

Pilotin Decl., Exhibit B
OFCCP v. Google, Inc.

October 19, 2016

**VIA E-MAIL (Wipper.Janette@dol.gov) &
FEDERAL EXPRESS**

PRIVILEGED & CONFIDENTIAL

Ms. Janette Wipper
Regional Director
United States Department of Labor
Office of Federal Contract Compliance Programs
Pacific Regional Office
90 Seventh Street, Suite 18-300
San Francisco, CA 94103

**Re: OFCCP Compliance Evaluation: Google Mountain
View Facility**

Dear Regional Director Wipper:

On behalf of Google Inc. (“Google” or the “Company”), we are responding to Office of Federal Contract Compliance Programs’ (“OFCCP” or the “Agency”) September 16, 2016 Notice to Show Cause, including Attachment A alleging a violation of 41 CFR §§ 60.1.43 and 60-1.12, and “Attachment C - Amended 9/19/2016” (collectively “Notice to Show Cause”) in connection with the above-referenced matter.¹

As described in detail herein, OFCCP and Google have reached an impasse with respect to a few of the items OFCCP has requested for production in connection with this Compliance Evaluation. This impasse is the result of OFCCP’s repeated refusal to accept Google’s invitations to engage in collaborative discussions regarding the relevancy and scope of

¹ In submitting this response, Google does not waive any rights, defenses, or objections it may have in any further proceedings or litigation, all of which are reserved. This response is confidentially provided to OFCCP and the Company requests that the Agency protect and not disclose this private information. The response is based upon the information now known by the Company and may be supplemented, as necessary and appropriate, upon the discovery of any additional information.

requests. However, we believe that Google's concerns can be appropriately addressed while preserving OFCCP's ability to effectively evaluate Google's compliance with Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Accordingly, Google re-extends its invitation to OFCCP to engage in collaborative discussions to address the Company's significant concerns addressed herein.

The Company sincerely hopes that we can reach a practical resolution to the current impasse. Nevertheless, Google respectfully requests that the Notice to Show Cause be rescinded in its entirety, and that an enforcement proceeding should not be initiated against the Company since for the reasons briefly summarized below and set forth in detail later in this correspondence, OFCCP's denial of access allegations are without merit.

First, OFCCP fails to acknowledge that Google has cooperated in good faith with OFCCP throughout the course of this Compliance Evaluation. In fact, Google has produced complete responses to over ninety percent (90%) of OFCCP's information, data and document requests (hereinafter "Administrative Subpoena Requests") in this Compliance Evaluation. For example, Google has produced over 884,000 items of compensation data regarding all of the Company's 21,114 employees in its Mountain View affirmative action plan workforce (hereinafter "workforce") as of September 1, 2015. Moreover, the Company has produced over 6.7 million items of applicant flow data regarding the applicants to twenty-seven (27) of Google's job groups during the period from September 1, 2014 to August 31, 2015. Furthermore, prior to the issuance of the Notice to Show Cause, Google agreed to produce additional information to OFCCP in accordance with a reasonable schedule. Google remains willing to do so.

Second, Google has not denied access to any of the information OFCCP has requested in the Administrative Subpoena Requests, but merely has asked that the Agency provide explanations for a limited number of them (hereinafter "the Remaining Requests"). As described in more detail below, absent such explanations these Remaining Requests are irrelevant to OFCCP's Compliance Evaluation, are unreasonable, and/or are unduly burdensome.

Third, OFCCP has failed to date to satisfy the elements necessary under its own regulations and/or for the issuance of an administrative subpoena with respect to the Remaining Requests due to: (1) OFCCP's repeated refusal to provide *any* explanation whatsoever regarding the relevance of the Remaining Requests, and/or (2) the unduly burdensome nature of the Remaining Requests. Accordingly, any requirement to produce information in response to the Remaining Requests, without further showings by OFCCP, would violate Google's Fourth Amendment rights under the U.S. Constitution. Indeed, were Google to respond to the Remaining Requests at this time, it could potentially waive its Fourth Amendment rights.

Fourth, OFCCP has included in its Notice to Show Cause numerous new items that OFCCP did not request previously, thus rendering the Notice to Show Cause invalid on its face.

I. BACKGROUND AND OVERVIEW

OFCCP's Notice to Show Cause ignores that Google has cooperated in good faith with the Agency throughout this Compliance Evaluation. Google already has produced well in excess of 90% of the data and documentation sought by the Agency. In addition, Google granted OFCCP access to its facilities for a two day onsite. Moreover, Google never informed OFCCP that it would not provide the information sought in the Remaining Requests, but has either proposed a reasonable schedule for doing so or asked that OFCCP simply articulate the basis on which the Agency claims the Remaining Requests are relevant to the Compliance Evaluation. To set the record straight with respect to these matters, we have provided the following brief history of the Compliance Evaluation to date, as well as a summary of Google's good faith cooperation with OFCCP throughout this matter.

A. History of the Compliance Evaluation and the Parties' Current Impasse

On September 30, 2015, OFCCP sent a Scheduling Letter to Google announcing a Compliance Evaluation of the Company's Mountain View facility. Google subsequently submitted its affirmative action plans and a complete response to Item 19 of the Scheduling Letter, providing 31 items of individualized compensation data for more than 21,000 employees in its Mountain View workforce as of September 1, 2015.

OFCCP subsequently made a series of requests for additional information and documentation from Google, including, *inter alia*, a description of each item of compensation data included in the Item 19 submission, equity data for all employees, and various policies and procedures. To date Google has provided OFCCP with *in excess of 884,000* items of compensation data. In addition, OFCCP requested the applicant flow logs for 27 of Google's job groups. To date Google has produced *over 6.7 million* items of applicant flow data to OFCCP.

In March 2016 OFCCP requested a two day onsite to interview various Google management and human resources employees regarding the Company's policies and procedures related to compensation and hiring. Google fully cooperated with the Agency during the onsite, which took place on April 27, 2016 and April 28, 2016. Google's management and human resources officials provided OFCCP with detailed, consistent and clear descriptions of Google's hiring and compensation processes.

On June 1, 2016, OFCCP sent two separate post-onsite requests for additional information and documentation to Google. Google provided complete responses to the first set of requests, which sought additional information related to Google's hiring practices.

OFCCP's second set of post-onsite requests sought: (1) thirty-six (36) additional data points for each of Google's 21,114 employees in its September 1, 2015 workforce; (2) a second compensation data base for each of Google's 19,538 employees in its September 1, 2014 workforce, including all factors previously requested, and the 36 new compensation data points requested on June 1, 2016; (3) six additional data points as of June 2016 for all Google

employees in the workforce as of September 1, 2015; and (4) nineteen (19) additional document requests related to both compensation and non-compensation personnel policies. These requests include, without limitation, the name, personal contact information, complete salary and job history, education, prior experience, prior salary, date of birth, competing offers, locality and numerous other data points for all of Google's employees as of September 1, 2015 and September 1, 2014. All told, OFCCP post-onsite requests required Google to produce well in excess of two million additional items of data to OFCCP within only a three week period of time.

On June 14, 2016, the parties held a teleconference to discuss Google's concerns with the relevance and sheer size of the requests. Google noted that OFCCP's requests significantly, and perhaps, unnecessarily expanded the scope and scale of the Compliance Evaluation, notwithstanding that the Agency had yet to disclose to Google the reasons for its requests or the existence of any issues related to the substantial compensation data already provided to the Agency. Understandably, Google respectfully requested OFCCP provide a brief, but specific, description of the potential issues it had observed in the data already provided. OFCCP responded that it "was not able to let [us] know exactly what the Agency was looking at." Google then requested OFCCP to, at least, identify the particular areas (e.g., job title or job groups) where OFCCP was seeing issues (e.g., gender, race, or ethnicity issues). OFCCP responded that it had "no findings it was able to share," and that it would not limit the scope of its requests in any way whatsoever.

B. Google Has Produced the Vast Majority of All the Information OFCCP Requested in its Administrative Subpoena Requests

Conspicuously absent from the Notice to Show Cause is any acknowledgement by OFCCP of Google's complete responses to well in excess of 90% of the OFCCP's Administrative Subpoena Requests in this matter. The eight page chart attached hereto as Exhibit A summarizes each Administrative Subpoena Request to which Google has responded to date, including the date of the request, the date Google responded or plans to respond within a reasonable timeframe, and the volume of the production in terms of number of documents and/or items of data produced. The chart demonstrates not only Google's good faith cooperation with OFCCP throughout this Compliance Evaluation, but evidences the massive volume of information the Company already has provided to the OFCCP. In sum, Google has produced *over 7.5 million items of data* to OFCCP, and has produced or agreed to produce *over 271,000 documents* to OFCCP.

C. The Impasse Regarding the Remaining Requests

As a result of Google's complete responses to the overwhelming majority of OFCCP's requests to date, the following are the only items still in question (i.e., the Remaining Requests): (1) interview notes for an estimated 54,000 applicants to Job Groups 211, 212, 213, 214, 215 and 216; (2) complete job salary and history, including without limitation starting salary, starting position/job title, compa-ratio, starting job family, starting level and starting organization for all 21,114 employees on the September 1, 2015 snapshot date, as well as all

19,539 employees on the September 1, 2014 prior year snapshot; (3) the names and personal contact information for all 21,114 employees on the September 1, 2015 snapshot date, as well as all 19,539 employees on the September 1, 2014 prior year snapshot; (4) market surveys; (5) a second compensation data set for all Google employees in the workforce as of September 1, 2014, including the production of all data items requested in connection with all employees as of the September 1, 2015 snapshot date; (6) internal employee “complaints filed during the past three years”; and (7) Public Access Files and LCAs from 9/1/13 to 8/31/15.

As explained in detail in Section II below, OFCCP has failed to comply with the elements necessary under its own regulations and/or for the lawful issuance of an administrative subpoena with respect to each of these Remaining Requests.

D. Google Has Made Multiple Good Faith Efforts to Work Collaboratively with OFCCP to Resolve Differences

Google has made numerous written requests that the Agency share information regarding the relevance and reasonableness of the Remaining Requests. Notwithstanding Google’s efforts, OFCCP repeatedly has declined to do so. Google needs this information to be able to determine appropriate next steps to protect its Fourth Amendment rights. The following is a summary of Google’s repeated requests for good faith cooperation in this matter, and OFCCP’s rejection thereof, following the parties’ June 14, 2016 teleconference described above:

- Google’s June 17, 2016 Correspondence to Assistant Director Agnes Huang:

Following up on the parties’ June 14, 2016 teleconference, Google wrote to OFCCP to confirm that “the Company understandably wishes to better understand the basis and need for Agency’s recent [post-onsite] requests,” and confirms that to date “OFCCP has not disclosed any information about what compensation issues, if any, [OFCCP] has identified during the first eight months of the review.” Google properly notes that “[t]his lack of transparency unreasonably prevents Google from evaluating the relevance of the Agency’s requests, working collaboratively with OFCCP to identify potential alternative, more efficient means of resolving such issues, and/or determining whether any reasonable limitations might be appropriate.” Google made clear that it “understand[s] and do[es] not object at this time to the fact that the Agency will not provide its actual analyses.” This remains Google’s position.

- OFCCP’s June 23, 2016 Response:

Assistant District Director Huang responded that “at this stage of the Compliance Evaluation, OFCCP is unable to share any preliminary findings or internal analyses.” OFCCP failed to provide any explanation as to why the information requested was relevant to its Compliance Evaluation.

- Google's June 30, 2016 Correspondence to Deputy Regional Director Suhr:

Google reiterated its concern regarding “the Agency’s ongoing refusal to provide *any* meaningful information to the Company regarding its preliminary findings related to compensation,” and that “failing to share such information deprives OFCCP and the Company of the opportunity to engage in a collaborative and open dialogue regarding alternative, yet sensible means of providing OFCCP the information it needs to conduct its Compliance Evaluation.” Google requests a teleconference with OFCCP Regional Office at its earliest convenience “to address the Company’s concerns while preserving the Agency’s ability to effectively evaluate Google.” Ms. Suhr did not respond to this invitation.

- Google's July 2016 Attempt to Speak with Regional Director Janette Wipper:

In July 2016, Google, through its undersigned counsel, left a phone message for OFCCP Regional Director Janette Wipper requesting a teleconference with the Region regarding Google’s ongoing concerns. Like Ms. Suhr, Ms. Wipper did not respond to this invitation. To the contrary, Google’s counsel received an e-mail dated July 8, 2016 from a Trial Attorney in the Solicitor’s office stating that the Agency expected to receive all outstanding requested information by July 15, 2016.

- The August 25, 2016 Teleconference:

On August 25, 2015 Google, through its undersigned counsel, and Assistant Regional Director Agnes Huang, Compliance Officers Farha Haq and Carolyn Mcham-Menchyk, participated in a teleconference to review “outstanding items.” Google again requested information regarding why OFCCP believed certain items were relevant to the review, and also agreed to provide certain additional disclosures by September 2, 2016. Following the conference, Ms. Mcham-Menchyk sent an e-mail to Google listing items that purportedly had yet to be provided and items that “need clarification.” No information regarding why the Remaining Requests are relevant to the Compliance Evaluation was provided.

- Google's September 2, 2016 Correspondence to OFCCP:

On September 2, 2016, Google supplemented its disclosures as agreed during the August 25, 2016 conference, set forth a schedule for additional supplemental disclosures, and listed those items it remained unable to produce due to OFCCP’s failure to provide any reasonable basis for their disclosure. Google notes that it “looks forward to the Agency’s response to the proposed schedule . . . as well as the Agency’s responses for any reasonable bases that would justify the disclosures” listed in Section V of the correspondence.

- September 16, 2016 Notice To Show Cause:

OFCCP failed to respond to Google's September 2, 2016 correspondence. Instead, OFCCP Regional Director Janette Wipper issued the September 16, 2016 Notice to Show Cause erroneously claiming that Google denied OFCCP access to records. In the Notice to Show Cause, OFCCP: (1) fails to provide any information regarding the relevance of the Remaining Requests; and (2) makes a significant number of additional requests for information for the first time.

II. **THE NOTICE TO SHOW CAUSE SHOULD BE RESCINDED SINCE: (1) GOOGLE HAS NOT DENIED THE AGENCY ACCESS TO INFORMATION RESPONSIVE TO THE REMAINING REQUESTS; (2) OFCCP HAS NOT SATISFIED THE STANDARD SET FORTH UNDER 41 C.F.R. § 60-1.43 AND/OR THE REQUIREMENTS FOR THE FOR THE LAWFUL ISSUANCE OF AN ADMINISTRATIVE SUBPOENA; AND (3) OFCCP'S NOTICE TO SHOW CAUSE IS INVALID ON ITS FACE.**

OFCCP's Notice to Show Cause should be rescinded and/or administrative proceedings should not be commenced against Google for the following reasons: (1) Google has never refused to produce responses to the Remaining Requests, and, therefore, the Company has not denied access to OFCCP; (2) to date OFCCP has failed to satisfy (a) its own regulatory standard for its demands related to the Remaining Requests and/or (b) its burden, under the administrative subpoena standard, of showing that the Remaining Requests are relevant to the Compliance Evaluation, reasonable, and not unduly burdensome; and (3) the Notice to Show Cause is facially invalid since OFCCP claims that Google denied access to information that OFCCP never previously requested. For these reasons, which are described in greater detail below, Google respectfully requests that the Notice to Show Cause be rescinded and an administrative proceeding not commence against the Company.

A. **Google Has Never Denied OFCCP Access to Any Remaining Request**

Contrary to the allegations in the Notice to Show Cause, Google has never denied OFCCP access to any Remaining Request. Rather, Google repeatedly has requested that OFCCP articulate the relevance of the Remaining Requests so that it can properly evaluate whether OFCCP has complied with the standards for issuance of an administrative subpoena described in Section II, Subsection b. below. Notwithstanding Google's good faith requests, OFCCP repeatedly has refused to provide Google with any explanation, other than to state in a conclusory and circular manner that the production is being made so that Agency can conduct its Compliance Evaluation. When asked at the parties' last teleconference on September 22, 2016 whether OFCCP was willing to provide any information regarding the relevance of the information to its investigation, OFCCP responded that it "would not provide any additional information."

OFCCP's lack of transparency with respect to the relevance of the Remaining Requests leaves Google in a difficult position – incur the significant burdens of producing all the information and data OFCCP has requested, thereby potentially waiving its right to object to the Remaining Requests, or protect its Fourth Amendment rights by ensuring that the Agency complies with the standards applicable to administrative subpoenas set forth below. OFCCP's repeated refusal to provide any reason why the Remaining Requests are reasonable and relevant to its Compliance Evaluation fully justifies Google's decision to protect its rights, especially when Google can potentially waive such rights by producing responses to the Remaining Requests. Cf. EEOC v. County of Hennepin, 623 F. Supp. 29, 31-32 (D. Minn. 1985) (failure to object to an administrative subpoena can act as a waiver of objections).

Throughout the course of the Compliance Evaluation and to this date, Google has informed OFCCP that it is ready, willing, and able to consider responding to all of the Remaining Requests, provided OFCCP complies with the its own regulations and the standards for the issuance of an administrative subpoena set forth below. Accordingly, since Google has never denied OFCCP access to records, but has merely appropriately protected its rights, OFCCP's claim fails as a matter of law.

B. OFCCP Has Not Met Its Own Regulatory Standard Applicable to the Administrative Requests, and/or the Standard Necessary for the Lawful Issuance of an Administrative Subpoena, as a Matter of Law

OFCCP's regulations require that “[e]ach contractor shall permit the inspecting and copying of such books and account and records, including computerized records, and other material *as may be relevant to the matter under investigation and pertinent to compliance* with [Executive Order 11246].” 41 C.F.R. § 60-1.43 (emphasis added). Further, OFCCP's requests for information are subject to the Fourth Amendment constitutional standards for administrative subpoenas set forth in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1946) and its progeny. See United Space Alliance, LLC v. Solis, 824 F. Supp.2d 68, 91 (D.D.C. 2011) (applying administrative subpoena standard in denial of access case brought by OFCCP). Thus, “when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome.” United Space Alliance, 824 F. Supp.2d at 91, citing Donovan v. Lone Steer, Inc., 464 U.S. 408, 415, 104 S. Ct. 769, 773, 78 L. Ed. 2d 567, 573 (1984).

“The gist of the protection is in the requirement, *expressed in terms*, that the disclosure sought shall not be *unreasonable*.” Id., citing Oklahoma Press at 66 S. Ct. at 505 (other citations omitted) (emphasis added). The line of cases establishing the administrative subpoena standard “in no way leaves an employer defenseless against an unreasonably burdensome administrative subpoena requiring the production of documents.” Id., citing Lone Steer, Inc., 104 S. Ct. at 773. “Rather, it ‘provide[s] protection for a subpoenaed employer by allowing [it] to question the reasonableness of the subpoena, before suffering any penalties for

refusing to comply with it, by raising objections in an action in district court.” Id., at 92, citing Lone Steer, Inc., 104 S. Ct. at 773.

In addition to the relevant and reasonable standard, an administrative subpoena must be “sufficiently limited in scope” and “specific in directive so that compliance will not be “*unreasonably burdensome.*” United Space Alliance, 824 F. Supp.2d at 91, quoting Lone Steer, Inc., 104 S. Ct. at 773 (emphasis added). Indeed, it is well established that “[a]n administrative subpoena may not be so broad so as to be in the nature of a ‘fishing expedition.’” Peters v. U.S., 853 F.2d 692, 700 (9th Cir. 1988); cf., Cook v. Howard, 484 Fed. Appx. 805, 813 (4th Cir. 2012) (stating that while the party seeking the disclosure asserted that the materials may have led to discovery of admissible evidence, they present “*no intelligible explanation of how that is so, nor can we detect any; the requests have every indicia of the quintessential fishing expedition*”) (emphasis added).

OFCCP repeatedly has refused to articulate to Google *any* explanation for why the Remaining Requests are reasonable and are relevant to its Compliance Evaluation. Accordingly, the Agency cannot meet its own regulatory standard set forth in 41 C.F.R. § 60-1.43, nor the standard described in United Space Alliance as a matter of law. In addition, OFCCP’s unreasonably excessive and overly-broad disclosure requests go far beyond the relevant facts and issues in this Compliance Evaluation, and constitute nothing more than an impermissible “fishing expedition” into Google’s records.

In its Notice to Show Cause, OFCCP cites to 41 C.F.R. § 60-1.12 as justification for its data and information requests. However, § 60-1.12 is simply a record retention provision. It governs the types of records that a contractor must maintain, not what a contractor may have to produce during a compliance evaluation. OFCCP has never alleged that Google has failed to preserve any record required to be maintained in this matter.

More appropriately, OFCCP also cites to 41 C.F.R. § 60-1.43 for a contractor’s obligations to produce records during a compliance evaluation. However, this section does not permit OFCCP *unfettered discretion* to obtain records and information during a compliance evaluation. § 60-1.43 provides, in pertinent part, that “[e]ach contractor shall permit the inspecting and copying of such books and account and records, including computerized records, and other material *as may be relevant to the matter under investigation and pertinent to compliance* with [Executive Order 11246]” (emphasis added).

Accordingly, 41 C.F.R. § 60-1.43 requires that the records OFCCP seeks for review are both *relevant* and *pertinent*. Beyond the regulations, as noted above, the Fourth Amendment to the United States Constitution, protects contractors like Google from unreasonable searches and seizures.

As described below, OFCCP has not met its burden under 41 C.F.R. §§ 60-1.43 and/or the administrative subpoena standard set forth above with respect to any of the Remaining Requests:

- Interview Notes:

OFCCP requests that Google produce interview notes related to an estimated 54,000 applicants who interviewed for positions in Job Groups 211, 212, 213, 214, 215 and 216. In response to this request, Google consulted with its e-Discovery team regarding the time, cost and burden of producing interview notes for these applicants. The team estimates a total cost of over \$1 million and no less than 6 months to collect the relevant data and produce same to OFCCP. The cost involves not only pulling the notes for the correct applicants, but ensuring that the notes correlate to the period under review and to the specific positions applied to in Job Groups 211 to 216.

Due to the enormous burden associated with this request, Google respectfully has requested the Agency to analyze the voluminous applicant flow data Google already has provided to the Agency to ascertain whether it is truly necessary to require the Company to gather and produce interview notes related to the 54,000 applicants we estimate were interviewed either by phone or on-site. Accordingly, we anticipate responding to this request would necessitate the production of hundreds of thousands of pages of interview notes. Once the Agency has completed its analyses of information already in its possession, OFCCP can revisit this request in order to determine if there is a more cost effective and efficient alternative, including whether the request can be limited to certain job titles or if sampling might suffice. Unfortunately, OFCCP never responded to this suggestion, instead deciding to issue the Notice to Show Cause. Accordingly, as it stands, this request is clearly overbroad and unduly burdensome.

- Job and Salary History, As Well As Starting Salary, Starting Position/Title, Compa-Ratio, Starting Job Code, Starting Job Family, Starting Job Level and Starting Organization:

OFCCP requests that Google produce the entire job and salary history, including starting salary, starting position/title, starting compa-ratio, starting job family, starting job level and starting organization, for all 21,114 employees on the September 1, 2015 snapshot, as well as all 19,539 employees on the September 1, 2014 prior year snapshot. This request seeks a massive amount of additional compensation data, with no attempt by OFCCP to limit the requests to an appropriate subset of employees. For example, OFCCP has not limited its requests to employees in areas where the Agency may have found some preliminary indicator of compensation disparities on the basis of gender, race, ethnicity or sex. To date OFCCP has failed to articulate any issue it may have found in the 844,560 items of compensation data for 21,114 employees that Google already has produced to OFCCP. Moreover, it strains credibility to claim that the Agency would need the massive amount of sought after information for all 21,114 employees. Absent such explanation, OFCCP's request for such voluminous data is unreasonable and unduly burdensome, and constitutes nothing more than an impermissible fishing expedition.

- Employee Names and Personal Contact Information:

OFCCP requests that Google produce the names and personal contact information (including phone numbers, addresses, e-mails, etc.) for all 21,114 employees on the September 1, 2015 snapshot, as well as all 19,539 employees on the September 1, 2014 prior year snapshot.

As described in our February 22, 2016 e-mail and September 2, 2016 correspondence to OFCCP, Google is not prepared to provide the names and personal contact information for its *entire* workforce at this time due to a lack of relevance, its unduly burdensome nature, and significant privacy and confidentiality concerns it raises. See Grey v. Sup. Ct., 63 Cal. App. 3d 698, 703-704 (1976) (speculation alone is not sufficient to warrant the disclosure of private information). As previously explained to the Agency and as demonstrated by its actions to date, Google takes the safeguarding of its employees' personal information extremely seriously.

While the Company recognizes that there may be a point during this Compliance Evaluation that the disclosure of *some* employee names may be necessary, the Company does not believe the Agency's current activities require such disclosure. This is especially true since OFCCP has *not* communicated any legitimate rationale for obtaining employee name – certainly not one that the Agency cannot achieve using the employee ID numbers already provided.

OFCCP can effectively and efficiently move forward with the roster provided at this time, which identifies each specific employee by a unique ID number. Of course, the Company would be happy to reconsider the Agency's request for employee names on one or more reports should OFCCP supply a necessary rationale for such information that overrides Google's privacy concerns and that cannot be accomplished with employee ID number.

- Market Surveys

OFCCP requests that Google produce all "Market Surveys." As explained during the on-site and in Google's September 2, 2016 correspondence to OFCCP, the Company developed Market Reference Points ("MRP") from Market Surveys. Since Google already has provided the Agency with the MRP for each position, the market surveys offer no additional probative value to OFCCP's investigation into still yet to be disclosed compensation issues. However, Google is willing to reconsider this position if OFCCP identifies a reason why market surveys are relevant to the Compliance Evaluation.

- A Second Compensation Snapshot Based on the Prior Year Snapshot Date:

OFCCP requests that Google provide a *second* compensation database for the 19,539 in Google's workforce as of September 1, 2014. Notwithstanding that the Agency has refused to provide any information regarding any compensation issues it purports to have

identified in connection with Google's Item 19 submission for the 21,114 employees as of September 1, 2015, the Agency continues to insist that Google provide a *second* compensation database for the 19,539 Google employees as of September 1, 2014. Absent any explanation regarding the issues it purports to have identified with the current year snapshot data, OFCCP's request for compensation data for a second snapshot date is not relevant to the Compliance Evaluation, is unreasonable, and overly burdensome, and constitutes nothing more than an impermissible fishing expedition. However, once again, Google is willing to reconsider this position if OFCCP identifies the particular issues that would justify the production of a second compensation submission based on the prior year snapshot date.

- Internal Employee Complaints Filed in the Last Three Years:

OFCCP requests that Google produce all "Complaints filed in the past three years, including (internal and external² by name, race gender, job title manager, department, basis and status.)" OFCCP's request is overbroad given (1) the lack of any substantiation by OFCCP for the need for "internal complaints" and (2) Google's production of all complaints filed with external fair employment practice agencies. The burden of locating information regarding any internal EEO complaints over a three year period for a workforce of over 21,000 employees is far outweighed by any probative value such complaints might provide in connection with this Compliance Evaluation. See, e.g., EEOC v. Morgan Stanley & Co., 132 F. Supp.2d 146, 161 (S.D.N.Y. 2000) (administrative subpoena found unduly burdensome where request for all informal or formal complaints would require "a massive and unduly burdensome effort to interview practically everyone who works or recently has worked in a supervisory position, in order to determine whether any employees ever questioned the fairness of their treatment."). However, if OFCCP provides, in writing, a reasonable explanation why such disclosure is necessary, the Company will take this under advisement.

- Public Access Files and LCAs from 9/1/13 to 8/31/15

OFCCP requests the Public Access Files and LCAs for the period from September 1, 2013 to August 31, 2015. Notwithstanding Google's requests, OFCCP has not provided any reasonable basis for the disclosure of these documents. During the course of the onsite, all managers consistently confirmed that applicants/employees requiring a visa of any type are treated *no differently* in terms of compensation, benefits or any other terms and conditions of employment than other applicants/employees. OFCCP has never stated that it has any information to the contrary. Accordingly, OFCCP's request for this information is not relevant

² Google already has provided OFCCP with formal EEO charges/complaints filed with federal, state or local fair employment practice agencies alleging race, gender, sexual harassment, disability, religious accommodation or national origin discrimination during the past three years.

to the Compliance Evaluation, is unreasonable and unduly burdensome, and constitutes nothing more than an impermissible fishing expedition.³

* * *

Based on the foregoing, Google submits that since OFCCP has not satisfied the elements necessary under its own regulations and/or for the issuance of an administrative subpoena as a matter of law, the Notice to Show Cause should be rescinded in its entirety and an administrative proceeding should not be commenced against the Company.

C. **The Notice to Show Cause Is Facially Invalid Since It Seeks the Production of Information That OFCCP Has Never Previously Requested**

On September 19, 2016, OFCCP e-mailed to Google Inc. an “Attachment C – Amended 9/16/16,” supplementing the original Attachment C to the Notice to Show Cause. In its original and/or Amended Attachment C to the Notice to Show Cause, OFCCP requests the following ten (10) items *for the first time*:

- National origin/citizenship/visa status/place of birth for all 21,114 employees in Google’s workforce as of September 1, 2015, and all 19,539 employees in Google’s workforce as of September 1, 2014.
- “Job Function” for all 21,114 employees in Google’s workforce as of September 1, 2015, and all 19,539 employees in Google’s workforce as of September 1, 2014. (Prior to the Notice to Show Cause, OFCCP had only requested Job Function with respect to the applicant flow logs for Job groups 211, 212, 213, 214, 215 and 216).
- “Starting Job Function” for all 21,114 employees in Google’s workforce as of September 1, 2015, and all 19,539 employees in Google’s workforce as of September 1, 2014.
- “All Stock Agreements” for all 21,114 employees in Google’s workforce as of September 1, 2015, and all 19,539 employees in Google’s workforce as of September 1, 2014.
- “All expressions of interest” for job openings in Job Groups 211, 212, 213, 214, 215 and 216.

³ Notwithstanding Google’s position with respect to the Public Access files and LCAs, in the spirit of the Company’s ongoing good faith and cooperation, the Company will produce these documents to OFCCP by November 1, 2016 on the basis that these documents are available to the public upon request. It is worth noting that the LCAs for the past 3 years are readily accessible on a web-site maintained by the U.S. Department of Labor. [See https://lcr-pjr.doleta.gov/index.cfm?event=ehlcjrexternal.dsplcrlanding](https://lcr-pjr.doleta.gov/index.cfm?event=ehlcjrexternal.dsplcrlanding).

- Race and gender “for all expressions of interest” to Job Groups 211, 212, 213, 214, 215 and 216.
- Applicant profile for each of the over 245,000 applicants to Job Groups 211, 212, 213, 214, 215 and 216.
- “Any other employee characteristics maintained” for each of the over 245,000 applicants to Job Groups 211, 212, 213, 214, 215 and 216.
- “Automated Resume Screen System”
- Instructional manual and screenshots for gHire.

The Notice to Show Cause is invalid on its face since OFCCP threatens the commencement of enforcement proceedings against the Company based, in part, on these items that OFCCP never requested prior to the issuance of the Notice to Show Cause. Google cannot have denied OFCCP access to items that it has not previously requested Google to produce.

In addition to invalidating the Notice to Show Cause, OFCCP’s demand for the first time in the Notice to Show Cause for a significant amount of additional information further illustrates the continuing refusal of OFCCP to engage in an open dialogue with Google in this Compliance Evaluation. For example, had OFCCP discussed these new requests with Google prior to issuance of the Notice to Show Cause, Google would have explained to the Agency, as it did during the parties’ teleconference on September 22, 2016, that the Company does not use the terms or have any data related to “job function” or “starting job function.”⁴ Similarly, Google would have explained that consistent with its compliance with Title VII of the Civil Rights Act of 1964 and Executive Order 11246, Google does not maintain comprehensive data related to national origin or place of birth in its HRIS systems. The Notice to Show Cause also highlights OFCCP’s pattern of refusing to provide to Google any information regarding the relevance of the Remaining Requests, and asking the Company to produce even further information without explanation. Nevertheless, as with every other request made by OFCCP, the Company will certainly consider producing any records or information that are both relevant to the Compliance Evaluation and not unduly burdensome.

III. CONCLUSION

Based on the foregoing, it is clear that Google has made every reasonable effort to cooperate with OFCCP during the Compliance Evaluation. In fact, it is only because of the Agency’s unreasonableness and refusal to work cooperatively and collaboratively with the Company that we find ourselves at this point. To this end, the Company again requests the

⁴ Google does have business units where different jobs are located – for example, General Business Operations (GBO), Engineering, etc. Accordingly, in the spirit of good faith cooperation, Google provided this general business organization in connection with the applicant flow logs for Job Groups 211 to 216, and is willing to do the same for the 21,114 employees on the September 1, 2015 workforce snapshot.

opportunity to engage in a collaborative and productive dialogue regarding alternative, yet sensible means of providing OFCCP the information it needs to complete its Compliance Evaluation. Accordingly, we request that the parties schedule a teleconference at a mutually convenient date and time. In addition, Google respectfully requests that the Notice to Show Cause should be rescinded in its entirety, and that an enforcement proceedings should not be initiated in this matter, so that we may move forward to conclude this Compliance Evaluation in an efficient and effective manner.

Very truly yours,

JACKSON LEWIS P.C.



Matthew J. Camardella

MJC/dvd

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EXHIBIT A

GOOGLE – MOUNTAINVIEW COMPLIANCE EVALUATION – PRODUCTION TO OFCCP TO DATE

EXHIBIT A

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Item 19 Data	September 2015	November 2015 and supplemented, as noted below, at various times during compliance review	844,560 items of compensation data for 21,114 employees produced to date
2015 EEO-1 Report; Compensation Policy; Race Definitions	December 2015	December 2015	4 pages produced
Salary Ranges; description of job grades; descriptions of certain forms of compensation; race codes	December 2015 and January 2016	January 2016	19 pages produced
Questions regarding personnel activity reports	January 2016	January 2016	Not applicable
Descriptions of Google's EEO-1 reports; description of Google's hiring and promotion processes	December and January 2016	January 2016	Not Applicable
Questions regarding job titles and compensation	January 2016	January 2016	Not Applicable
Google's Consolidated 2015 EEO-1 Report	January 2016	January 2016	1 page produced
Questions regarding Item 19 data	January 2016	January 2016	Not Applicable

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Stock Awards for all 21,114 employees in workforce as of September 1, 2015	January 2016	January 2016 and supplemented in April 2016	274,482 items of data produced
Employee Roster as of September 1, 2015 in Excel	February 2016	February 2016	126,684 items of data produced
Questions regarding applicant flow log, hiring and recruiting processes	February 2016	February 2016	Not Applicable
Applicant Flow Data for 27 Job Groups	February 2016	March, April and May 2016	Over 6.7 million items of applicant flow data produced to date
Bonus Earned	June 2016	OFCCP retracted request since Google had already produced the data to the Agency	Not Applicable
Bonus Period Covered	June 2016	OFCCP retracted request since Google had already produced the information to the Agency	Not Applicable
Campus or Industry Hire	June 2016	August 2016	21,114 items of data produced
Current Compa Ratio	June 2016	August 2016	21,114 items of data produced
Current Job Code	June 2016	August 2016	21,114 items of data produced
Current Job Family	June 2016	August 2016	21,114 items of data produced

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Current Level	June 2016	August 2016	21,114 items of data produced
Current Manager	June 2016	August 2016	21,114 items of data produced
Current Organization	June 2016	August 2016	21,114 items of data produced
Date of Birth	June 2016	August 2016	21,114 items of data produced
Department Hired Into	June 2016	August 2016	21,114 items of data produced
Education	June 2016	December 2016	Google has agreed to provide resumes for all 21,114 employees in workforce by December 15, 2016
Equity Adjustment	June 2016	September 2016	None – no equity increases were made
Hiring Manager	June 2016	August 2016	21,114 items of data produced
Locality	June 2016	August 2016	21,114 items of data produced
Long/Short Term Incentive Eligibility and Grants	June 2016	November 2015	Included in original Item 19 submission
Market Reference Point	June 2016	August 2016	21,114 items of data produced
Market Target	June 2016	August 2016	None – term market target does not exist at Google
Performance Rating for the Last Three Years	June 2016	August 2016	63,342 items of data produced

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Prior Experience	June 2016	December 2016	Google has agreed to provide resumes for all 21,114 employees in workforce by December 15, 2016
Prior Salary	June 2016	Not Applicable	Google does not regularly maintain prior salary information in its HRIS systems
Referral Bonus	June 2016	November 2015 (Google provided this data with its original Item 19 submission)	Not applicable
Stock Monetary Value at Award Date	June 2016	January 2016 and supplemented in April 2016	Data already provided to OFCCP allows for calculation of hypothetical value.
Target Bonus	June 2016	August 2016	21,114 items of data produced
Total Cash Compensation	June 2016	November 2015 and supplemented in April and August 2016	Data already provided in connection to Item 19 submission and supplements thereto allows for calculation of total cash compensation.
Any Other Factors Related to Compensation	June 2016	April 27-28, 2016	Not applicable; provided during interviews at April 27-28, 2016 onsite

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Bonus Targets for the Past Three Years	June 2016	August 2016	63,342 items of data produced
Competing Offer	June 2016	September 2016	Google informed OFCCP that it does not regularly maintain this data in its HRIS
Compensation Policies, Guidelines and Training Materials; Employee Guide – Compensation, Performance Appraisals; Hiring, Promotion and Termination Policies; Guidelines and Training Materials; Manager Guides for Compensation; Performance Review Policy/Guidelines, and Training Materials; Recruiter Guides – for Recruiting and Hiring	June 2016	August 2016	374 pages from 26 policies or other documents produced
FMLA Policy	June 2016	OFCCP retracted request since Google had already produced the policy to the Agency	Not applicable
Job Pay Level Listing – Education	June 2016	January 2016	Google produced this information to OFCCP prior to the onsite

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Listing of all Job Families, Job Codes and Positions Within	June 2016	September 2016	Google does not maintain a list of all job families, job codes and positions therein as of the September 1, 2015 snapshot date.
Merit Algorithm or Matrix for Past Three Years	June 2016	August 2016	3 spreadsheets produced
Organization Charts – Compensation, Global Business, People Operations (Recruiting, Staffing, etc.)	June 2016	August 2016	2 org charts produced covering Compensation, Global Business and People Operations, including Recruiting and Staffing)
Pay Locality Guide	June 2016	August 2016	1 spreadsheet
Screenshots/instructions for GComp, Workday, Prosper, Perf	June 2016	September 2016	17 documents; 436 pages
Confirmation that “Market Target” is equivalent to market reference point	June 2016	June 2016	Google confirmed there is no term “market target” at Google.
Effective Dates for Calibration Lead Cheat Sheet, Manager Calibration Cheat Sheet, etc.	August 2016	September 2016	Not applicable
Key for Merit Algorithm	August 2016	September 2016	1 page
Correction of “◆◆” symbols Google’s Item 19 Submission	August 2016	September 2016	Not Applicable

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Additional Organizational Charts Related to Recruiting and Staffing	August 2016	September 2016	None – Google confirmed that the recruiting and staffing function was already included on the organization chart provided to OFCCP previously
Department Applied To For Job Groups 211 to 216	June 2016	August 2016	None – Google explained that applicants do not apply to particular departments at Google
Department Hired Into (if hired) for the Applicant Flow for Job Groups 211 to 216	June 2016	October 2016	3031 items of data produced
Job Family for the Applicant Flow for Job Groups 211 to 216	June 2016	August 2016	Over 245,000 items of data produced
Job Function for the Applicant Flow for Job Groups 211 to 216	June 2016	August 2016	Over 245,000 items of data produced (Google does not use the term job function but provided the business unit for each position)
Education for the Applicant Flow for Job Groups 211 to 216	June 2016	December 2016	Google has agreed to produce resumes for over 245,000 applicants to Job Groups 211 to 216 by December 15, 2016

<u>Administrative Subpoena Request</u>	<u>Month Requested</u>	<u>Month Produced/To Be Produced</u>	<u>Volume of Production</u>
Prior Relevant Work Experience for the Applicant Flow for Job Groups 211 to 216	June 2016	December 2016	Google has agreed to produce resumes for over 245,000 applicants to Job Groups 211 to 216 by December 15, 2016
Requisition Applied To for the Applicant Flow for Job Groups 211 to 216	June 2016	August 2016	Over 245,000 items of data produced
Requisition Hired Into (if hired) for the Applicant Flow for Job Groups 211 to 216	June 2016	August 2016	2921 items of data produced