign-on bonus?

20 A That would be correct.

21 Q Anything else?

22 A Not -- as I mentioned, those are the compensation
23 components that would be included.

24 Q Okay. So now I'm focusing on the industry hires.
25 Is there a target equity grant for non-college -- or, sorry,

1 I promised I would use the right terminology and I'm already
2 breaking the promise.

3 For industry hires, is there a target equity
4 grant?

5 A Yes.

6 Q And what is the target equity grant for industry
7 hires?

8 A It varies by job.

9 Q Okay. So it's the same as respect to non-college
10 hires?

11 A Correct.

12 Q And are competing offers considered with respect
13 to the equity grant for industry hires?

14 A Yes.

15 Q Does prior pay factor into what the equity grant
16 will be for an industry hire?

17 A How do you define "prior pay"?

18 Q Prior pay, as we've been using it and as I will
19 continue to use it, will be that salary immediately prior to
20 joining Google. So the applicant's current salary.

21 A So, could you repeat the question, then?

22 Q Sure. Will an applicant's prior pay have an
23 effect on the equity grant that's provided at hire for an
24 industry hire? So, the way --

25 A I think you're saying does the prior salary have

1 an effect on the equity grant? Is that what you're saying?

2 Q Yes.

3 A Potentially.

4 Q Okay. In what way potentially?

5 A If the person has a higher salary than we would
6 like to offer, we would -- we may offset that with an equity
7 grant.

8 Q And what do you mean by "a higher salary than what
9 we would like to offer"?

10 A Well, we endeavor to bring people in as close to
11 our standard offer as possible. And if someone is highly
12 paid, has a high salary, we may not -- we may offer equity
13 as opposed -- or stock as opposed to that higher salary.

14 Q So in lieu of a higher salary, you may grant
15 equity instead?

16 A Yes.

17 Q Anything else considered, aside from competing
18 offers of prior pay with respect to an equity grant to an
19 industry hire?

20 A When we're setting compensation, those are the
21 things that we consider, that I can think of. I can't think
22 of what else we would consider.

23 Q Would --

24 JUDGE BERLIN: Again, if you make an offer of an
25 equity grant to bring in an industry hire without increasing

1 the salary offer as much, is that a one-time grant that
2 might be less over time or does it become part of an ongoing
3 package that they'll get more grants every year?

4 THE WITNESS: The initial grant is one time. Then
5 when it comes time in the subsequent equity grant cycle, we
6 run an equity grant cycle every year, but we base any
7 subsequent grant off of their performance within that
8 specific job. And so future grants are all based on
9 performance in the job into which they're hired.

10 And the historical grants are not reviewed.
11 They're not part of that planning process.

12 MS. SWEEN: Your Honor, I'm just -- I do want to
13 lodge the objection that I've reviewed the subject demands
14 and historical bonus and historical equity grants are not
15 part of the outstanding subject demands. They may be part
16 of the compensation for which we've produced already data
17 points on.

18 But as far as the subject demands before Your
19 Honor, I don't believe that bonus history and equity grants
20 are part of those subject demands.

21 JUDGE BERLIN: So the salary histories that are
22 being required -- or requested -- or job histories -- are
23 just salary and job only and not any other compensation?

24 MR. PILOTIN: That's incorrect, Your Honor. We've
25 made a request for information from 2014, which encompasses

1 bonus, equity grant, and these various items. So it's
2 incorrect that we haven't requested this information.

3 JUDGE BERLIN: So a snapshot?

4 MR. PILOTIN: Correct.

5 JUDGE BERLIN: For 2014?

6 MR. PILOTIN: Correct, Your Honor.

7 JUDGE BERLIN: How about the history for each
8 employee going back to when they were hired, does that
9 include compensation changes over time or is it restricted
10 to just salary changes over time?

11 MR. PILOTIN: So with respect to this, Your Honor,
12 I mean this is all encompassed within the -- this is
13 primarily going to the September 1st, 2014, snapshot. And
14 as, you know, we've discussed either the -- these equity
15 grants, that's over the course of four years. And I think
16 Mr. Wagner will correct me if I'm wrong.

17 THE WITNESS: The typical vesting period is -- for
18 a new hire offer would be four years.

19 MR. PILOTIN: So the -- for at least from 2010 to
20 2014, given that these stock grants vest over that time
21 period, the Agency is, you know, looking at that in terms of
22 the historical portion of the data requested in the
23 September 1st, 2014, snapshot. However, the complaint does
24 state that with respect to salary history generally for an
25 employee, that it is salary history. But it's incorrect

1 that we have not requested equity information.

2 JUDGE BERLIN: All right. You can continue your
3 question.

4 BY MR. PILOTIN:

5 Q So we were still talking about equity grants for
6 industrial hires. We've talked about prior pay potentially
7 having an effect, competing offers potentially having an
8 effect. Does that -- are there any other items that may
9 have an effect on the industry hire's initial equity grant?

10 A Beyond prior pay and competing offers?

11 Q Correct.

12 A Those are the only things that the compensation
13 team would consider.

14 Q Would --

15 A Plus, of course, the standard offer that we make
16 that's the starting point.

17 Q Would an industry hire's existing equity at his or
18 her prior job have an effect?

19 A For an industry hire, is there a current equity
20 that they have? Yes, it would.

21 Q So in addition to, then, it would be prior pay and
22 competing offers, existing equity would also have an effect?

23 A Yes, if you call "prior pay" salary.

24 Q Okay. Anything else?

25 A It could be -- if we define prior pay as salary,

1 then it could be the bonus that they get at their current
2 job -- their job prior to Google.

3 Q Okay. Anything else?

4 A That's all I can think of at this time.

5 Q Okay. I'd like to then move on to starting bonus
6 with respect to industry hires. Or not starting bonus, let
7 me correct myself. The sign-on bonus.

8 With respect to that sign-on bonus, does prior pay
9 have an effect on the magnitude of the sign-on bonus for an
10 industry hire?

11 A So, if -- prior salary?

12 Q Sure, prior salary.

13 A Possibly if we are asking them or our offer is
14 less than their current salary.

15 Q So in lieu of a higher starting salary, that
16 individual may get a higher sign-on bonus?

17 A They may get a sign-on bonus, yes.

18 Q Or they may get a sign-on bonus, okay.

19 Do competing offers have an effect on the sign-on
20 bonus for an industry hire?

21 A Possibly.

22 Q And would existing equity have an effect on the
23 sign-on bonus for an industry hire?

24 A Not typically.

25 Q When you say not typically, do you mean never?

1 A No.

2 Q So there are -- there is potential that existing
3 equity may have an effect on a sign-on bonus?

4 A Yes, but not typically.

5 MS. SWEEN: Again, Your Honor, equity -- prior
6 equity at an individual's prior job is not one of the
7 subject demands. It has never been asked for.

8 JUDGE BERLIN: I understand. At the witness' last
9 session -- this same witness testified to explain how Google
10 handles a circumstance when a new industry hire is making a
11 very high salary. So, I don't imagine this described the
12 majority of hires or anything near the majority. I imagine
13 it's a small group of people.

14 But this witness, on April 7th, testified that to
15 try to keep the starting salary as close to where the
16 company would normally offer it, instead Google tries to
17 bring in the employee by offering more stock or a starting
18 bonus.

19 So, that opened the door and I think that OFCCP is
20 allowed to question along those lines, because the door was
21 opened.

22 MS. SWEEN: Thank you, Your Honor.

23 BY MR. PILOTIN:

24 Q On the first day, Mr. Wagner, you testified along
25 the lines of -- well, I'll just read the transcript. The

1 question was:

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

7 MS. SWEEN: Your Honor, could we get a page and
8 line, please, so that I can follow along?

9 MR. PILOTIN: Sure. It's page 177, lines 1
10 through 6.

11 MS. SWEEN: Okay.

12 BY MR. PILOTIN:

13 Q And your answer was, "No, I wouldn't think so. I
14 can't think of a circumstance."

15 Do you recall that testimony?

16 A Could you read it again for me?

17 Q Absolutely. The question was:

18 "Are there any circumstances you can think of
19 where a Google candidate was offered
20 above 80 percent of the MRP, but it had
21 nothing to do with their immediate prior
22 salary?"

23 Your answer was, "No, I wouldn't think so. I
24 can't think of a circumstance."

25 That -- your answer was inaccurate, insofar as

1 competing offers are considered and may raise a starting
2 salary above 80 percent -- or 80 percent of the MRP,
3 correct?

4 A I think -- I believe that I answered that at that
5 time with respect to circumstances related to the
6 individual's prior pay only. That may be how I understood
7 it, the question.

8 Q Okay. But just to clarify now, competing offers
9 can elevate an industry hire's starting salary above 80
10 percent of MRP, correct?

11 A That is possible. That was something that would
12 be external or separate from their prior pay.

13 JUDGE BERLIN: Just to you know, my recollection -
14 - I don't have the transcript in front of me -- was that the
15 line of questions was for new hires, for not recent college
16 grads, is it correct that the only salary history that is
17 relevant is current compensation? I thought that was the
18 context, if you read several of the questions and the
19 witness said, "Yes." But that was only with respect to
20 salary history, not competing offers. I think the context
21 did not include factors other than salary history.

22 So, I'm just not seeing any impeachment material.
23 But he has explained that competing offers also can be
24 relevant.

25 MR. PILOTIN: Thank you, Your Honor.

1 JUDGE BERLIN: All right.

2 BY MR. PILOTIN:

3 Q Now, continuing to focus on industry hires, your
4 testimony has been that Google endeavors not to offer an
5 industry hire a starting salary more than 90 percent of MRP,
6 correct?

7 A We try, yes.

8 Q Are there instances in which you will exceed 90
9 percent of MRP?

10 A Yes.

11 Q What is the maximum Google will offer with respect
12 to the industry hires relative to MRP?

13 A It would be extraordinarily rare for us to ever
14 offer an MRP or 100 percent of MRP.

15 Q What would be the maximum, then, that Google would
16 offer -- is there a maximum above 90 percent that Google
17 has?

18 A There is no firm maximum. Such as we don't have
19 firm salary ranges. But -- so, but, anything over 100
20 percent MRP, you know, with the thousands of people we hire,
21 I think I can probably count on one hand.

22 Q What factors would Google consider, then, with
23 respect to making an offer to someone above 90 percent of
24 MRP?

25 A The magnitude of the salary that they currently

1 have.

2 Q Is prior salary the only reason, then, that Google
3 would offer above 90 percent of MRP?

4 A That would be the only typical reason that I could
5 think of.

6 Q Are there any atypical reasons you can think of as
7 you sit here today?

8 A It is possible that if they have a very large
9 bonus at their prior company, but no stock, we potentially
10 could have higher than 90 percent of MRP. That would be
11 atypical, but.

12 Q Any other factor other than prior equity?

13 A No, that's not what I said. I said prior -- a
14 high bonus.

15 Q Oh, I'm sorry about that.

16 A Cash bonus. And that would be -- that would be
17 one -- the more common atypical circumstance.

18 Q Would Google consider education?

19 A What do you mean?

20 Q Would Google consider, essentially, other than the
21 person's prior pay and prior bonus, would Google consider
22 the individual's qualifications?

23 A No. Well, so, if you said for Job X, we're paying
24 for the job and we have a standard offer for the job. If we
25 had two candidates with different educational backgrounds

1 would we pay differently? The answer would be no.

2 Q No. My question is with respect to, you know,
3 where you would offer more than what is, I guess, Google's
4 90 percent?

5 A Well, the typical would be 80 percent.

6 Q Correct. But with respect to offering -- well,
7 let me start with more than 90 percent. Would an
8 applicant's qualifications have any role in determining
9 whether to offer that applicant more than 90 percent?

10 MS. SWEEN: I'm just going to object.

11 Qualifications? Are we talking about education? What are
12 we talking about with qualifications?

13 JUDGE BERLIN: Could you be more specific in your
14 question?

15 MR. PILOTIN: Sure.

16 BY MR. PILOTIN:

17 Q So let me start off with respect to
18 qualifications. I'll start out with education, I'll break
19 it down, since we started there. Would an applicant's
20 education have any effect on the determination as to whether
21 to offer that candidate more than 90 percent of MRP?

22 A No.

23 Q Would that individual's prior job experience have
24 any effect on offering that candidate more than 90 percent
25 of MRP?

1 A No.

2 Q Would -- now going from 80 to 90 percent, the same
3 questions. Would that person's education have any effect in
4 the determination to offer that candidate more than 80
5 percent of MRP?

6 A No. Once the person is in the job or assigned to
7 a job, when it comes to the compensation team with Job X, we
8 prepare the offer based on the job as it's performed at
9 Google.

10 And the compensation team does not assign the
11 person to the job.

12 Q Okay, understood. So education is not a
13 consideration in terms of offering more than the standard
14 offer, correct?

15 A No.

16 Q Nor is that person's prior job experience?

17 A No.

18 JUDGE BERLIN: So, we're going into these
19 negatives again. So, in offering more than the standard 80
20 percent offer, would Google consider education?

21 THE WITNESS: By itself? No.

22 BY MR. PILOTIN:

23 Q And Google would also not consider --

24 JUDGE BERLIN: No, no, no, no.

25 MR. PILOTIN: Okay.

1 JUDGE BERLIN: Don't use the word "not."

2 MR. PILOTIN: I will try to banish that, as well
3 as non-college hires or college hires. I'm trying, Your
4 Honor.

5 BY MR. PILOTIN:

6 Q During the hiring process at -- so far as you
7 know, at what point does Google learn of an industry hire's
8 prior salary?

9 A I'm not -- I don't know the precise time at which
10 that occurs.

11 Q Okay. Does the -- is there a practice or
12 procedure for Google to ask about an industry hire's prior
13 salary?

14 A I'm not involved with the staffing, so I don't
15 know that interaction they have with a candidate.

16 Q At what point does compensation, then, become
17 aware of a industry hire's prior salary?

18 A When we're asked to prepare an offer for the
19 candidate.

20 Q And how do you learn about it through that process
21 of being asked to prepare for -- preparing an offer?

22 A We will get a -- the team would receive an
23 identifier for that particular candidate, it will be
24 determined that they're going into Job X and if there is
25 information about prior compensation and we deem that it is

1 relevant, then we will look at that information that is
2 based primarily on the standards for the job.

3 Q Okay. Is that information -- the prior salary
4 information communicated to -- through what medium is that
5 information communicated to the compensation team? For
6 instance, is it an email?

7 A It would typically be in a system called gHire,
8 which is how we track applicants.

9 Q And does gHire contain a field with respect to
10 prior salary?

11 A Yes.

12 Q Now, I want to turn to merit increases. So these
13 are now incumbents at Google. And at this point, I don't
14 need to make the distinction between college hires and
15 industry hires.

16 Q When it comes to -- current Google employees are
17 eligible for merit increases for their salaries on an annual
18 basis, correct?

19 A Yes.

20 Q And that merit increase is a function of the
21 employee's -- what you call comp ratio and his or her
22 performance ratings for that year, correct?

23 A For the prior two cycles, which are typically a
24 year, yes.

25 Q Okay. And just to clarify, the comp ratio is the

1 ratio between that news director's current salary and the
2 market reference point for the job, correct?

3 A That's correct.

4 Q Now, I'm going to ask you to take a look at
5 Exhibit 216 in your binder. It would be in the binder
6 labeled -- if you've already found it, that's great. And
7 I'm going to ask you to turn to page 83.

8 MR. PILOTIN: While we're doing that, I wanted to
9 let Your Honor know -- and this will be the time to offer it
10 now -- OFCCP revised its exhibits only to add page numbers
11 to assist the Court in finding things, because counsel was
12 looking over at -- I thought it would be a disaster for you
13 to try to figure it out.

14 May I approach the Bench with our revised
15 exhibits?

16 JUDGE BERLIN: Sure. Thank you.

17 All right. Is there any objection if I return to
18 Mr. Pilotin that he gave me before? All right. I'm going
19 to return this to you. Oh, they're not the same.

20 So, this is Exhibit 216, page --

21 MR. PILOTIN: Page 83, Your Honor.

22 JUDGE BERLIN: Thank you.

23 BY MR. PILOTIN:

24 Q And looking at page 83, Mr. Wagner, is this the --
25 basically the formula that's used or an explanation of how

1 the merit increases are calculated for incumbents at Google?

2 A This was the formula for the model amount that
3 Google applied for the planning that occurred in the fall of
4 2014.

5 Q Okay. And does this modeled amount reflect
6 generally the testimony that you've given about how merit
7 increases are done at Google?

8 A Yes.

9 Q Now, I just want to make sure we understand this.
10 On the left side, I'm looking at the table toward the middle
11 of the page, there's a column heading -- discussed -- that's
12 labeled "perf bucket." Do you see that?

13 A Correct.

14 Q And are the rows below, the initials that are
15 there -- the letters that are there -- refer to the
16 different performance ratings an employee may get?

17 A Yes.

18 Q And "I" refers to "needs improvement," is that
19 right?

20 A Yes, it does.

21 Q "CME" is "consistently meets expectations"?

22 A Yes.

23 Q "EE" is "exceeds expectations"?

24 A Yes.

25 Q What does "SEE" stand for?

1 A "Strongly exceeds expectations."

2 Q And what does "S" stand for?

3 A "Superb."

4 Q And you referred to these during your April 7th
5 testimony, if you'll recall.

6 A I believe I did, yes.

7 Q Okay. At the very top along the -- it says, "Pre
8 ADJ comp ratio." Do you see that?

9 A Yes.

10 Q And what does that refer to?

11 A That refers to the salary before we -- before the
12 individual receives their merit increase or their current
13 salary.

14 Q Okay. And then what do the cells underneath the -
15 - that kind of title heading refer to? So, for instance,
16 I'm looking in the corner -- just to take an example, in the
17 corner cells, in the column labeled, "Less than 55 percent,"
18 and next to CME on it, it says, "61 percent." What does 61
19 percent refer to?

20 A Sixty-one percent refers to the comp ratio to
21 which we would move someone who is below 55 percent comp
22 ratio.

23 Q Okay.

24 JUDGE BERLIN: The comp ratio or the merit
25 increase?

1 THE WITNESS: Well, the way that it works is that
2 if someone goes from 80 to 84 percent, we would calculate
3 what 80 percent of MRP is. I would say if MRP is \$100,000,
4 it would go from 80,000 to 84 percent, which -- 84 comp
5 ratio, and that would be a \$4,000 increase or five percent.

6 BY MR. PILOTIN:

7 Q Now, in the lower right-hand corner, I see "MIN."
8 Do you see that?

9 A Yes.

10 Q What does "MIN" refer to?

11 A That means regardless of the comp ratio or -- they
12 would receive a minimum increase.

13 MS. SWEEN: Your Honor, I need to do a belated
14 objection. This exhibit was just brought to my attention is
15 under seal and we have an open courtroom.

16 JUDGE BERLIN: All right.

17 MS. SWEEN: So I would move for this entire line
18 of testimony to be under seal as an initial matter and if
19 we're going to continue this, I'd ask the attendees to
20 leave.

21 MR. PILOTIN: If I may, Your Honor, I mean Mr.
22 Wagner, as he already talked about, we've discussed this in
23 open court on April 7th and we're just referring generally
24 now to how this table works. And I don't see the compelling
25 reason at this stage to evict everybody else in the

1 courtroom.

2 JUDGE BERLIN: All right. I understood the
3 testimony before about how this worked. I see that the
4 chart seems to be consistent with the prior testimony. Is
5 there any reason you need to discuss this chart further or
6 any of the information that's on it?

7 MR. PILOTIN: The only other item, Your Honor,
8 would just be to clarify what the "MIN" stands for.

9 JUDGE BERLIN: I take that to mean the minimum
10 increase that was described in the testimony before.

11 MR. PILOTIN: Okay.

12 JUDGE BERLIN: He stated that in certain
13 circumstances there is a minimum increase. I'm not going to
14 repeat now the testimony. But I take it that's what it
15 means.

16 MR. PILOTIN: That's good, Your Honor. The only
17 reason we -- I wanted to go through this, Your Honor, is so
18 that when we identify it in the brief, we have some
19 additional information explaining it.

20 JUDGE BERLIN: I think you've accomplished that.

21 MR. PILOTIN: Okay. Thank you, Your Honor. I
22 will move on from referring to this.

23 JUDGE BERLIN: Beyond that, I don't know that
24 there's anything I can do, especially, but I don't think we
25 have any numbers that actually came out.

1 MS. SWEEN: There were some percentages, Your
2 Honor. I just wanted to bring it to the Court's attention,
3 in light of the fact that both counsel knew that this
4 exhibit was under seal.

5 So if we're not intending to ask any more
6 questions about this exhibit, we can proceed.

7 BY MR. PILOTIN:

8 Q Now, as you've described it -- well, I'll go
9 ahead.

10 Now, your testimony back on April 7th was that
11 Google has no salary counts on individuals, is that right?

12 A That's correct.

13 Q Now, the -- with respect to merit increases, I
14 believe the term you used is that these are modeled
15 increases, correct?

16 A Yes. And if I could say, to correct the prior
17 thing I just said, is that we don't have caps on individuals
18 jobs. But we do have a maximum salary level that we
19 actually pay for any one job. But for anybody at Google,
20 but that's not specific to their job. Meaning, we don't pay
21 people higher than the VP's salary, for example. Sorry,
22 just to correct that.

23 I'm sorry, could you repeat your other question?

24 Q Sure. So, with respect to the merit increases
25 that Google offers on an annual basis, these are target

1 increases, correct? Modeled increases?

2 A Modeled increases, yes.

3 Q Do managers have discretion to deviate from the
4 model?

5 A They do.

6 Q And when would that discretion be exercised?

7 A We ask to align -- we allow managers to adjust the
8 model amounts to align the individual with their peer set in
9 line with performance. Of course, all of those are subject
10 to review by subsequent levels of management, as well as by
11 the compensation team.

12 Q Is there any other reason why Google would -- or
13 managers may deviate from the modeled numbers?

14 A Well, we allow modest discretion to make
15 adjustments for alignment with peers and align with
16 performance. That's the guidance we give to managers.

17 Q Can discretion be exercised to -- for retention
18 purposes, essentially in an effort to retain an individual?

19 MS. SWEEN: The question is vague, Your Honor.

20 JUDGE BERLIN: Do you mean discretion with respect
21 to merit increases?

22 MR. PILOTIN: Yes, Your Honor.

23 JUDGE BERLIN: All right. You can answer that.

24 THE WITNESS: Discretion could be used to -- one
25 might give a higher increase -- a manager might do that in

1 order to send a positive message reflecting performance,
2 which could have a retentive effect. But that's not the
3 guidance we give managers on salary increases.

4 BY MR. PILOTIN:

5 Q Is it the guidance that you give with respect to
6 any other increase dealing with compensation?

7 A Yes.

8 Q Well, what guidance, then, would that be?

9 MS. SWEEN: Your Honor, this is well beyond the
10 scope of the direct, as well as subject demands, and I'm
11 getting concerned that this is guiding into an area that's
12 not before Your Honor.

13 JUDGE BERLIN: This does seem to be something -- I
14 mean, there are many, many parameters of data that OFCCP is
15 requesting. But I'm not sure that I saw anything on that
16 long list of parameters that would go into efforts of
17 retention. Is there something there?

18 MR. PILOTIN: Again, Your Honor, this pertains to
19 just generally understanding the cause of why we are seeing
20 disparities. And we have requested a broad set of data when
21 it comes to 2014. And with respect to that set of data, it
22 would be helpful to know and understand how these decisions
23 are being made. Because, ultimately, OFCCP is looking for
24 the cause of these issues.

25 MS. SWEEN: Your Honor, we're not here on a

1 determination as to cause, we're here on a denial of access
2 case with respect to whether or not the subject demands are
3 reasonable and relevant. And my concern is that we are
4 going too far down the path here and, ultimately, having
5 this witness testify on things that are well beyond direct
6 examination.

7 JUDGE BERLIN: There is a point where trying to
8 understand -- trying to offer the Administrative Law Judge
9 an explanation for how salaries are set in order to show why
10 OFCCP should be entitled to the information begins, instead,
11 to be discovery on a merits case. And I think you've cross.
12 So I'm going to sustain the objection. But I understand the
13 point that there are many factors that OFCCP wants to
14 examine.

15 MR. PILOTIN: Understand, Your Honor. Thank you.

16 JUDGE BERLIN: And let me be clear, then, that I'm
17 not making any judgments about the merits. So, for example,
18 Google could argue on the merits that it is legitimate to
19 offer someone who has an offer from another company more
20 money to get them to stay and it is not discriminatory or
21 not illegitimate in any way. So I'm not foreclosing or
22 making any rulings that would relate to a merits case.

23 BY MR. PILOTIN:

24 Q I want to continue on with merit increases, but
25 I'm going to use -- because I want to understand in terms

1 of, you know, the progression that we're looking at. I will
2 not use Exhibit 216 and the numbers used on there. I'll use
3 kind of the general feedback that you gave at the April 7th
4 hearing to model this, so that we can understand what's
5 going on.

6 JUDGE BERLIN: So, can't you just use hypothetical
7 numbers?

8 MR. PILOTIN: I will ground it as much as I can,
9 Your Honor, in what Mr. Wagner testified to on April 7th,
10 publically. But I will not use the numbers that are given
11 in the exhibit.

12 JUDGE BERLIN: I don't recall him using any
13 factual or real data, specific increase amounts for specific
14 job performances on specific jobs. So as long as you
15 compare them with real data in terms of testimony, right?

16 MR. PILOTIN: Well, there was some data that was
17 offered, Your Honor, but let me elicit -- well, I don't want
18 to re-elicite it, because we already have it in the April 7th
19 record.

20 There was some testimony that was given then
21 regarding, you know, someone being at the 80th percentile of
22 MRP getting a larger bonus -- or, sorry, larger merit
23 increase than somebody who was already at the 90th MRP
24 level. And that once that person hits the 110th percentile,
25 that person will get only the minimum, which Mr. Wagner,

1 back on April 7th, would be about three percent, based on
2 how much the market is moving.

3 So I was just going to use those principles in
4 terms of this hypothetical, rather than use the actual
5 figures that are provided in the exhibit.

6 MS. SWEEN: Your Honor, in the interest of moving
7 this along, I'm not quite sure that hypotheticals really add
8 anything to the evidence. The witness -- as Mr. Pilotin
9 just indicated -- was pretty clear on what actually happens.

10 JUDGE BERLIN: I did understand the testimony
11 before. And that, you know, the people at the highest
12 rating, they always want to get some merit increase, but
13 once you get to a certain salary level, they will eventually
14 top out.

15 So, I do recall on that. I'm only characterizing
16 it, I'm not trying to repeat or say verbatim anything that
17 was said before.

18 But do we need more on that?

19 MR. PILOTIN: With respect to making our burden of
20 proof, Your Honor, our burden of persuasion, I think it's
21 important that we go through this to demonstrate the need
22 for -- they've contested whether non-salary history is
23 necessary. And they've also contested whether or not prior
24 salary and starting salary is necessary. And this
25 hypothetical goes to that issue.

1 MS. SWEEN: Your Honor, the burden is not
2 necessary. It's whether it's relevant.

3 JUDGE BERLIN: You just want to show that people
4 who are given a discriminatory starting salary, it will be
5 perpetuated by the merit increases over time, because of
6 their percentage of the starting salary and each salary
7 progression after that?

8 MR. PILOTIN: Yes, Your Honor, that's part of it.
9 As I mentioned, I'm not talking about burden here.
10 I'm talking about our burden of proof.

11 JUDGE BERLIN: Okay, I get that part.

12 MR. PILOTIN: And we want to show that, yes, you
13 know, as -- you know, if someone who comes in at the 80th
14 MRP is up against someone who comes in at the same time
15 doing the same job at the 90th MRP and both individuals
16 perform superbly thoroughly that -- throughout a given set
17 of years, that that person at the end of the process who
18 received the 80th percentile will still be earning less than
19 the person who came in at the 90th percentile.

20 JUDGE BERLIN: Mr. Wagner, is that correct?

21 THE WITNESS: He has to repeat the --

22 JUDGE BERLIN: If somebody is hired at the 80th
23 percentile of the market target rate and another person
24 starts at the 90th in the same job on the same day, and they
25 both work there over a period of years, and their

1 performance is rated identically at the time, will the one
2 that started at the 90th percentile each year make more
3 money than the one who started at the 80th percentage?

4 THE WITNESS: Most likely the answer to that would
5 be no. That our system is designed to make those pay levels
6 converge.

7 JUDGE BERLIN: Okay. Can you explain that?

8 THE WITNESS: So, at any given rate -- let's say
9 someone is hired at the 90th percentile. They will not --
10 it's likely that they're going to meet expectations for
11 their first cycle. It is extraordinarily rare. I don't
12 know if we even have a person that's like a superb rating
13 for their first cycle, for example, for their first year.
14 That would be extraordinarily rare.

15 So that person who came in higher would likely not
16 be given a salary increase. And the person who's performing
17 well, who came in at 80, would get a large salary increase.

18 So -- and we don't drop that person at 90, because
19 we're going to give them the chance to continue to increase
20 their performance. And if they don't and one -- person A --
21 regardless of gender and situation -- person A and person B,
22 the idea is that if their performance is sustained over
23 time, that they will converge and they will be paid
24 similarly.

25 So it does not persist. That is not the design of

1 our compensation system.

2 JUDGE BERLIN: Do you want to follow-up on that?

3 MR. PILOTIN: Yes. And this is the need, Your
4 Honor, why we need to do the hypothetical, because at least
5 the way I understand Mr. Wagner's testimony of it, there's
6 the hope that they will converge over time. But it could
7 take many years for it to converge. It could -- you know,
8 in the immediate year afterwards, the folks are not going to
9 be paid similarly. And as Your Honor --

10 MS. SWEEN: Your Honor, I need to interrupt. This
11 -- this is OFCCP testifying at this point in time. This is
12 not a question and answer series.

13 JUDGE BERLIN: He's arguing himself.

14 Can you not base that on the table?

15 MR. PILOTIN: Yes.

16 JUDGE BERLIN: I can read the table. We have it
17 on the table. It's been admitted. And I can do these
18 calculations or if you submit a brief and I'll see it.

19 I'll allow a few questions on this, but I'm trying
20 to keep the fact that the document is sealed into account
21 and it's only temporarily that I have an opportunity to rule
22 on a motion. But it is sealed now. So I'm trying to fit
23 that into account, without canceling you. But to some
24 extent, with the witness' testimony that he just gave --
25 which you can follow-up on -- I understand how it works and

1 the idea -- the concept. I can see, you know, how it worked
2 out at the time. But at the same time, the chart is on the
3 record. But, go ahead.

4 Let's ask the hypothetical and let's see how it is
5 and then we rule on it.

6 MR. PILOTIN: Thank you, Your Honor. And I want
7 to do the hypothetical, in part, because Mr. Wagner's answer
8 was "no." And so we --

9 JUDGE BERLIN: All right. You can proceed.

10 MR. PILOTIN: Okay. Thank you, Your Honor.

11 BY MR. PILOTIN:

12 Q So, I'm going to speak loudly and try to use this
13 chart, because, number one, I used to be a fourth grade
14 teacher and so I like to use charts.

15 JUDGE BERLIN: If you could move that microphone,
16 just so we want to make sure this is recorded.

17 MR. PILOTIN: Plus, I want to ground this in
18 something and numbers -- part of the reason I became a
19 lawyer is I can't handle numbers. So I'm going to try to
20 write this down.

21 We have two individuals who come in at the same
22 job at the same time for job one. And the MRP for that job
23 is 200,000 -- just for illustrative purposes. We have two
24 individuals -- since I heard the job this morning, we have
25 Jack and Diane.

1 Jack comes in with either prior pay or a competing
2 offer that -- you know, that warrants a 90 percent MRP.
3 Diane comes in with an MRP of 80 percent, with no -- because
4 she had no prior pay or competing offer.

5 Someone will definitely correct me if I'm wrong,
6 90 percent of 200 is 180. And then 80 percent of 200 is
7 160. And I now want to go through this -- what the Judge
8 talked about in terms of, you know, kind of progressions
9 thereafter. So the status happened in
10 2010.

11 In 2011 -- now I've done it -- in 2011, both Jack
12 and Diane perform at some rate -- superbly their second year
13 there. As I understand it, you said that at a minimum Jack
14 would be entitled to at least a three percent raise, is that
15 right?

16 MS. SWEEN: That misstates testimony, Your Honor.

17 BY MR. PILOTIN:

18 Q Or some magnitude with respect to Diane, correct?

19 Or, no. Jack would be entitled to some raise,
20 correct?

21 A If they were both superb performers, of course,
22 that is highly unlikely that someone who's hired in 2010
23 would get superb in 2011, but, yes.

24 Q But assuming that they got the same performance
25 rating, they both would get a raise, correct?

1 JUDGE BERLIN: He has already testified that
2 wasn't necessarily true. If, for example, if they got just
3 "meets," then the one at the 90 percent might not get a
4 raise.

5 THE WITNESS: They likely would not, yeah.

6 BY MR. PILOTIN:

7 Q If they both got more than "meets" --

8 JUDGE BERLIN: But he testified they usually get
9 "meets" in their first year. I mean, you can design it
10 however hypothetically you want, but the testimony was the
11 usually beginning review would be "meets."

12 MS. SWEEN: Your Honor, again, I'm just going to
13 object. It sounds like the Court understands this process,
14 and I don't know that a hypothetical is anything other than
15 redundant to the testimony that's already been given.

16 JUDGE BERLIN: Is there something you have a
17 question about that I don't understand?

18 MR. PILOTIN: Well, my question is this -- and
19 then perhaps we can solve it in this way.

20 JUDGE BERLIN: Okay.

21 BY MR. PILOTIN:

22 Q Is there -- is it your testimony that if Jack and
23 Diane get better than "meets" in the other incidents in
24 which Jack and Diane get, you know, better than "meets" in
25 terms of their performance rating, will, in the subsequent

1 year, they both be earning the same?

2 A Could you say that again?

3 Q Sure. So, with the "meets" standard, there's some
4 understanding that perhaps Jack will not get a raise,
5 correct?

6 A At the 90th? That would be correct, yeah.

7 Q If they get better than "meets" -- and I forget
8 what performance rating is above "meets" --

9 JUDGE BERLIN: What is the next one?

10 THE WITNESS: Exceeds expectations.

11 BY MR. PILOTIN:

12 Q If they both get "exceeds expectations," will they
13 be earning the same in 2011?

14 A No.

15 Q If they both --

16 A It will be unlikely.

17 However, the comparison to Jack and Diane is not
18 the right comparison. It's to the entire peer set.

19 Q But Jack and Diane would not be earning the same,
20 correct?

21 A Correct.

22 Q And the same goes for all performance ratings
23 above "meets," correct?

24 MS. SWEEN: The question is vague.

25 MR. PILOTIN: I can go through each individually.

1 JUDGE BERLIN: Well, with all of these same
2 assumptions, the rating is above "meets" -- yes?

3 MR. PILOTIN: Correct, Your Honor.

4 BY MR. PILOTIN:

5 Q The same assumption. It's any sort of performance
6 rating above "meets." In that second year, Jack and Diane
7 would not necessarily be earning --

8 A Unlikely.

9 Q -- it's unlikely they'd be earning the same?

10 A In the second year? We do look at -- we ask
11 managers to look within their teams and pay people
12 appropriately based on their performance. No reconvergence
13 over time is how I'd say it.

14 Q Okay, convergence over time.

15 But in that second year, will they be paid the
16 same?

17 A Perhaps not. I can't say yes or no, since this is
18 not the only detail you need to know to assess this.

19 Q What other details do I need?

20 A Well, the design of our system is to ensure that
21 people who are similarly situated as a group would be paid
22 similarly relative to MRP. There can be outliers -- males
23 and females -- when you took two together, they -- because
24 who could not be -- who could be outliers of the cadre, but
25 in general for the entire group, the design is intended to

1 have alignment.

2 Q Over time, correct?

3 A Yes. But we have tens of thousands of people,
4 right, in -- at Google.

5 Q But in that immediate second year, they may not be
6 -- Jack and Diane may not be aligned, these two individuals
7 -- hypothetically?

8 A They may not, but that's hypothetical.

9 Q Okay. So, given that this may happen over time,
10 all OFCCP currently has right now is one point in time. To
11 understand any disparity between Jack's and Diane's
12 salaries, it would be knowing their starting salary would
13 show light on that current disparity, correct?

14 MS. SWEEN: And, Your Honor, I'm just going to
15 object on the grounds that the hypothetical presumes
16 disparity exists in favor of the man over the woman. I
17 don't think that this hypothetical is anything other than
18 prejudicial, because it's making an assumption that is favor
19 of OFCCP's position.

20 There very well may be lots of instances in which
21 the woman comes in at 90 percent and the man comes in at 80
22 percent.

23 JUDGE BERLIN: I'll allow it. I'll bear that in
24 mind. You can answer.

25 THE WITNESS: Could you repeat?

1 BY MR. PILOTIN:

2 Q If we have -- if OFCCP has evidence, as was
3 testified to on April 7th, that there are pay disparities
4 between men and women and we only have one snapshot of that
5 -- we see Jack as being paid more than Diane -- knowing
6 where Jack and Diane came in at, would shed light on where
7 that disparity is coming from, correct?

8 MS. SWEEN: Calls for speculation and it's well
9 beyond the scope of the direct examination. And it also
10 goes to the merits, as compared to what's before the Court
11 today.

12 MR. PILOTIN: With respect to that last one, Your
13 Honor, we're talking about relevance here and what sheds
14 light on the current disparity that the Agency is seeing.

15 MS. SWEEN: I don't know that the standard is
16 shedding light as compared to relevance.

17 JUDGE BERLIN: So, I think that this is actually
18 argument. You are arguing what data you need to draw these
19 inferences. You're not asking him how he sets compensation
20 at Google, how the raises are done, how they're calculated,
21 what the factors are. You're offering him an argument about
22 why you need to look at something to understand that
23 something happened.

24 And you should just argue about that, in your
25 argument. So the objection is sustained. It's

1 argumentative.

2 BY MR. PILOTIN:

3 Q Okay. So, Google did a pay equity analysis at the
4 end of 2016 that showed no pay disparities between men and
5 women, correct?

6 MS. SWEEN: The question is beyond the scope of
7 the direct.

8 JUDGE BERLIN: I'm not even sure why it's
9 relevant. Can you tell me why it's relevant?

10 MR. PILOTIN: Sure, Your Honor. We are trying to
11 establish the relevance of particular items that OFCCP has
12 requested. And, obviously, Google has contested that.

13 Google has claimed that it has done a pay equity
14 analysis, looking at 2016 data, to establish the relevance
15 of our requests, I think it's important to know what Google
16 used on its own to determine what it used to perform its
17 equity analysis. Because, insofar as Google used it, it
18 cannot then argue that OFCCP's request for the same
19 information is relevant.

20 MS. SWEEN: What Google did in 2016 is not
21 relevant to what the OFCCP knew at the time it issued its
22 scheduling letter.

23 JUDGE BERLIN: I agree. I am not going to decide
24 the case based on how Google does it. I'm going to decide
25 it based on OFCCP's presentation about what it needs and

1 why.

2 So, you need to -- I'm not going to take it as an
3 admission. They can do it however they want to do it.

4 I'm sure if, for example, they considered none of
5 the parameters you're asking about, you would not, you know,
6 say that I should consider that in deciding whether your
7 requirements are relevant or not. And I'm not going to take
8 it as an admission.

9 So, let's just focus on the narrow questions under
10 the defenses that have been raised and the demands that
11 OFCCP have made in this expedited proceeding that we're
12 trying to conclude today.

13 MR. PILOTIN: Understood, Your Honor.

14 JUDGE BERLIN: All right.

15 MR. PILOTIN: We have no further questions at this
16 time.

17 JUDGE BERLIN: All right. I have a few questions.

18 EXAMINATION

19 BY JUDGE BERLIN:

20 Q So, Mr. Wagner, you've given a lot of testimony
21 about compensation for new hires in 2013 to 2015.

22 A Yes, Your Honor.

23 Q And I assume that Google has many employees or had
24 many employees during that same period of time who were not
25 new hires?

1 A That's correct.

2 Q So, for some of those other employees who are not
3 newly hired in 201 to 2015, were those people hired at a
4 time that Google negotiated salaries?

5 A The way I would answer it is that we have employed
6 the same approach that I've described since I arrived at
7 Google.

8 Q And when was that?

9 A 2007.

10 Q And when you say the same, do you mean that all of
11 the testimony that you gave would apply to all of those
12 people hired since 2007, excepting the top 200 employees who
13 are outside of your purview?

14 A I would say that the general approach of trying to
15 hire people toward the bottom of -- or toward our standard
16 offer and curtailing salary amounts as it approached MRP is
17 accurate and that's what we've done.

18 JUDGE BERLIN: All right. Ms. Sween, redirect?

19 MS. SWEEN: I just have one, Your Honor.

20 REDIRECT EXAMINATION

21 BY MS. SWEEN:

22 Q Mr. Wagner, do you know for sure whether there is
23 a specific field in gHire that is allocated to a prior
24 salary?

25 A I do not.

1 JUDGE BERLIN: Mr. Pilotin?

2 MR. PILOTIN: Just a follow-up.

3 RECROSS-EXAMINATION

4 BY MR. PILOTIN:

5 Q How, then, since the compensation team does
6 consider prior salary with respect to starting salary, how
7 is that information communicated to the compensation team if
8 it's not in a field in gHire?

9 MS. SWEEN: Number one, misstates the prior
10 testimony, as the question as stated is overbroad. There
11 was no number two, but that's the objection.

12 JUDGE BERLIN: Well, one of the issues is about
13 the burden on Google, so I would like to understand how this
14 information is stored and communicated. It gives me a
15 better sense of the burden on producing it.

16 So, how does -- how does your compensation group
17 find out about prior salary?

18 THE WITNESS: Prior salary. There is a space in
19 our offer work flow -- that's our terminology for it --
20 within gHire that allows our compensation analysts to see
21 the job into which the person is going. And that allows us
22 to populate -- it can be populated with a standard offer or
23 something that might differ from a standard offer. And
24 there is prior compensation information in that field.

25 Candidly, I don't even go into the system and look

1 at it. So, I don't know the specific steps an analyst will
2 take or what fields that are the specific fields that are in
3 there.

4 JUDGE BERLIN: So, you don't know?

5 THE WITNESS: Yeah.

6 BY MR. PILOTIN:

7 Q To your knowledge, is there any other field or any
8 other source for this information other than that field that
9 may be in gHire?

10 A Or fields.

11 Q Or fields.

12 MS. SWEEN: Calls for speculation.

13 JUDGE BERLIN: If you know, you can answer, but
14 don't guess.

15 THE WITNESS: I don't know.

16 JUDGE BERLIN: He said he didn't know.

17 MR. PILOTIN: No further questions, Mr. Wagner.

18 MS. SWEEN: Nothing more, Your Honor.

19 JUDGE BERLIN: All right. Sir, thank you very
20 much.

21 THE WITNESS: Thank you.

22 (Witness excused.)

23 JUDGE BERLIN: Why don't we take a 10-minute
24 break.

25 (Off the record.)

1 JUDGE BERLIN: Ms. Sween, your next witness,
2 please?

3 MS. SWEEN: Yes, Your Honor. We're going to call
4 Kristin Zrmhal, please.

5 MR. ELIASOPH: Your Honor, before the witness
6 takes the stand --

7 JUDGE BERLIN: Oh, I'm sorry, Mr. Pilotin isn't
8 here.

9 MR. ELIASOPH: That's okay. I will be handling
10 the next witness, anyway.

11 JUDGE BERLIN: All right.

12 MR. ELIASOPH: Your Honor, this Court ordered that
13 the parties were to submit a witness list and that the
14 witness list must contain a summary of the testimony the
15 witness will provide, a precise statement of what the
16 testimony will prove, and a detailed explanation of the
17 relevance of the testimony. Quote, "General statements
18 about the topics the testimony will cover are not
19 sufficient."

20 I have a copy here of the witness list that Google
21 provided the Court and provided OFCCP. This witness list
22 does not put OFCCP on notice as to what this testimony will
23 be, in clear defiance of the Court's order.

24 JUDGE BERLIN: Mr. Eliasoph, we had a pre-trial
25 conference on the record. I asked each side to identify the

1 witness they would be calling specifically. We discussed
2 why they were going to be called. There were no objections
3 to anything on the witness list. So that objection is
4 overruled.

5 If there some questioning that completely takes
6 OFCCP by surprise, then let me know. But this was not a
7 case where depositions were allowed. On OFCCP's motion, it
8 is an expedited hearing. Virtually no discovery allowed,
9 other than request for admissions, and there was one
10 deposition I allowed the defense to take. And so there's
11 none that you can do that have some element of surprise at
12 hearings like this.

13 So, if there was an objection, the time to make it
14 was the pre-trial conference. But if you are completely
15 surprised, let me know.

16 All right. Let's proceed with the next witness.
17 Whereupon,

18 KRISTIN ZRMHAL,
19 having been first duly sworn by the Administrative Law
20 Judge, was examined and testified as follows:

21 JUDGE BERLIN: Please have a seat.

22 Ms. Sween?

23 MS. SWEEN: Thank you, Your Honor.

24 DIRECT EXAMINATION

25 BY MS. SWEEN:

1 Q Good morning, Ms. Zrmhal.

2 A Good morning.

3 Q Can you spell -- state and spell your name for the
4 record?

5 A Kristin Zrmhal. That's K-r-i-s-t-i-n, the last
6 name is Z-r-m-h-a-l.

7 Q Do you currently work at Google?

8 A Yes, I do.

9 Q And what is your current job title?

10 A I am the Senior Legal Operations Manager.

11 Q How long have you held that position?

12 A I was promoted to this position in the summer of
13 2016.

14 Q Have you held any other positions at Google?

15 A I've had a couple of other titles at Google,
16 always within the Legal Department.

17 Q And beginning -- you joined Google when?

18 A In January of 2011.

19 Q And can you just briefly describe for the Court
20 your career history at Google?

21 A Sure. I started in January 2011 as the discovery
22 support team lead. We then changed job ladders and titles
23 on my team and I was the discovery program manager. That
24 was in 2012.

25 I was then promoted to Legal Operations Manager in

1 2014. And ultimately promoted to Senior Legal Operations
2 Manager in 2016.

3 Q And just can you briefly describe your education
4 background?

5 A Yes. I have a BS in economics from Miami
6 University in Ohio, and currently getting my MBA at UC
7 Berkeley, at the School of Business. I graduate in December
8 of this year.

9 Q Before joining Google, did you have any
10 professional experience managing document collection or
11 document review in preparation for litigation matters or
12 audits?

13 A I did. Prior to joining Google, I was a
14 consultant at Navigant Consulting Group from 2004 until
15 about 2007. And then from 2007 until 2010, I worked as
16 Ghiron Consulting Group. My responsibilities were related
17 to litigation and e-discovery support for a variety of
18 different clients, including Google, managing large teams of
19 data collection, analysis, and document production.

20 Q What were your job duties when you became Legal
21 Operations Manager in 2014?

22 A So, I -- throughout my tenure at Google, I have
23 been responsible for managing a team of project managers and
24 technologists that collects data, documents from Google
25 employees and Google internal repositories. We analyzed the

1 documents. We make them available for our lawyers and then
2 ultimately produce them.

3 Q And do you have any responsibility over budgeting
4 or forecasting the costs related to those projects?

5 A I do. I'm responsible for setting our annual
6 budgets, for litigation support, as well as preparing
7 analyses for individual cases, for how much time spent for
8 each case, for forecasting as well as keeping track of those
9 on a monthly basis.

10 Q And have your job duties changed in any
11 significant manner since becoming Senior Legal Operations
12 Manager in 2016?

13 A I have the same responsibilities.

14 Q How many employees are on the Google discovery
15 operations and project management team that you oversee?

16 A There are 21 people on my team. There are 12 on
17 the operations side and nine project managers.

18 Q And on the operations side, are those operation
19 data? What does "operations side" mean?

20 A So, there's two different teams. One is managed
21 by a man named Danny. He -- his team does our data
22 collection, our processing analysis -- which means running
23 search terms and analyzing it, making it available for our
24 lawyers. And then another team is responsible for document
25 productions.

1 Q Since joining Google in 2011 on the discovery
2 operations and project management team, approximately how
3 many litigation matters have you either participated in or
4 have managed and supervised?

5 A I've managed or supervised over 500 matters in the
6 six years that I've been at Google.

7 Q And those would be related to collection of
8 documents, production of documents, and those types of
9 things?

10 A That's exactly right.

11 Q When did you -- did you become involved in the
12 OFCCP collection of documents and information in relation to
13 OFCCP's request for information for its September 2015
14 compliance review?

15 A Yes, I've been involved.

16 Q And when did you first become involved in that?

17 A In January of 2016, someone from our people
18 operations teams -- our HR team -- reached out to my team
19 for assisting in responding to the request.

20 Q And can you describe for the Court what was your
21 understanding of what you were being asked to do at that
22 point in time?

23 A At that point, we wanted to meet with them to help
24 them understand exactly how to collect and produce the
25 documents in response to the request.

1 Q Did the HR team at that point tell you that they
2 had begun collection efforts and ask you for any particular
3 assistance at that point?

4 A At that point, they reached out to my team,
5 because they felt that they lacked the resources available
6 to collect all of the documents. At that point, we were
7 talking about resume and interview information and they
8 didn't have the resources available to do that. So they had
9 heard about my team, the discovery operation team, that does
10 this for most of our matters, and reached out to us for
11 technical support.

12 Q Can you describe the steps that your team took in
13 order to coordinate Google's efforts to respond to the
14 OFCCP's requests from January 2016 to the present?

15 MR. ELIASOPH: Your Honor, I'm going to object.
16 Google, in the last witness, was very clear that the
17 testimony today should be limited to the subject items. This
18 review has included other aspects of Google's hiring
19 process. It appears they're attempting to elicit testimony
20 that has nothing to do with the subject request.

21 MS. SWEEN: Your Honor, this all goes to a
22 demonstration of how burdensome it's been to collect to
23 date, through the present.

24 The current request in this witness will also
25 testify with respect to her job duties, to anticipate the

1 burden to collect the subject demands.

2 JUDGE BERLIN: I'll allow it by way of background,
3 so that I can get the whole picture of the burden. But
4 let's try to focus mostly on what the current demands will
5 require. But I'll allow some testimony on this.

6 MS. SWEEN: Sure

7 BY MS. SWEEN:

8 Q Ms. Zrmhal, can you please describe briefly for
9 the Court the steps that you and your team took in order to
10 respond to the OFCCP to date?

11 A Yes. We met with a number -- we gathered a team
12 together, a Project Manager from my team, as well as
13 discovery counsel and staff attorneys, to evaluate how to
14 collect the documents and produce -- review and produce
15 them. So, essentially, we had to work with the engineers on
16 our gHire team, which stores a lot of our interview
17 information, candidate information, and figure out how to
18 extract the contents out of that data base. The documents
19 aren't normally accessible in a way that you can extract
20 them out, for privacy issues -- for privacy reasons. So, my
21 team coordinated with engineers, as well as attempted a
22 number of different methods to extrapolate documents out in
23 a way that would be readable and usable.

24 From there, once we figured out -- it took us
25 quite a few weeks to figure out exactly what to do. We had

1 engaged with two or three of the gHire engineers. We worked
2 with -- at that point, had 15 staff attorneys lined up and
3 ready to review these documents and finally got them out
4 after, you know, weeks and months of trying to figure out
5 and coding different scripts to get the data out.

6 Once we got the documents, we wanted to ensure
7 that we were reviewing them before just producing them, and
8 the 15 staff attorneys went through every single page by
9 page, to redact out personal information for our employees.

10 At that point, it became too burdensome for our
11 team and we had to outsource some of the work to a third
12 party vendor at a lower rate, because the team was sort of
13 bogged down with the amount of work for this particular
14 case, and we support many cases at Google. So, we
15 outsourced the work to third party vendors to finish the
16 redaction of this information, so that we could prepare it
17 for outside counsel to analyze and prepare the production
18 side.

19 Q And you mentioned the gHire engineers. Was it
20 your understanding that they had systems in place that could
21 extract this information?

22 A No. We did not have systems in place and
23 attempted multiple different tools that we had already
24 available to us, but ultimately they had to build new
25 scripts into it to extract this information in a way -- like

1 I said -- that would be useful to both our attorneys and the
2 receiving party.

3 Q Do you have an approximate amount of time that it
4 took those gHire engineers to build that tool?

5 A We estimated about 40 hours.

6 Q And can you generally describe what types of
7 documents were collected and produced by your team in
8 response to the request?

9 A Sure. So, as I mentioned, we had collected some
10 candidate information resumes. We also went through and
11 collected various policies and guidelines. So, guidelines
12 related to hiring, related to firing, related to, you know,
13 termination of employees, related to job histories,
14 promotions, user guides for how to use the different tools
15 at Google, a lot of different documents that both a manager
16 would see, as well as the employees would see related to
17 these topics.

18 Q And approximately how many documents in total or
19 pages in total do you understand you collected and produced
20 in response to the OFCCP's request?

21 A We produced about 329,000 documents, which is
22 about 740,000 pages.

23 Q And do you know approximately how many items of
24 applicant flow data -- which you mentioned earlier -- has
25 been provided as a result of your collection efforts?

1 A There were over a million. I think it was close
2 to 1.3 million data points that we provided.

3 Q Is one of your job responsibilities to keep track
4 of how many employee hours are spent responding to the
5 document and data request?

6 A Yes. As part of our role as a manager, we -- I am
7 responsible for ensuring that we have the appropriate number
8 of people available, for full-time and temp workers, to
9 respond to requests that we get. So, I do this on a semi-
10 regular basis.

11 Q And what's your best estimate of the number of
12 hours your team, the gHire engineers, internal and external
13 reviewers spent in order to collect, process, and review the
14 documents that Google produced to OFCCP?

15 MR. ELIASOPH: I'm going to object. That's
16 incredibly vague.

17 JUDGE BERLIN: Overruled. Don't guess, but if you
18 can give an estimate or a range, that's fine.

19 THE WITNESS: So, we have an internal system that
20 we use for our staff attorneys in order to answer their
21 time, so they spent 600 hours, approximately, on reviewing
22 the documents and redacting -- as I had alluded to before.
23 There was 15 of them.

24 We also, as I mentioned, contracted with a third
25 party vendor, who actually invoiced us, so there were five

1 people from that vendor that spent an additional 600 hours
2 on this redaction and review exercise. My team, we
3 estimated between scripting, collecting, loading the
4 documents, quality control checking that we had everything,
5 and then the analysis was about 300 hours, with -- it was
6 either six or seven people on my team.

7 As I mentioned, we talked to the gHire engineers.
8 There was a couple of them -- they estimated about 40 hours
9 on building the script. We also had the people operations -
10 - or HR team -- that we coordinated with, and they estimated
11 about 200 hours were spent just on aggregating this data.

12 BY MS. SWEEN:

13 Q Do you know approximately how much time your
14 outside counsel spent in assisting in the collection and
15 document review process?

16 A I looked at the invoices to evaluate how much time
17 and it was about 600 hours.

18 Q In total, do you know what that number adds up to?

19 A In total of all of my team -- meaning the project
20 management and operations -- the staff attorneys, the
21 engineers, the people operations, and the outside counsel
22 hours, is about 2,300 hours, total.

23 Q And other than your team and the gHire team --
24 strike that. You actually answered that already.

25 Do you know approximately how many Google

1 employees in the people operation department worked on
2 responding to this request? I think you just answered that,
3 but I just want to make sure.

4 A I believe it was 10.

5 Q Are you generally aware of the information that
6 has been provided to date by the people operations team in
7 response to the OFCCP's request? Is there anything that you
8 haven't told us already that's been produced?

9 MR. ELIASOPH: Objection, vague as to what
10 information is being referred to.

11 JUDGE BERLIN: Overruled.

12 THE WITNESS: So, what I understand, we have
13 collected and produced policies and procedures related to
14 hiring, termination, promotion, salary information,
15 guidelines related -- and trainings relating on how to use
16 the systems for our managers and employees, for how to use
17 gHire and the compensation tools and systems. So quite a
18 bit of information that we would see as both managers and
19 employees related to any of those topics that I mentioned.

20 BY MS. SWEEN:

21 Q You mentioned 1.3 as a collection number and we
22 were talking about applicant flow data at that point in
23 time. Is there a difference, do you recall, between the
24 number of data points that were produced for compensation
25 data versus applicant flow data?

1 A Oh, yes, I believe there were different -- the
2 data points that we are talking about on the spreadsheets.
3 So there was 1.3 -- I believe one million, 1.3 million, data
4 points related to applicants. And then four or 500,000 data
5 points related to compensation. So, separate and apart from
6 the 1.3.

7 Q Okay. Do you recall whether the 1.3 million data
8 points related to compensation?

9 A I don't recall.

10 Q Okay. And with respect to just the compensation
11 data, are you aware of the total time associated with the
12 collection review processing and disclosure of just the
13 compensation data, the number of hours that that component
14 took?

15 A The compensation data was pulled by our
16 corroborations team. And, again, I think there was about 10
17 people that worked on it.

18 Q Okay. And I think you mentioned before, is one of
19 your job duties is to estimate the cost to Google in
20 responding to these types of request for information,
21 document gathering?

22 A Yes.

23 Q And have you estimated the total cost to date, not
24 including outside counsel fees, to Google in order to
25 respond to the OFCCP's document request?

1 A So what we did was estimate our internal man hours
2 and how much that would cost, yes.

3 Q Okay. And do you have a number that you came to
4 with respect to that estimate?

5 MR. ELIASOPH: Objection, Your Honor. At the
6 prehearing conference, the only information we received
7 about this witness, they did not indicate that they would
8 present a cost estimate on how much complying with the
9 subject requests would be.

10 JUDGE BERLIN: Overruled. You can cross-examine.

11 BY MS. SWEEN:

12 Q You can answer the question. Do you have an
13 estimate in mind with respect to how much it's cost Google
14 to date, not including outside counsel fees, in order to
15 respond to the OFCCP's requests?

16 A Yes, we estimated about \$250,000.

17 Q Okay. And how would you characterize that
18 estimate?

19 MR. ELIASOPH: Objection, vague.

20 JUDGE BERLIN: Sustained.

21 BY MS. SWEEN:

22 Q Can you give me an idea of whether that is a high
23 estimate, a low estimate, a mid-estimate? How would you
24 characterize it?

25 MR. ELIASOPH: Objection, leading.

1 JUDGE BERLIN: I'll allow it.

2 THE WITNESS: So, to create that estimate, what I
3 did was essentially look at and evaluate the data for how
4 many hours we spent on the particular project. And then
5 evaluate based on an hourly fee. So it's pretty low and
6 conservative, because what we worked out on the hourly fee
7 isn't necessarily what people's salaries are or our --
8 because they're not hourly employees, but, rather, the level
9 of work that is required.

10 So, as an example, for our staff attorneys, they
11 did not use their full compensation package. I estimated
12 what the third party vendor used, which is a much lower
13 number.

14 BY MS. SWEEN:

15 Q And in that estimate, did you include any
16 component with respect to technology or infrastructure your
17 costs or anything like that?

18 MR. ELIASOPH: Objection, leading.

19 JUDGE BERLIN: I'll allow it.

20 THE WITNESS: No. I just included the number of
21 hours. There's other pieces of my job that I'm responsible,
22 including clearing software, licensing software, purchasing
23 hardware. I didn't amortize that data across this
24 particular case, because we have so many different cases.
25 So this is just the people hours.

1 BY MS. SWEEN:

2 Q And are there any other components, other than the
3 people hours that you included in your cost estimate, other
4 than what you've already testified to?

5 A No.

6 Q Do you know what Google has spent in outside
7 counsel fees in order to respond to OFCCP's request?

8 MR. ELIASOPH: Objection, relevance.

9 JUDGE BERLIN: You can answer yes or no. Do you
10 know how much?

11 THE WITNESS: I know how much our outside counsel
12 has spent related to the collection, review, and production
13 component.

14 BY MS. SWEEN:

15 Q Okay. And what was that amount?

16 A Over \$210,000.

17 Q And so what is your best estimate of Google's cost
18 to respond to the OFCCP's request for data and information
19 to date?

20 A So, it's just under \$500,000.

21 Q Do you have any estimation of what it would cost
22 Google to proceed in responding to OFCCP's subject demands?

23 MR. ELIASOPH: Objection, vague.

24 JUDGE BERLIN: You can answer yes or no.

25 BY MS. SWEEN:

1 Q Let me strike that and I'll back up.

2 Are you aware of the pending subject demands that
3 are at issue in this case?

4 A Yes.

5 Q Okay. And you have a general awareness of what
6 those categories of information are?

7 A Yes.

8 Q Okay. And can you describe to the best of your
9 understanding what categories of information that is?

10 A Yes.

11 So, as I understand it, there's three categories
12 of data that we were asked to produce. The first category
13 is name, contact information, for about 20,000 -- 25,000
14 employees.

15 The second is a number of different data points,
16 job history, salary history, compensation history. I think
17 it's over 85 data points that have been asked for.

18 And then the third question or working of data is
19 for a prior year snapshots for -- I believe the date was
20 September 1st, 2014.

21 Q And have you spent any time estimating the cost to
22 Google with respect to their internal reviewers or their
23 external third party reviewers, not including outside
24 counsel? Have you spent any time estimating what the total
25 cost to Google would be to continue to respond to the

1 subject demands?

2 A We evaluated about how much time it would take to
3 collect that information.

4 Q Okay. And what was that estimate?

5 A So, I spoke with a number of different teams,
6 because this would require coordination between the people
7 operation team, the stock admin team, the compensation team
8 -- all different people. So it would be about 10 different
9 people, each taking 40 -- you know, so about 400 to 500
10 hours.

11 Q Okay. And do you have a cost estimate related to
12 that or do you use the same analysis you did before? It's
13 the same analysis you had used before for that 400 to 500
14 hours?

15 A Yes.

16 Q Do you have any particular cost estimate?

17 A It could be as much as \$100,000.

18 MS. SWEEN: No further questions, Your Honor.

19 JUDGE BERLIN: So the 400 to 500 hours you said
20 was to collect the information, does -- you also spoke
21 before about reviewing it, redacting things -- are you
22 including that in the four to 500 hours?

23 THE WITNESS: No, I didn't include that because
24 when we come up with an estimate of the review, it's best to
25 have the data in front of you to understand exactly how much

1 time it would take and we don't have that data collected
2 yet, so it's difficult to estimate.

3 JUDGE BERLIN: Mr. Eliasoph?

4 MR. ELIASOPH: I'm sorry, is the question -- have
5 you concluded your direct?

6 MS. SWEEN: I did say, "Thank you, Your Honor."
7 But I do have one follow-up question before cross, if you
8 don't mind.

9 JUDGE BERLIN: Any objection?

10 MR. ELIASOPH: No.

11 JUDGE BERLIN: All right.

12 BY MS. SWEEN:

13 Q Ms. Zrmhal, has -- to your knowledge, has Google
14 begun collecting any of the information related to the
15 subject demands?

16 A No.

17 MS. SWEEN: Thank you, Your Honor.

18 JUDGE BERLIN: Mr. Eliasoph?

19 MR. ELIASOPH: Thank you.

20 CROSS-EXAMINATION

21 BY MR. ELIASOPH:

22 Q I want to go -- I'll start where you ended there.
23 You indicated that with respect to the subject demands, you
24 estimate just the collection of that information will be
25 four to 500 hours? Did I understand that right?

1 A That's right.

2 Q Okay. Can you break that down for me?

3 Could you start with, where is -- let's go
4 demand-by-demand. Name and contact information, where is
5 that information stored?

6 MS. SWEEN: Objection, Your Honor, it's beyond the
7 scope. We did not talk about name and contact information.
8 We talked about gathering documents relevant to subject
9 demand, other than the name and contact information.

10 MR. ELIASOPH: Your Honor, the witness just
11 testified that she considered all three categories and that
12 this was an all-in estimate.

13 JUDGE BERLIN: I'm going to allow this for a time,
14 but I don't anticipate allowing you to go through 30 or 40
15 different parameters and, also, this is, again, not
16 discovery for later use. So -- but some, I'll allow.

17 MR. ELIASOPH: Understood, Your Honor.

18 JUDGE BERLIN: Okay.

19 So you can answer the question. Do you still have
20 in mind the question Mr. Eliasoph asked?

21 THE WITNESS: Would you mind asking it one more
22 time?

23 MR. ELIASOPH: No problem.

24 BY MR. ELIASOPH:

25 Q So, name and contact information, are you aware of

1 how that information is stored?

2 A No.

3 Q And have you done an estimate on how burdensome or
4 how costly -- strike that.

5 How many hours it would take to gather name and
6 contact information?

7 A I don't have an estimate for that.

8 Q Okay. Thank you.

9 Now, the 2014 snapshot, do you know where the
10 information is stored with respect to that snapshot?

11 A No.

12 Q Are you aware of any category of information
13 that's been requested that's not electronically stored?

14 MS. SWEEN: The question is vague as phrased,
15 overbroad.

16 JUDGE BERLIN: Overruled.

17 THE WITNESS: I'm not specifically aware of where
18 the electronic or non-electronic data sources that -- where
19 information that has been requested is stored.

20 BY MR. ELIASOPH:

21 Q Okay. But you're not specifically aware of
22 requests -- or you're not specifically aware of requests
23 that would be -- let me try again.

24 You're not specifically aware of responsive
25 information that is not electronically stored?

1 MS. SWEEN: The question is vague, overbroad.

2 JUDGE BERLIN: Well, she said she doesn't know
3 whether what's electronic and what isn't. So she doesn't
4 know.

5 You're just asking the question another way. But
6 you asked it already once.

7 BY MR. ELIASOPH:

8 Q So, for the 2014 snapshot, how many hours will it
9 take to compile the information that OFCCP has requested?

10 A I don't know.

11 Q So that was not part of your estimate?

12 A It was part of just -- we analyzed approximately
13 how many hours it would take for all three of the
14 categories, based on talking to a number of different teams
15 and then estimating how many people it would take to do that
16 and how long it would take them to do that, but not
17 specifically that request, that one request.

18 Q So the estimate you're providing the Court today,
19 you're not aware of its component parts?

20 MS. SWEEN: Misstates the testimony.

21 BY MR. ELIASOPH:

22 Q Are you aware of its component parts?

23 MS. SWEEN: Is the question is she aware of the
24 subject demand component parts?

25 JUDGE BERLIN: Do you mean the three components:

1 The contact information, the salary history, and the
2 snapshot? Or are you talking about something else?

3 MR. ELIASOPH: I'm just asking -- she's provided
4 an estimate. I want to know how it was built.

5 BY MR. ELIASOPH:

6 Q So, it sounds like from your testimony -- and I'm
7 just trying to understand how this estimate came about --
8 that it was not built by segregating out the 2014 snapshot,
9 the hours that would be required to compile that, versus the
10 other requests, which would be the prior history and the
11 salary history. So your estimate was not done that way?

12 MS. SWEEN: Objection, Your Honor, to the extent
13 he's asking the witness to shoe horn her answer into a 2014
14 snapshot, as if that exists at Google, as compared to the
15 component pieces that go into a 2014 snapshot.

16 MR. ELIASOPH: Your Honor, this objection is
17 argumentative and leading the witness.

18 JUDGE BERLIN: How did you arrive at the estimate
19 that you testified to? So what it would cost to comply with
20 OFCCP's current request.

21 THE WITNESS: So, we -- I sat down with people
22 from the compensation team, the people operations team.
23 They had information from the stock admin team and we sort
24 of just walked through approximately how many people they
25 would have to reach out to and how long they expected those

1 people would have to work to gather information. It's in a
2 number of disparate systems, of which I don't know the
3 names, but they said they would have to query multiple
4 different systems and calculate this information. And so it
5 was basically information that was provided to me.

6 BY MR. ELIASOPH:

7 Q So you don't have personal knowledge of the
8 underlying information that goes into this estimate?

9 MS. SWEEN: Misstates the testimony.

10 BY MR. ELIASOPH:

11 Q Do you have personal knowledge of the underlying
12 information?

13 A Based on my conversation -- the information is
14 based on my conversations and working through with a couple
15 of people.

16 Q Okay. So, did -- based on that conversation, what
17 is your understanding -- based on that conversation, do you
18 have any understanding on the specific number of hours it
19 would take to gather the 2014 snapshot?

20 MS. SWEEN: Misstates the testimony.

21 MR. ELIASOPH: I'm asking a question.

22 MS. SWEEN: You said --

23 THE WITNESS: I'm not sure I actually understand
24 your question.

25 JUDGE BERLIN: So, you were saying you didn't

1 really, yourself, divide it into thee three categories of
2 documents or anything. Do you have an estimate of how long
3 it will take Google in terms of hours of work to come up
4 with a full response about the 2014 snapshot?

5 THE WITNESS: I don't have an estimate for the
6 specific snapshot, no. Just the three together.

7 BY MR. ELIASOPH:

8 Q Okay. What can you tell me about your estimate as
9 to how it was put together, other than the fact that you
10 spoke to multiple teams? Can you subdivide the 400, 500
11 hours in any way?

12 A I can subdivide them just based on the different
13 people that we talked to on each teams have the data, but
14 that's -- but that's not specific to the three requests.

15 Q Okay. We -- I think the Court and we would love
16 to understand how it takes 400 to 500 hours to gather the
17 information. So if you can provide what your separate team
18 members said, even though we have no ability to verify the
19 information, please.

20 MS. SWEEN: Your Honor, that's argumentative.

21 JUDGE BERLIN: No, I'll allow it. If you could,
22 you know, just -- it's a little -- it calls for a narrative,
23 it's very broad, but maybe just describe what you talked
24 about with the various teams in a little more detail?

25 THE WITNESS: Sure. There's, essentially,

1 multiple data bases that contain information -- either
2 current information or historical information. And so the
3 estimates from people came from the time it would take to
4 create the script, to extract the content, and, in certain
5 instances, compile it and do mathematics to put everything
6 together the way it's been asked for, because there's so
7 many different data points that exist in multiple different
8 systems.

9 I didn't go through and outline every single
10 system that they would have to query from, but we were
11 estimating based on their knowledge and what we've done in
12 the past, to just query data bases, put the information
13 together. And when I say "query," that means you have to
14 write specific code and scripts to ensure you're getting the
15 right data points and then calculations of those data points
16 for the request.

17 BY MR. ELIASOPH:

18 Q So, what information needs specific scripts to be
19 written in order to extract it?

20 MS. SWEEN: Calls for speculation.

21 JUDGE BERLIN: If you know, you can answer.

22 THE WITNESS: All of the requests have to be
23 pulled in some way, but I don't know specifically which ones
24 have scripts already filled versus which ones don't.

25 BY MR. ELIASOPH:

1 Q So, you have no ability -- your estimate -- are
2 you able to identify specific items that would be
3 particularly time consuming to extract?

4 A I can provide an example of what's more difficult
5 than one might think. The example being if it relates to
6 stocks and the price of a vest -- vested stock at a certain
7 time in history is not necessarily stored in the data base,
8 so it has to be queried or analyzed to appropriately come up
9 with the value of it.

10 The same is true for some historical information
11 and job information. It might not exist in a static state,
12 and so it has to be queried through multiple systems.

13 Q Now, do you know if that stock information is also
14 available in W-2 data?

15 A I'm not sure what you mean.

16 Q Are you aware if Google maintains W-2 data
17 involving its employees?

18 MS. SWEEN: Calls for speculation beyond her own
19 personal knowledge of herself.

20 MR. ELIASOPH: I asked if she was aware.

21 JUDGE BERLIN: You can answer. If you don't know,
22 say that you don't know.

23 THE WITNESS: I know that I have a W-2. I don't
24 know where that data is stored or how it gets aggregated.

25 BY MR. ELIASOPH:

1 Q Okay. Do you know if Google complies with FLSA
2 regulations that require individual employee level records
3 to be maintained in a safe, accessible, central location,
4 and must be available within 72 hours after notice of the
5 Department of Labor?

6 MS. SWEEN: Your Honor, calls for --

7 JUDGE BERLIN: This one is, "Do you know?" That
8 was the question.

9 THE WITNESS: I don't know.

10 BY MR. ELIASOPH:

11 Q Do you know if Google maintains employee level
12 data?

13 MS. SWEEN: The question's vague.

14 MR. ELIASOPH: I'm just asking --

15 JUDGE BERLIN: Is there any information at Google
16 that's organized by the employee, that you know of?

17 MS. SWEEN: The question's overbroad and vague.

18 THE WITNESS: I really don't know how to answer
19 the question.

20 BY MR. ELIASOPH:

21 Q Do you -- are you aware of whether Google
22 maintains its payroll data?

23 A I assume it --

24 Q If you don't know, you don't know.

25 JUDGE BERLIN: Are you aware of a payroll data

1 base? You know, some companies have a payroll service that
2 does their payroll for them, and they might keep records and
3 they might not. Maybe the payroll company does. But do you
4 know if Google has a payroll data base?

5 THE WITNESS: I don't know if we have it -- if we
6 maintain it or if it's maintained elsewhere.

7 BY MR. ELIASOPH:

8 Q So, are you -- are you at all familiar with gComp?

9 A I'm familiar with the tool as a manager that has
10 used it.

11 Q And are you familiar with the type of information
12 that's stored in it?

13 A I've never accessed the back end of it, so I only
14 know what's presented to me as a manager.

15 Q And are you aware that merit increases are stored
16 in gComp?

17 MS. SWEEN: Your Honor, this is beyond the scope
18 of the direct examination.

19 JUDGE BERLIN: I'll allow it, if you know.

20 THE WITNESS: I don't know anything about how the
21 data is stored or where it is stored. I know the interface
22 that we call gComp, and that it presents information about
23 merit increases.

24 BY MR. ELIASOPH:

25 Q Okay. And it also presents information about

1 promotion data, doesn't it?

2 A What do you mean by "promotion data"?

3 Q When promotions occurred, how much it was.

4 MS. SWEEN: Calls for speculation.

5 MR. ELIASOPH: I'm asking the witness if she
6 knows.

7 JUDGE BERLIN: Would you please direct your
8 comments to me? Thank you.

9 You can answer, if you know.

10 THE WITNESS: I'm having trouble, because I don't
11 fully understand the question. You said how much in a
12 promotion?

13 BY MR. ELIASOPH:

14 Q Is there any promotion information as far as you
15 are aware in gComp?

16 A There's -- there can be information displayed in
17 the gComp interface related to promotions.

18 Q Okay. And is there bonus data displayed there?

19 A There's bonus data displayed in the gComp
20 interface.

21 Q And is there equity information displayed there?

22 A For certain levels, there is equity information
23 displayed.

24 Q And stock increases, are they displayed there?

25 A No, not that I'm aware of.

1 MS. SWEEN: Your Honor, I'm going to object on the
2 grounds that this is now getting into one of those 32,000
3 categories of information that you indicated, we weren't
4 going to go down this track. This individual has not been
5 put on the stand to be an expert with respect to our gComp
6 data system. She interfaces as a manager and, therefore,
7 her personal knowledge with respect to what's displayed
8 there is as a manager, not as a data collections analyst,
9 because she doesn't own that system.

10 She would have to go to somebody else to ask
11 what's on that system. So this whole line of testimony is
12 irrelevant.

13 JUDGE BERLIN: I'm going to allow a few more of
14 these, but it's got to come to an end, because unless we
15 want to go through every step of how Google is going to
16 respond and provide to OFCCP with these requested data,
17 which will take a very long time, I don't know that this --
18 and I don't know that this witness can answer all of those
19 questions. My impression is that she can't. And if you're
20 trying to make that impression, you've made it.

21 But if you want to get into the nitty gritty of
22 just what do they have to do, I'm not sure this is going to
23 be very productive.

24 MR. ELIASOPH: Thank you, Your Honor. I will take
25 the cue from the Court.

1 BY MR. ELIASOPH:

2 Q I do, actually, though -- I am still puzzled as to
3 what is entailed in this 400 hours -- four to 500 hours.
4 You indicated that scripts need to be developed. What else
5 needs to happen?

6 A So, in order to respond to a request for large
7 data sets, we have to identify the data owner, who will then
8 have to evaluate what the data base schema is, to then write
9 queries that will aggregate the information in a way that
10 can be organized and useful.

11 Part of that is going to take iterations between
12 our lawyers and the data owners, that will then coordinate
13 with engineers to write the scripts. We generally will test
14 the scripts to make sure that they're not missing any data.
15 Because we have been around for a number of years and this
16 data encompasses historical data, that there's been
17 migrations over the years, you have to do a lot of
18 validation to ensure that what you're providing is the
19 accurate data, and that requires what we call quality
20 control checking.

21 As I mentioned, there's also certain data points
22 that require multiplication or division, so you have to
23 build those in and ensure that you're querying and
24 aggregating the right numbers. It's somewhat similar to a
25 person putting together like a large financial statement

1 with lots of different data points and validation to ensure
2 that the information that you're providing is accurate.

3 So, it would require our lawyers, the data base
4 owners that could have a number of different titles, and
5 then engineers that have a good understanding of the
6 underlying data bases, so they know how to query it. If we
7 went through all of those steps for the multiple data bases,
8 we would then aggregate it and have somebody run through it,
9 probably from -- you know, the data owners, the compensation
10 team, the stock admin team, the payroll team, the HR team,
11 to make sure that it's accurate before we would ever produce
12 it and turn it over.

13 Q Okay. So, how much of this 400 hours would
14 involve attorney time?

15 A We actually, in my estimate, I didn't include any
16 of our outside counsel, attorneys. That was just internal
17 time of my team and the engineers and the data base owners.

18 Q I'm asking for the in-house attorneys.

19 A If the data contained personal information about
20 our employees, we would have our staff attorneys run through
21 a redaction exercise, as well. Because I don't have the
22 data in front of me, or I haven't seen it, it would be
23 difficult for me to estimate.

24 Q So you don't know how much of the 400 hours would
25 be spent in redacting information to be submitted?

1 MS. SWEEN: Misstates the testimony. She already
2 testified that it didn't include that component part.

3 JUDGE BERLIN: Is that right, your estimate of
4 four to 500 hours, even with respect to in-house counsel,
5 does not include the time that it would take to redact
6 personal information?

7 THE WITNESS: That's right.

8 BY MR. ELIASOPH:

9 Q Okay. Well, I'm a little bit lost, because I
10 asked what the 400 hours entailed and you specifically said
11 it involved an iterative process between the attorneys and
12 separate teams. So was that wrong?

13 JUDGE BERLIN: But remember I was asking her
14 before on direct, you know, was this just the collection
15 part or was this, also, like reviewing it to redact things
16 and she described with respect to the first response, three
17 different steps, the last of which was reviewing things to
18 redact. And the answer I heard was, "No, this is just for
19 the collection part, because until we see how much data we
20 collect, I really can't estimate how long it will take to do
21 the rest."

22 So I'm assuming when she says the lawyers are
23 involved, even in the collections, that it's for some
24 purpose other than reviewing for redactions.

25 Is that right?

1 THE WITNESS: Yes.

2 JUDGE BERLIN: Okay.

3 BY MR. ELIASOPH:

4 Q Okay. What other purpose are the lawyers doing --
5 or are you saying your four to 500 hours has -- does not
6 involve any attorney time, including your in-house team?

7 MS. SWEEN: Misstates the testimony.

8 JUDGE BERLIN: Well, he's asking.

9 I mean, does the four to 500 hours include any
10 attorney time for your staff attorneys?

11 MS. SWEEN: No.

12 BY MR. ELIASOPH:

13 Q And, I'm sorry, you said that it does include
14 attorney time or it does not?

15 A It does not include attorney time.

16 Q Okay. So, you indicated that it does include
17 quality control time. Can you tell me what that quality
18 control exercise is?

19 A So, this would happen between people on my team,
20 as well as the data owners, ensuring that we don't have
21 duplicative data. And, again, I have to couch this with I
22 don't have the data and we haven't written the queries, so
23 this is how kind of hypothetical of how I would evaluate and
24 analyze and ensure that we have the appropriate data. But
25 generally what we're looking for is that the queries are

1 pulling back the intended information, that there isn't
2 duplicative data, that there aren't math errors. That
3 becomes very difficult without having gone through the
4 exercise.

5 Q Can you estimate how many hours it would take to
6 simply gather the raw information requested?

7 A I don't know.

8 Q Okay. Can you tell me for what was already
9 produced to OFCCP, that there was a 2015 snapshot, do you
10 know how many hours went into that -- in producing that
11 snapshot?

12 A I don't know.

13 Q And you indicated that much of what has been
14 produced to OFCCP involved hiring, correct?

15 A Yes. I think that when I ran through the list of
16 things I know that we collected, it was related to hiring as
17 well as other activities.

18 Q And you threw out the term, you know, like, 1.4
19 million items of data. What does that mean?

20 JUDGE BERLIN: I think she said 1.3 million.

21 MR. ELIASOPH: Okay.

22 THE WITNESS: Data points. So different -- within
23 dozens of spreadsheet, if I recall correctly, the different
24 data points that were provided.

25 BY MR. ELIASOPH:

1 Q And how much time did Google spend calculating how
2 many items of data they provided OFCCP?

3 A I don't know.

4 Q What is an item of data? Can you give examples of
5 what would constitute an item of data?

6 A It's basically, I guess, a cell in a spreadsheet.

7 Q And you indicated that Google attorneys have spent
8 time reviewing and redacting submissions to OFCCP?

9 A Yes.

10 Q Are you aware of any requirement that Google
11 review and redact documents before it submits it to OFCCP?

12 A We have internal requirements about, basically,
13 safeguarding our confidential and private information,
14 especially as it relates to employees. So part of the
15 reason that the extraction, for instance, from gHire took so
16 long is because we put security protocols in place, so that
17 we can't extract this information out so easily. So those
18 are the internal guidelines that we have about safeguarding
19 and ensuring that we're only producing information
20 absolutely required and protecting the privacy of our
21 employees.

22 Q So the impediment is of Google's own making?

23 MS. SWEEN: Argumentative.

24 JUDGE BERLIN: I'll allow it. Well, sustained as
25 to the word "impediment."

1 You can rephrase.

2 BY MR. ELIASOPH:

3 Q Part of the expense is to override Google's own
4 security protocols?

5 A I don't know that I would characterize it as an
6 override. It's ensuring that you're not opening up your
7 internal systems to malicious attacks, which is a very
8 dangerous issue that we've all seen and it's something that
9 we take very seriously.

10 Q Now, are you familiar that in prior reviews Google
11 did not, in fact, go through and redact applicant
12 applications?

13 MS. SWEEN: Vague as to time.

14 THE WITNESS: I don't know.

15 BY MR. ELIASOPH:

16 Q You don't know.

17 How much has Google spent just in these legal
18 proceedings?

19 MS. SWEEN: Relevance and vague.

20 JUDGE BERLIN: Sustained.

21 BY MR. ELIASOPH:

22 Q So you indicated that Google has spent 2,300 hours
23 in producing information with respect to this review?

24 A The collection review and production of that
25 information.

1 Q And what percent of that involved compensation
2 information?

3 A I don't know.

4 Q Could you provide an estimate?

5 JUDGE BERLIN: Don't guess. But if you could give
6 a range or give us some knowledge and if you can give an
7 estimate you're comfortable, you should do that, but don't
8 guess.

9 THE WITNESS: I don't have an estimate.

10 BY MR. ELIASOPH:

11 Q Do you know if it's less than half?

12 A I think I'd have to guess.

13 Q Now, you've testified on behalf of Google in prior
14 cases in which you provide cost estimates?

15 MS. SWEEN: Relevance, Your Honor.

16 JUDGE BERLIN: You can answer yes or no. Have you
17 done that?

18 THE WITNESS: I have testified on behalf of
19 Google. I can't recall if there were cost estimates in
20 specific testimony.

21 BY MR. ELIASOPH:

22 Q Do you recall that in SEC vs. Google, you
23 estimated that a data production would cost approximately
24 \$100,000 per custodian?

25 MS. SWEEN: Your Honor, this is well beyond the

1 scope of direct examination and it's also not relevant.

2 JUDGE BERLIN: I'll allow it.

3 Do you recall giving that testimony?

4 THE WITNESS: No, I don't recall.

5 BY MR. ELIASOPH:

6 Q Are you familiar with the Work Day system?

7 A I've used the Work Day system.

8 Q From your use of Work Day, does it display salary
9 data with respect to Google employees?

10 A Yes.

11 Q Does it also store salary history?

12 A I don't know where the data is stored.

13 Q I appreciate that. Does it also display salary
14 history?

15 A Yes.

16 Q And that would include every change in
17 compensation?

18 MS. SWEEN: Calls for speculation.

19 JUDGE BERLIN: If you know.

20 THE WITNESS: So, I know from my personal
21 experience of using the interface of the Work Day system,
22 that it has my salary changes in it displayed.

23 JUDGE BERLIN: But you don't know one way or the
24 other about other employees?

25 THE WITNESS: Not for every employee. All I have

1 access to is my own.

2 BY MR. ELIASOPH:

3 Q And does it have your job history in it?

4 A Yes.

5 Q Does Work Day include your contact information?

6 MS. SWEEN: Objection, Your Honor. This witness
7 has testified she's only used this for her own personal use.
8 There's no foundation that she's ever used it in a
9 collection effort situation or that she has any experience
10 or knowledge using it for the purposes that the OFCCP is
11 asking us to use it for. So I think this whole line of
12 testimony is not relevant and should be stricken.

13 JUDGE BERLIN: I'll allow it for what it's worth.
14 It's one employee's experience.

15 BY MR. ELIASOPH:

16 Q You are a Google employee?

17 JUDGE BERLIN: No, we have that. So, go to the
18 question that was pending.

19 MR. ELIASOPH: I just want to know if her contact
20 information is in it.

21 THE WITNESS: I'm not actually sure exactly what
22 information is in it, as it relates to like my contact
23 information.

24 BY MR. ELIASOPH:

25 Q You testified earlier that you produced the Work

1 Day manual?

2 MS. SWEEN: Misstates the testimony.

3 BY MR. ELIASOPH:

4 Q Are you familiar with the Work Day manual?

5 MS. SWEEN: Asked and answered.

6 JUDGE BERLIN: You can answer again.

7 THE WITNESS: I haven't seen the Work Day manual.

8 I know we produced user manuals and guidelines, but I don't
9 recall specifically seeing the Work Day manual.

10 BY MR. ELIASOPH:

11 Q I'm not going to read the Work Day manual, because
12 it is sealed and I don't want to complicate these
13 proceedings.

14 JUDGE BERLIN: You can just argue about it. I
15 mean, it's in there. You can include it in your brief, or
16 whatever.

17 BY MR. ELIASOPH:

18 Q Is there any reason that you are aware of that if
19 the manual says that it contains that information it
20 wouldn't be in there?

21 A I just mean I don't recall putting my information
22 in there or looking at it myself. When I go into Work Day,
23 that's not what I use it for.

24 Q But my question is: Are you aware of any aspect
25 of the manual that's incorrect?

1 JUDGE BERLIN: Are you familiar with the contents
2 of the manual for Work Day?

3 THE WITNESS: No.

4 MR. ELIASOPH: Okay. I have nothing further.

5 JUDGE BERLIN: Ms. Sween?

6 MS. SWEEN: Just one question, Ms. Zrmhal -- or
7 maybe two.

8 REDIRECT EXAMINATION

9 BY MS. SWEEN:

10 Q Do you know if it's Google's practice to turn over
11 information in litigation or audit situations without first
12 having some level of review for quality control?

13 A In every matter that I've worked on for Google,
14 both as an employee since 2011, and then prior as a
15 consultant, we have done a review or analysis of the
16 documents before we produce them.

17 Q So if OFCCP were to make the representation that
18 if we just turned over interview notes to them and allow
19 them to extract information they were interested in, would
20 that be something that Google would typically comply with?

21 MR. ELIASOPH: Object, that's outside the scope of
22 this subject request.

23 MS. SWEEN: It was brought up in the hearing.

24 JUDGE BERLIN: I'll allow it.

25 You were asking whether -- you used the word

1 "impediment," but you did change it, so is this a self-
2 created requirement.

3 BY MS. SWEEN:

4 Q Do you have the question in mind?

5 A Could you ask it one more time?

6 Q Sure. If OFCCP represented to this Court that
7 they made an offer to have Google just turn over interview
8 notes and that they would extract information that they were
9 interested in from the raw data, is that something that
10 would lessen Google's burden with respect to producing
11 interview notes?

12 A No. We would -- I'm not exactly sure how
13 voluminous that would be, but we would definitely review and
14 analyze those documents before it would be produced. So we
15 would have attorneys, our internal team or have to hire a
16 third party vendor to go through that and redact out the
17 personal and confidential information. So that would
18 actually be very time consuming.

19 MS. SWEEN: Thank you, Your Honor. No further
20 questions.

21 JUDGE BERLIN: Mr. Eliasoph?

22 MR. ELIASOPH: No further questions.

23 JUDGE BERLIN: All right. Ma'am, thank you very
24 much for your testimony and you're excused.

25 (Witness excused.)

1 JUDGE BERLIN: So, I'm shortly going to take our
2 lunch break, but, Mr. Eliasoph, I don't recall which of the
3 OFCCP attorneys wrote a letter, but -- alerting me to the
4 Ninth Circuit's decision on remand in the McLane case. And,
5 Ms. Sween, I know you were copied on the letter.

6 I don't know if Google -- let me start again.

7 I don't know if Google had an opportunity to
8 review that case and there might be ways to distinguish the
9 Ninth Circuit's opinion. But I just want you to know at the
10 conclusion of the evidence, I'm really asking if Google
11 wishes to concede the point about that the contact
12 information that's been requested in these four categories -
13 - I fully understand Google's resistance to producing that.
14 And I appreciate Google's concern for the privacy of its
15 employees. But my decision is going to be controlled by
16 anything that applies from the Ninth Circuit.

17 So this is a recent decision and, as I said,
18 Google might be able to distinguish it in good faith,
19 meeting the requirements we have in 29 CFR 18.35, but I will
20 be asking Google for its views on that, just to let you
21 know.

22 All right. Why don't we break now for the lunch
23 hour? And let's be back in one hour.

24 MS. SWEEN: Your Honor, Google does intend to rest
25 at this point. So if Your Honor wanted to push through and

1 go to closing arguments, we are not adverse to that.

2 JUDGE BERLIN: All right. So, Google rests at
3 this point.

4 Mr. Pilotin, is OFCCP planning to offer any
5 rebuttal witnesses?

6 MR. PILOTIN: No, Your Honor, no rebuttal
7 witnesses.

8 JUDGE BERLIN: All right. I would appreciate
9 estimates from each of you about the amount of time you need
10 for closing argument.

11 MS. SWEEN: Twelve minutes.

12 JUDGE BERLIN: Thank you.

13 MR. ELIASOPH: I will be presenting the closing,
14 Your Honor. I have not, in fact, timed it. My best guess
15 would be between 10 and 20 minutes.

16 JUDGE BERLIN: All right. It's just 12:00 noon.
17 It seems to me that we should be able to complete this now.
18 Is everyone in agreement with that or do you need a lunch
19 break?

20 MS. SWEEN: We don't need a break, Your Honor.

21 MR. ELIASOPH: I had a granola bar at the break
22 and I am ready to go.

23 JUDGE BERLIN: All right. Mr. Eliasoph?

24 CLOSING STATEMENT

25 BY MR. ELIASOPH:

1 Your Honor, this is a very straightforward matter.
2 Google made a deal. In exchange for getting lucrative
3 government business, it agreed to comply with Executive
4 Order 11246 and the Secretary's regulations implementing it.

5 What Google got from this deal was government
6 business. What it agreed to do in exchange included
7 agreeing that it cannot engage in employment discrimination,
8 including compensation discrimination. It had to implement
9 an affirmative action program. It agreed to special record
10 keeping requirements. And Google specifically agreed to
11 furnish documents and supply access to OFCCP in compliance
12 reviews.

13 That -- and this is information that is relevant
14 to determining Google's compliance with its non-
15 discrimination and affirmative action requirements.

16 This deal, of course, is true for all federal
17 contracts and subcontractors, whether or not the contract
18 they signed said it. Notice is not required. But here
19 there is no question Google was on notice and this is what
20 they were agreeing to. It's in at least one of their
21 contracts and Google had already been reviewed by OFCCP on
22 at least four occasions. So Google knew what the deal was
23 and they agreed to it to get federal business.

24 Now the review is underway. Google wants to
25 renege on its agreement, claiming that OFCCP's requests are

1 extreme and that OFCCP clearly is just on a fishing
2 expedition. So what did OFCCP request that warranted five
3 months of litigation, numerous motions and briefs, countless
4 hours of this Court's time, and a two-day trial, all at
5 taxpayer expense?

6 Well, the hubbub -- with all of the hubbub, one
7 would think OFCCP is asking for something way far afield,
8 like Google's search algorithm or its overseas investments.
9 But all OFCCP is asking for is information related to
10 Google's compensation practices and employee contact
11 information, so that it can verify through direct employee
12 contact the information Google provides. In other words,
13 OFCCP is just trying to do its job.

14 Google's one and only defense to supplying the
15 information requested is that OFCCP's attempt to gather
16 records related to compensation that Google agreed it would
17 supply when it sought federal business, somehow violates the
18 Fourth Amendment of the Constitution.

19 Never mind that Courts, starting with the Supreme
20 Court, has said for over 50 years that Fourth Amendment
21 rights are waived when a person or entity agrees to provide
22 access to the government with respect to a specific category
23 of records in exchange for a benefit. This rule may apply
24 to pharmacists, who have medical records audited, or
25 government employees who get tested -- who get drug tested

1 through invasive means, or individuals who agree to have
2 their homes searched at will rather than go to jail. But
3 somehow the same Fourth Amendment does not apply to Google.

4 While OFCCP acknowledges it has not relied on a
5 consent by contract theory since the Eleventh Circuit in
6 1982 issued a decision that ignored the clearly applicable
7 case law on this topic, it is significant that, as noted in
8 OFCCP's briefs, both the ARB and the United Space Alliance
9 District Court has specifically reserved ruling on this
10 issue, inviting OFCCP to raise the argument it has in this
11 case.

12 But aside from the consent by contract theory,
13 here's the problem for Google. Even under the Fourth
14 Amendment tests it has advocated for the test used in
15 administrative subpoena cases, the Fourth Amendment just
16 doesn't help them. Under that test, as this Court has
17 noted, there really are only two questions the Court need
18 ask. Are the requests relevant to the type of inquiry under
19 way, which here involves whether Google is paying employees
20 in a non-discriminatory fashion and meeting its affirmative
21 action obligations? As the Ninth Circuit reaffirmed just
22 this week in *McLane*, relevance encompasses, quote,
23 "Virtually any material that might cast light on the
24 allegations against the employer," end quote.

25 The second part of this Court's inquiry is whether

1 the request is unduly burdensome. And, as framed by most
2 courts, including the DC Circuit, the test is whether
3 Google's compliance hinder its normal business operations.
4 Given this test, Google's Fourth Amendment claim is beyond
5 far fetched. It is obvious from the fact of the request
6 that they may cast light on Google's compensation practices.
7 Because of this, Google has consistently argued that OFCCP
8 must show a specific need for this specific evidence. But
9 the Ninth Circuit stated this week in *McLane*, in the
10 analogous EEOC context, quote, "If the EEOC establishes that
11 the evidence it seeks is relevant to the charge under
12 investigation, we have no warrant to decide whether the EEOC
13 could conduct the investigation just as well without it."

14 So, the question is not whether we need the
15 information, it's only whether it would shed light on the
16 matters that OFCCP is investigating.

17 Let's consider each of OFCCP's requests in turn.

18 With respect to the 2014 snapshot, amazingly
19 Google asked this Court to twist reason on its head and
20 somehow conclude that OFCCP's request to know what Google
21 paid people in 2014 -- an entire year of the review period -
22 - is not relevant to a compensation inquiry. While Google
23 has claimed for months that OFCCP is on a fishing
24 expedition, the Regional Director explained that the 2014
25 snapshot was requested after analysis of the 2015 snapshot,

1 which showed, quote, "Indicators that were consistently
2 adverse to women," end quote, across Google's work force.

3 With respect to the factors requested for both the
4 2015 and 2014 snapshot, the Regional Director has testified
5 in detail as to how each factor is relevant to a
6 compensation analysis and confirmed -- and she confirmed
7 that Google has indicated that it, itself, considers these
8 factors.

9 Let's turn to the prior salary and starting -- and
10 prior pay history. So, Google claims that anything before
11 2014 is not relevant to the review in hand. This claim
12 requires putting one's head in the sand with respect to 30
13 years of law on pay discrimination. At least since the
14 Supreme Court's 1986 Bazemore decision, it has been bedrock
15 law that past acts of discrimination impacting pay are
16 renewed with each paycheck. This is called the "paycheck
17 the cruel" rule. Congress expressly approved of this rule
18 and amended Title 7 to ensure it was enshrined in law with
19 the Lilly Ledbetter Paycheck Fairness Act of 2009. Congress
20 found that a ruling that ignored the fact that prior
21 decisions on pay could long continue to have disciplinary
22 impact simply, quote, "ignore the reality of wage
23 discrimination," end quote.

24 The Regional Director testified in great detail
25 how prior pay can have a present impact on -- I'm sorry --

1 how prior pay decisions can have a present impact on pay.
2 By seeking historic information, OFCCP is in no way
3 extending the liability, period. Rather, it needs this data
4 to understand if disparities to the extent they are seen
5 today are the cause of a prior act of discrimination that is
6 renewed with each paycheck. That is what that is about.

7 As to employee contact information, I was going to
8 cite McLane in detail to this Court. However, in light of
9 this Court's prior statement, I won't do so. I'll just add
10 that as in McLane, the Regional Director testified that in
11 this matter, the employee contact information was needed for
12 much the same reason. It is important for the Agency to
13 understand how Google's practices are, in fact, applied.

14 She also testified that it is insufficient to rely
15 on Google to set up interviews which warps the informant's
16 privilege and creates an atmosphere in which employees may
17 or may not feel free to talk. This need for confidentiality
18 has been further demonstrated by the fact that the NLRB has
19 filed a complaint against Google just last month, on April
20 28th, alleging that Google's confidential provisions with
21 respect to its employees are so broad and restrictive that
22 it discourages and interferes with their collective action
23 rights.

24 In short, all three categories of data are plainly
25 relevant. So I'm going to move to burden.

1 Google simply cannot meet the applicable legal
2 standard that compliance would disrupt its business
3 operations. It is obvious based on Dr. Brunetti's testimony
4 and other evidence that Google can afford to comply with its
5 regulatory requirements and that organizationally, Google
6 would be able to absorb the cost as easy as a dry kitchen
7 sponge could absorb a single drop of water. Google's net
8 operating income per year is almost \$28 billion. That's
9 billion with a "b."

10 As Exhibit 211 demonstrates, Google was ranked
11 eighth most profitable company in the United States in 2015.
12 Google has likely spent far more on the fees for the five
13 lawyers sitting on its behalf in this room than it would
14 spend to simply comply with OFCCP's requests. Google has
15 also announced with great public fan fare that it spent \$115
16 million on diversity initiatives in 2014 and that it
17 intended to spend \$150 million more in 2015. I believe
18 that's in Exhibit 210.

19 Google cannot claim it -- with its significant
20 resources to address diversity issues and its fan fare to
21 the public that it now has no money to comply with a federal
22 agency seeking to ensure compliance with equal opportunity
23 laws on behalf of the public.

24 Google argued in its prehearing brief that a Rule
25 26 burden analysis applies in the admin's subpoena

1 enforcement context. However, when it was convenient for
2 them to acknowledge that this was not the case in their
3 subsequent motion to dismiss, the truth was laid bare.
4 Nonetheless, under any analysis, Google can meet its burden.
5 Indeed, in private cases under federal rules, parties
6 routinely produce the exact type of information sought by
7 OFCCP here.

8 To try to make its case more sympathetic, Google
9 portrays itself as an accidental federal contractor. But
10 the truth is that Google has been a long-time federal
11 contractor and has made millions off contracts and
12 subcontracts with the federal government. Subcontracts,
13 even those with no direct federal contracts, are also
14 covered by the executive order. Unrebutted testimony shows
15 that Google was the subject of compliance reviews opened in
16 2007, 2010, 2011, and 2012. And the testimony also
17 indicates that Google was a contractor since 2007 because,
18 as Jane Suhr said, the first action items when a case is
19 opened is to check contract coverage for jurisdiction.

20 This Court has admitted into evidence numerous
21 exhibits that show that Google has long been a federal
22 contractor and subcontractor and that it has invested
23 millions of dollars in seeking federal business. And it has
24 consistently earned millions of dollars in federal business
25 through its contracts and subcontracts. Indeed, as Exhibits

1 208 and 209 show, Google successfully sued the federal
2 government in 2010, to win a lucrative \$60 million
3 subcontract to provide cloud computing using a program
4 Google built, in part, to meet all federal requirements.

5 The Secretary's exhibits show that Google has won
6 other contracts and Google stipulated that in 2014 and 2015,
7 alone, Google received \$30 as a federal subcontractor.

8 Google is simply a significant federal contractor.

9 Now, Google's main argument on burden is a
10 superficial argument that confuses the review with the
11 burdensomeness of the requested documents. We have all
12 heard the expression "too big to fail." And we know the
13 devastating impact that it's had on American society. Here,
14 Google is urging the Court to adopt a "too big to comply"
15 defense to a regulatory obligation. Google, basically,
16 argues that anything OFCCP asks for that pertains to its
17 entire Mountain View facility will be burdensome, because
18 the AAP has 21,000 people in it. This, Google touts --
19 sorry, thus Google touts that it has produced 1.3 million,
20 quote, "items of data," whatever that means. Which now we
21 know is just a cell on a spreadsheet.

22 Google takes routine requests and makes them sound
23 onerous by emphasizing the number of people involved. It
24 also builds into its model on costs the amount that it,
25 itself, adds with respect to its security protocols and its

1 decision to hire some of the world's most expensive and best
2 lawyers to defend them and to participate in their process.

3 What Google is asking this Court to do is nothing
4 less than stand common notions of justice and fairness on
5 its head and exempt the big guy from complying with the laws
6 that the little guys need to comply with.

7 Let's take two companies. One is a family-owned
8 business -- we'll call it Lil's Laundry -- with 50 employees
9 that provides laundry services to the US Army near an Army
10 base. The other business is Google. Now, Lil's Laundry is
11 a family-owned business with a simple pay system. Everyone
12 is hourly. No bonuses are issued. Everyone got one and
13 only one raise in 2007, 10 years after the business opened.
14 Everyone in a specific job gets paid roughly the same. The
15 business barely makes a profit, but it understands its
16 regulatory requirements and it maintains the records it
17 should.

18 Now, when OFCCP asks for compensation data,
19 including applicant history, going back to 1997, and
20 employee contact information and all other components of
21 pay, it's sitting there in a single filing cabinet. They
22 need to comply, even though they are just eking out a
23 living.

24 Now, take Google. It is stipulated, their
25 compensation system is complicated because it is a big and

1 sophisticated operation. They don't just pay base pay, they
2 have bonuses, stock options, referral bonuses, et cetera.
3 They have a lot more people in one AAP establishment and
4 they rely on a lot of factors in setting pay. And consider
5 whether you are a college recruit or other recruit. They
6 rely on market reference points. They consider your current
7 pay and a multitude of other factors.

8 They also have an army of lawyers, HR personnel,
9 accountants, and other professionals that implement their
10 complicated system.

11 All of this makes it more time consuming and, yes,
12 potentially more expensive when Google is subject to an
13 audit. Because there are a lot of people, a lot of factors,
14 and a number of variables, it will be more work. But it is
15 fundamentally unfair and there's simply no basis in law to
16 suggest that simply because it is harder, more complex, for
17 Google to be reviewed and for the government to understand
18 its compensation system, that it does not get reviewed when
19 Lil's Laundry does need to comply and does need to open its
20 books.

21 Google is a company sitting on \$27 billion of net
22 profit every year. It needs to comply.

23 Fortunately, the Secretary has rejected the
24 approach sought by Google, In OFCCP vs. Caldwell Banker, a
25 bank did nothing more than serve as a managing agent for a

1 building that happened to have a federal tenant. While
2 there was no direct contract between the bank and the
3 federal government, OFCCP determined that the bank was,
4 nonetheless, a contractor and needed to submit AAPs for its
5 work force nationwide.

6 When the bank protested that the cost of the AAPs
7 would almost balance out the entire benefit of the contract,
8 the Secretary said that analyzing the cost of compliance
9 against the federal contract was the wrong test. The
10 Secretary held, quote:

11 "The constitutionality of the applicability of
12 the executive order does not turn on
13 whether, as applied to a particular
14 contractor, the contractor's government-
15 derived revenues exceed costs associated
16 with compliance. Cost alone does not
17 make the application of a law
18 unconstitutional."

19 It cited the Day-Brite Supreme Court decision.

20 It is time to put this matter to bed. The
21 documents sought are clearly relevant to an analysis of
22 whether Google's compensation system complies with non-
23 discrimination and affirmative action obligations. Google
24 can easily comply. As the Court has noted from its February
25 21 order, quote:

1 "Google agreed in the government contract that
2 on OFCCP's request, it would provide
3 OFCCP with books, records, accounts and
4 other material so that OFCCP could
5 determine whether Google was complying
6 with various non-discrimination
7 requirements such as those in Executive
8 Order 11246."

9 Since Google has failed to voluntarily comply with
10 its commitments, OFCCP respectfully requests that this Court
11 order Google to come into compliance.

12 JUDGE BERLIN: Thank you.

13 Ms. Sween?

14 MS. SWEEN: Thank you, Your Honor.

15 CLOSING STATEMENT

16 BY MS. SWEEN:

17 From the beginning of this current dispute, this
18 case has been about one thing: Mr. Eliasoph is correct.
19 But contrary to his representation, it's not about Google
20 skirting its responsibilities as a federal contractor. I
21 think we can all agree -- and this Court has even noted --
22 that to date, Google has attempted to comply in good faith.

23 So what this dispute is really about is whether
24 the subject demands are relevant, reasonable in scope, and
25 limited -- appropriately limited.

1 As we know and as we've heard since OFCCP began
2 its compliance review in September of 2015, Google's
3 produced 1.3 million data points in over 100 categories of
4 information -- voluminous documents, 329,000 documents,
5 740,000 pages. Google's also complied with OFCCP's request
6 to interview its employees and managers in a 2016 on-site.
7 This Court should not overlook the fact that this hearing
8 relates to only three outstanding categories of information
9 and we need to determine whether they are sufficiently
10 relevant and limited in scope.

11 Google has consistently objected to these three
12 categories by relying on the Fourth Amendment of the
13 Constitution. It has a right to do that, whether it's a
14 Lil's Laundry Mat or Google. And contrary to the OFCCP's
15 representation, Google never waived its Fourth Amendment
16 rights under the Constitution. In fact, this Court so ruled
17 in denying OFCCP's motion for summary judgment on that very
18 issue. The government is not given unfettered discretion
19 just because they're the government. They have to
20 demonstrate that the requests are reasonable, relevant, and
21 limited in scope.

22 Like any organization subject to a search by law
23 enforcement, Google has a right to raise its Constitutional
24 defense. It doesn't waive that right just because it enters
25 into a federal contract. It has the right and, indeed, the

1 obligation to protect the privacy rights at all expenses,
2 swing for the fences to protect its privacy rights of its
3 employees of all the 21 employees (sic) at the Mountain View
4 campus -- 21,000-plus employees -- whose names, email
5 addresses, home addresses and telephone numbers and
6 potentially cell phone numbers that OFCCP has demanded. And
7 to answer this Court's question, Google will not concede
8 that we have in any way waived that right to protect that
9 information under the McLane decision and we will make those
10 distinguishing remarks in our post-hearing brief.

11 The Constitution requires OFCCP's demands to be
12 reasonable. According to the law of the US Supreme Court,
13 this means three things. First, OFCCP can only make demands
14 that are limited in scope. And my colleague to the left of
15 me has conveniently left out that argument with respect to
16 the Fourth Amendment. He has mentioned nothing about a
17 sufficient limitation on scope.

18 Second, OFCCP can only request relevant
19 information. And as I will tell the Court with respect to
20 what the evidence revealed in this hearing, many items of
21 data that they've requested are simply not relevant to how
22 Google deals with its compensation, at least with respect to
23 21,000 people in its Mountain View work force.

24 Third, OFCCP can only request specific information
25 so that the -- so that compliance with the request is not

1 unduly burdensome on Google.

2 It's OFCCP's burden to meet these standards and
3 the evidence showed that OFCCP has not met each of those
4 elements.

5 First, we had an opening statement and I think
6 Google delivered on what we said we would show the Court.
7 During its opening statement, Google promised to provide
8 evidence showing that the processes Google uses to determine
9 compensation through our witnesses will demonstrate that in
10 many instances salary information is not relevant. Google
11 delivered on that with the testimony of Google's Director of
12 Compensation, Frank Wagner. His testimony showed that many
13 of OFCCP's demands asked for a relevant or, at the very
14 least, overbroad information when it is applied to the
15 entire Mountain View work force.

16 For example, OFCCP seeks prior salary for all
17 21,000-plus employees. Mr. Wagner testified that Google
18 does not consider the prior salary when the company sets
19 starting salary for new grads, who make up approximately a
20 fifth of the Mountain View work force.

21 Mr. Wagner also testified that prior salary may be
22 relevant with respect to industry new hires, but only 50
23 percent of the time. Contrary to Ms. Wipper's testimony,
24 managers do not have wide discretion in making salary
25 adjustments during the promotion process. In 90 percent of

1 the situations where salary adjustments are made to the
2 modeled promotional increase amounts, the manager's
3 adjustment is less than one percent.

4 Not only does this testimony show that OFCCP's
5 demand has demanded irrelevant information and overbroad
6 information, but it also shows that despite being here now
7 in front of Your Honor, they still don't understand Google's
8 compensation policies, despite Google clearly articulating
9 them to them.

10 During its opening statement, Google promised to
11 provide evidence showing the burden of complying with
12 OFCCP's demands. Google delivered on that promise, as well,
13 through the testimony today of Google's Senior Legal
14 Operations Manager, Kristen Zrmhal. She testified that
15 employees and consultants have already worked 2,300 hours at
16 a cost of nearly \$500,000, responding to OFCCP's demands in
17 this case. She also testified that if Google is ordered to
18 comply in its entirety with the three outstanding requests,
19 as currently drafted, Google would be forced to invest
20 approximately another four to 500 hours at a cost that could
21 come up to \$100,000. Again, Google's revenue generation
22 stream is not the issue. It's whether or not the requests
23 are reasonable and limited in scope. One piece of paper
24 that is not reasonable or limited in scope is burdensome.

25 OFCCP's witnesses should not be credited. OFCCP

1 asked the Court to approve its demand for information by
2 relying on witness testimony, principally OFCCP Regional
3 Director Wipper's claims regarding the results of the
4 Agency's preliminary analysis. But the Court should give no
5 weight to Ms. Wipper's testimony, because it is
6 uncorroborated and directly contradicts the Agency's prior
7 positions and statements and reflects ever-shifting
8 rationales for their demands.

9 First, Ms. Wipper's testimony regarding the
10 results of the Agency's preliminary analysis are
11 uncorroborated. When a witness offers an opinion or a
12 conclusion, it should only be credited if the witness
13 explains the basis for the opinion or the conclusion. Ms.
14 Wipper testified about a conclusion. Her agency found pay
15 disparities. But when asked to explain the basis for that
16 conclusion, she made a tactical decision to invoke the
17 deliberative process privilege and refused to explain the
18 basis for her opinion. Therefore, her testimony about pay
19 disparities is conclusionary only, unsupported by facts, and
20 the Court should give it no weight.

21 Second, Ms. Wipper contradicted her Agency's own
22 prior representations to this Court. In its reply brief in
23 support of its motion for summary judgment, which the Court
24 denied, OFCCP stated that the agency, quote, "Will not
25 provide any testimony, disclosing its preliminary findings

1 or aspects of the ongoing investigation," end quote.

2 Similar, in its prehearing statement, OFCCP
3 informed this Court that its preliminary findings are,
4 quote, "irrelevant to this case," end quote.

5 Despite these statements, on Day One of this
6 hearing, Ms. Wipper did the exact opposite and announced the
7 results of OFCCP's preliminary analysis, while during the
8 same hearing the Agency's counsel repeatedly objected to any
9 inquiry into how the results were reached. For those
10 reasons, OFCCP's witnesses and their testimony should be
11 discredited.

12 Third, we are going to ask the Court to invalidate
13 the requests or, in the alternative, blue pencil them. And
14 here is the reasons why?

15 OFCCP's evidence, including Ms. Wipper's
16 unsupported testimony, fails to meet the Agency's burden to
17 prove that the outstanding demands comply with the Fourth
18 Amendment. We will take them one by one.

19 First, the request for personal contact
20 information for all 21,000-plus Google employees at its
21 Mountain View campuses includes every person's name, home
22 address, personal email address, and phone numbers. From a
23 logistical standpoint, the OFCCP cannot possibly interview
24 21,000 people, as Ms. Wipper finally admitted to this Court
25 after being questioned. Google asks the Court to rule that

1 the request is unreasonable, because it is not limited in
2 scope.

3 Alternatively, Google asks the Court to blue
4 pencil the request and impose reasonable limits on it. For
5 example, the Court could order Google to provide the contact
6 information for a random and reasonable sample of employees,
7 provided the employees' consent to have their contact
8 information released. That would protect the privacy of
9 tens of thousands of Google employees and it would ensure
10 that Google is not aware of the identities of which
11 employees OFCCP ultimately decides to interview, thus
12 satisfying OFCCP's purported concerns.

13 Next is the outstanding request for job and salary
14 history, including prior salary and competing offers, for
15 all 21,000 Mountain View employees. This request is clearly
16 not limited in scope, because OFCCP -- strike that.

17 This request is clearly overbroad, because OFCCP
18 has only a two-year review period. Ms. Wipper repeatedly
19 testified to this limitation and it's an issue that Google
20 agrees with her on for good reason. The scope is two years.

21 OFCCP's own regulations codify this two-year
22 period limitation. The review period here is September
23 30th, 2015, back to September 30th, 2013. And the request
24 for information prior to that period are, by definition,
25 overbroad. Additionally, Mr. Wagner's testimony showed that

1 many aspects of the demand are overbroad and not limited in
2 scope and ask for irrelevant information. For example,
3 approximately one-fifth of Google's employees are campus
4 hires for which prior salary is not considered when starting
5 salary -- when setting starting salary.

6 Mr. Wagner's testimony also showed that job
7 history at Google is irrelevant to current salary. I'll say
8 that again. Job history is irrelevant to current salary.
9 Similar, Mr. Wagner testified -- Mr. Wagner's testimony
10 clearly demonstrated that while an employee's immediate
11 prior salary may be relevant in setting the next, immediate
12 salary, an employee's entire salary history at Google is
13 simply not relevant to current salary.

14 Complying with these requests would be burdensome,
15 as well. Ms. Zrmhal testified that the pre-Google salary
16 information -- I'm sorry. Ms. Zrmhal testified that to
17 include any information in its raw data would, as the OFCCP
18 has suggested we may be able to do, does not eliminate
19 burden at all, because our internal reviewers need to make
20 sure that they are reviewing the documents and redacting
21 them for any, one, irrelevant, extraneous information that
22 OFCCP has not asked for, and, two, to ensure that they
23 protect the privacy of Google employees. This is obviously
24 a very time consuming and burdensome project.

25 OFCCP claims that Google could simply hand these

1 over and avoid the burden, but as Ms. Zrmhal testified to,
2 that wouldn't solve that problem.

3 Google asks that the Court rule that the
4 outstanding requests for job and salary history, as well as
5 prior salary and competing offers, are unreasonable and
6 unconstitutional. In the alternative, Google asks the Court
7 to blue pencil the request and impose reasonable limits on
8 them consistent with the testimony and evidence that was
9 presented to this Court as to when and if that information
10 is relevant to setting salary.

11 The last outstanding category is the 2014
12 compensation snapshot, a compensation data base for 21,000-
13 plus employees in Mountain View. Ms. Wipper testified that
14 her agency requested it, because it purportedly found pay
15 disparities based on gender in the 2015 snapshot data base
16 that Google has already provided to the OFCCP. But as
17 Google has shown in this trial, Ms. Wipper's testimony
18 should be given no weight, because she contradicted the
19 Agency's prior statements and she, more specifically,
20 offered absolutely no factual basis for her purely
21 conclusory testimony.

22 Google asks that the Court rule that this request
23 is unreasonable and unconstitutional and Google need not
24 comply or, in the alternative, asks that the Court blue
25 pencil the request and impose reasonable limits.

1 In conclusion, at the bottom, this case is about
2 reasonableness. The US Constitution limits OFCCP's power
3 and requires OFCCP to act reasonably. For its part, Google
4 has been reasonable. It's complied with the overwhelming
5 majority of all of the OFCCP's demands, has asserted a
6 Constitutional defense, and seeks to protect the privacy
7 rights of its employees. But OFCCP appears not to care
8 about the Constitutional limits. Indeed, it has repeatedly
9 argued that the Constitution doesn't apply in this case or,
10 for that matter, to any federal contractor. OFCCP has even
11 said that this Court has no power to review its conduct at
12 all. Indeed, these extreme positions themselves demonstrate
13 that the Agency has little, if any, regard for the Fourth
14 Amendment rights of its federal contractors.

15 But, of course, OFCCP's extreme positions cannot
16 be correct. If they were, the Agency would possess
17 unfettered discretion to violate the Constitutional rights
18 of not only Google, but of Lil's Laundry Shop, as well.
19 Large and small, every federal contractor has Fourth
20 Amendment rights.

21 The federal government's power has limits and the
22 power must be exercised reasonably and with respect to the
23 privacy of employees. When the government strays beyond its
24 constitutionally-mandated limits, our courts must act to
25 check this abuse of power. Otherwise, these protections

1 become nothing more than words on a paper.

2 Thank you, Your Honor.

3 JUDGE BERLIN: Thank you.

4 All right. I've asked the court reporter to
5 expedite the transcript. I don't know when it will be
6 ready. Monday, of course, is a holiday. I will not be
7 working. And I certainly won't turn to this before Tuesday.
8 I probably will wait for the transcript. So I believe I'm
9 supposed to rule on this without waiting for your briefs,
10 which is why I invited oral closing arguments. But, you
11 know, you might choose to prepare and file a brief.
12 Anything I receive before I issue an order, I will consider.
13 So, there is no deadline. Once you get my order, it's
14 clearly too late to file a brief. And I very much doubt
15 that I'll have anything completed before the end of next
16 week, but, again, I don't know when the transcript will be
17 ready.

18 So, you know, I don't know what more I can say
19 about the subject of closing briefs. I very want much to
20 thank everyone for their participation in the case. It
21 proved to be more complicated than I had imagined initially.
22 And I appreciate the efforts everyone has gone to.

23 So, is there anything further for today?

24 MS. SWEEN: Yes. Your Honor, you had asked for
25 briefing on what law applies during our pre-trial conference

1 and we wanted to make sure if we should be addressing that
2 in a post-hearing brief or if you want separate briefing on
3 that point?

4 JUDGE BERLIN: I will leave that to you, how you
5 wish to do it. But I -- actually, if I could have a brief
6 on that by the end of next week? So, I don't know if your
7 closing brief will be ready by then.

8 I also need to -- we normally require citations to
9 the record in a closing brief. But we have a transcript
10 from April 7th. If you would like to be sure to get your
11 brief on file before I decide the case -- as I said, I'm
12 going to wait for the transcript -- but if you would like to
13 file without citations to the record of today's hearing,
14 I'll allow it. So do your best to summarize anything -- any
15 testimony you want to rely on, but you do not need to point
16 to the record.

17 All right. Anything further?

18 I thank everyone again very much and we'll go off
19 the record.

20 (Whereupon, the proceedings concluded at 12:44
21 o'clock p.m.)

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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: MAY 26, 2017

LOCATION: SAN FRANCISCO, CALIFORNIA

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

SIGNATURE OF REPORTER

DATE