

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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MAR 16 2017

Office of Administrative Law Judges
San Francisco, Ca

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

Plaintiff,

Case No.: 2017-OFC-00004

v.

GOOGLE INC.,

Defendant.

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FEB 23 2017

Office of Administrative Law Judges
San Francisco, Ca

DEFENDANT'S STATEMENT OF DISPUTED FACTS

Defendant Google Inc. ("Google"), by and through its undersigned counsel and pursuant to 41 C.F.R. § 60-30.23(d), hereby submits its Response to Plaintiff's Statement of Allegedly "Uncontested Facts" and Defendant's Statement of Disputed Facts.

A. Response to Plaintiff's Statement of Allegedly "Uncontested Facts"

	Plaintiff's Allegedly "Uncontested Facts"	Response
1.	Google is a wholly-owned subsidiary of Alphabet, Inc. It offers, among other things, Internet advertising services. It is located at 1600 Amphitheatre Parkway in Mountain View, CA. Complaint ¶ 2; Answer ¶ 2.	Not disputed; Answer ¶ 2.
2.	At all times relevant hereto, Google has had 50 or more employees and has had at least one contract with the federal government of \$100,000 or more, including Contract No. GS07F227BA for "Advertising and Integrated Marketing Solutions," which the General Services Administration awarded Google on June 2, 2014 ("AIMS Contract"). Complaint ¶¶ 3-4; Answer ¶¶ 3-4.	Disputed. Answer ¶¶ 3-4. The evidence in the record shows that OFCCP has failed to define "at all times relevant hereto," a disputed issue of fact in this case, since OFCCP is seeking information and data prior to its two year maximum review period.

	Plaintiff's Allegedly "Uncontested Facts"	Response
3.	<p>The AIMS Contract contains provisions requiring Google to comply with the Executive Order, VEVRAA, and the Rehabilitation Act and the implementing regulations promulgated pursuant to each. Pilotin Decl., Ex. A-2 at 16-17 (regulations incorporated into AIMS Contract); <i>id.</i>, Ex. A-3 (text of regulations) at 48 (FAR § 52.222-26(c)(6)), 51 (FAR § 52.222-35(b)(2)), 53 (FAR § 52.222-36(a)(2)).⁴ Under the AIMS Contract, Google specifically agreed to, among other things, to “comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor” and</p> <p style="padding-left: 40px;">permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.</p> <p>Pilotin Decl., Ex. A-3 at 48 (FAR § 52.22-26(c)(6), (8)). Google projected the contract would generate \$5 million in annual sales. <i>Id.</i>, Ex. A-4 at 3.</p> <p>⁴The AIMS Contract consists of four sets of documents: (1) the Government’s solicitation; (2) Google’s offer, dated July 2, 2013; (3) Google’s Final Proposal Revision, dated April 23, 2014 and submitted May 6, 2014; and (4) the relevant Standard Form 1449 and its continuing pages. <i>See</i> Ex. A-1 at 1B, Because Google’s Answer directs the Court to the AIMS Contract itself, OFCCP submits the relevant portions of the contract as Exhibits A-1, A-2, A-3, and A-4 to the Pilotin Declaration. Complaint ¶ 5 (discussing AIMS Contract); Answer ¶ 5</p>	<p>Disputed. Answer ¶¶ 4-6. The evidence in the record shows that these provisions are cited in Plaintiff’s brief as having been voluntarily negotiated and for the proposition that Google has waived its Fourth Amendment rights, both of which are factually and legally incorrect. As it did in its Answer to Administrative Complaint and Request for Hearing, Google respectfully refers the Court to the full content of the referenced documents in response to Plaintiff’s averments.</p>

	Plaintiff's Allegedly "Uncontested Facts"	Response
4.	<p>(referring "the Court to the full contents of the referenced document in response to the Complaint's specific averments therein").</p> <p>When it agreed to the AIMS Contract, Google "affirm[ed] that no exceptions are being taken to the terms and conditions related to" the contract, which contained the provisions in paragraph 3 above. Complaint ¶ 6 (citing language); Answer ¶ 6 (referring Court to document); Pilotin Decl., Ex. A-5 (April 23, 2014 Google letter containing language) at 1. Google also affirmed that its agreement "reflect[ed] the outcome of negotiations between Google and" the General Services Administration. Pilotin Decl., Ex. A-5 at 1.</p>	<p>Disputed. Answer ¶¶ 4-6. The evidence in the record shows that these provisions are cited in Plaintiff's brief as having been voluntarily negotiated and for the proposition that Google has waived its Fourth Amendment rights, both of which are factually and legally incorrect. As it did in its Answer to Administrative Complaint and Request for Hearing, Google respectfully refers the Court to the full content of the referenced document in response to Plaintiff's averments.</p>
5.	<p>On or about September 30, 2015, Google received a scheduling letter from OFCCP, notifying the company that its Mountain View facility had been "selected . . . for a compliance evaluation" in the form of a "compliance review." Complaint ¶ 8; Answer ¶ 8; Aff'n of Daniel V. Duff III, Esq. in Support of Defs.' Mot. to Remove ("Duff Aff'n") ¶ 2, Ex. A at 1.</p>	<p>Not disputed; Answer ¶ 8.</p>
6.	<p>On or before June 1, 2016, as part of the compliance evaluation, OFCCP requested that Google produce</p> <ol style="list-style-type: none"> a. a database containing information on the company's compensation of its employees (<i>i.e.</i>, "compensation snapshot"), as of September 1, 2014; b. job and salary history for employees in a September 1, 2015 compensation snapshot that Google had produced and the requested September 	<p>Disputed. Answer ¶ 9; Camardella Decl. ¶ 28 and Exhibit B thereto.¹ The evidence in the record shows that Plaintiff fails to accurately describe the full extent of the demands at issue in this proceeding (the "Subject Demands"). The Subject Demands seek:</p> <ol style="list-style-type: none"> a) the name, home telephone number, home address, personal e-mail and all other contact information for over 21,000 Google employees in its corporate headquarters AAP as

¹ "Camardella Decl." refers to the February 23, 2017 Declaration of Matthew J. Camardella, Esq. in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment.

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	<p>1, 2014 snapshot, including starting salary, starting position, starting "comparatio," starting job code, starting job family, starting job level, starting organization, and changes to the foregoing; and,</p> <p>c. the names and contact information for employees in the previously-produced September 1, 2015 snapshot and the requested September 1, 2014 snapshot.</p> <p>Complaint ¶ 9; Answer ¶ 9 (referring Court "to the items requested by OFCCP"); Duff Aff'n, Ex. B (June 1, 2016 OFCCP requests to Google).</p>	<p>of September 1, 2015, <i>without any limitation</i>;</p> <p>b) the complete job and salary history from the founding of Google in 1998 to the present for over 21,000 Google employees in its corporate headquarters AAP as of September 1, 2015, <i>without any limitation</i>;</p> <p>c) the name, home telephone number, home address, personal e-mail and all other contact information for over 19,500 Google employees in its corporate headquarters AAP as of September 1, 2014, <i>without any limitation</i>;</p> <p>d) the complete job and salary history from the founding of Google in 1998 to the present for over 19,500 Google employees in its corporate headquarters AAP as of September 1, 2014, <i>without any limitation</i>; and,</p> <p>e) a second compensation snapshot, including the over 65 compensation data points previously requested, including OFCCP's unmoored request for "any other factors related to compensation," for over 19,500 Google employee as of September 1, 2014, <i>without any limitation</i>.</p>
7.	<p>On June 17, 2016, Google refused to produce the items requested in paragraph 6 ("Subject Items"), unless OFCCP first disclosed preliminary findings in its investigation.</p>	<p>Disputed. Answer ¶¶ 10-11; Camardella Decl. ¶ 23 and Exhibits C, E, F, I and J thereto. The evidence in the record shows that Google has never</p>

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	<p>Complaint ¶ 10; Duff Aff'n, Ex. C (6/17/2016 Camardella Ltr.) at 3-4. Google conditioned its production of the requested items on the agency disclosing its preliminary findings, namely: (1) the nature and extent of the purported issues, if any, OFCCP has found in the data/information already provided to the Agency, and (2) each specific area where these potential issues are found (<u>e.g.</u>, a list of the specific job groups, job titles, or other groupings where OFCCP purportedly has identified issues).</p> <p>Duff Aff'n, Ex. C at 3-4; <i>see also</i> Pilotin Decl., Ex. B (10/19/16 Camardella Ltr.) at 4 (to obtain the Subject Items, OFCCP must "provide a brief, <i>but specific</i>, description of the potential issues it had observed in the data already provided") (emphasis added).</p>	<p>refused to produce responses to the Subject Demands, but asked OFCCP to comply with its obligations under the Fourth Amendment, Executive 11246 and its implementing regulations and/or OFCCP's own policies and procedures before doing so, including asking for OFCCP to merely identify why the data and information was relevant and the particular areas (<i>e.g.</i>, job title or job groups) where OFCCP was seeing issues (<i>e.g.</i>, gender, race or ethnicity issues) [Camardella Decl., Exhibit C at pg. 3, Exhibit E at pg. 2, Exhibit F at pgs. 4-6, Exhibit I at pgs. 5-13, and Exhibit J at pgs. 2-9]; Google specifically stated that "we understand and do not object at this time to the fact that the Agency will not provide its actual analyses" [Camardella Decl., Exhibit C at pg. 4].</p>
8.	<p>On or around September 16, 2016, OFCCP served a notice to show cause why enforcement proceedings should not be initiated based on the company's refusal to produce the Subject Items ("Show Cause Notice"). Complaint ¶ 11; Answer ¶ 11.</p>	<p>Disputed. Answer ¶¶ 10-11; Camardella Decl. ¶ 23 and Exhibits C, E, F, I and J thereto. The evidence in the record shows that Google has never refused to produce responses to the Subject Demands, but asked OFCCP to comply with its obligations under the Fourth Amendment, Executive 11246 and its implementing regulations and/or OFCCP's own policies and procedures before doing so, including asking for OFCCP to merely identify why the data and information was relevant and the particular areas (<i>e.g.</i>, job title or job groups) where OFCCP was seeing issues (<i>e.g.</i>, gender, race or ethnicity issues) [Camardella Decl., Exhibit C at pg. 3, Exhibit E at pg. 2, Exhibit F at pgs. 4-6, Exhibit I at pgs. 5-13, and Exhibit J at pgs. 2-9]; Google specifically stated that "we understand and do not object at this time to the fact that the Agency will not provide its</p>

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		actual analyses" [Camardella Decl., Exhibit C at pg. 4].
9.	On October 19, 2016, Google responded to the Show Cause Notice, stating that the parties were at an "[i]mpasse" regarding the Subject Items and reiterated its position that it would not produce them unless OFCCP established their relevance by disclosing its preliminary findings regarding discrimination. Pilotin Decl., Ex. B (Oct. 19, 2016 Camardella Ltr.) at 4 (declaring "[i]mpasse"); <i>id.</i> at 12 ("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 . . .").	Disputed. Answer ¶¶ 10-11; Camardella Decl. ¶ 23 and Exhibits C, E, F, I and J thereto. The evidence in the record shows that Google has never refused to produce responses to the Subject Demands, but asked OFCCP to comply with its obligations under the Fourth Amendment, Executive 11246 and its implementing regulations and/or OFCCP's own policies and procedures before doing so, including asking for OFCCP to merely identify why the data and information was relevant and the particular areas (<i>e.g.</i> , job title or job groups) where OFCCP was seeing issues (<i>e.g.</i> , gender, race or ethnicity issues) [Camardella Decl., Exhibit C at pg. 3, Exhibit E at pg. 2, Exhibit F at pgs. 4-6, Exhibit I at pgs. 5-13, and Exhibit J at pgs. 2-9]; Google specifically stated that "we understand and do not object at this time to the fact that the Agency will not provide its actual analyses" [Camardella Decl., Exhibit C at pg. 4, Exhibit F at pg. 4].
10.	On November 29, 2016, the parties had a teleconference regarding the Show Cause Notice. Pilotin Decl., Ex. C (Dec. 6, 2016 Camardella Ltr.) at 1. While the parties narrowed their disputes, Google maintained its position that it would not produce the Subject Items unless OFCCP disclosed its preliminary findings. <i>Id.</i> at 2 (maintaining that Subject Items' relevance must be tied "to any preliminary findings made by OFCCP concerning compensation"); <i>id.</i> (arguing that OFCCP's refusal to provide "information regarding the preliminary compensation findings the Agency has made" violates Google's Fourth Amendment rights).	Disputed. Answer ¶¶ 10-11; Camardella Decl. ¶ 23 and Exhibits C, E, F, I and J thereto. The evidence in the record shows that Google has never refused to produce responses to the Subject Demands, but asked OFCCP to comply with its obligations under the Fourth Amendment, Executive 11246 and its implementing regulations and/or OFCCP's own policies and procedures before doing so, including asking for OFCCP to merely identify why the data and information was relevant and the particular areas (<i>e.g.</i> , job title or job groups) where OFCCP was seeing issues (<i>e.g.</i> , gender, race or

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		ethnicity issues) [Camardella Decl., Exhibit C at pg. 3, Exhibit E at pg. 2, Exhibit F at pgs. 4-6, Exhibit I at pgs. 5-13, and Exhibit J at pgs. 2-9]; Google specifically stated that "we understand and do not object at this time to the fact that the Agency will not provide its actual analyses" [Camardella Decl., Exhibit C at pg. 4].
11.	Since OFCCP requested the Subject Items in June 2016, the parties have exchanged multiple communications and held several teleconferences in an attempt to resolve Google's objections. Decl. of Agnes Huang in Support of Pl.'s Response to Def.'s Mot. to Remove from Admin. Compl. ¶¶ 4-5.	Disputed. Answer ¶¶ 10-11; Camardella Decl. ¶¶ 11, 12, 13, 15, 20, 22 and Exhibits C, D, I and J thereto; Plaintiff's Complaint, February 1, 2017 Declaration of Agnes Huang in Support of Plaintiff's Response to Defendant's Motion to Remove the Complaint from the Expedited Calendar or Permit Discovery; February 3, 2017 Declaration of Marc Pilotin in Support of Plaintiff's Response to Defendant's Motion to Remove the Complaint from the Expedited Calendar or Permit Discovery; and February 7, 2017 Declaration of Marc Pilotin In Support of Plaintiff's Motion for Summary Judgment. The evidence in the record shows that OFCCP never attempted to resolve the issues with respect to the Subject Demands, refused any compromise with respect to the Subject Demands, and failed to articulate any legitimate basis for the Subject Demands, and therefore the parties never narrowed the issues with the respect to the Subject Demands. [Camardella Decl., Exhibit C at pg. 3 ("OFCCP responded that it 'had no findings it was able to share [with us]' and that it would not limit the scope of the requests in any way"), Exhibit D at pg. 1 ("At this stage of the compliance evaluation, OFCCP is unable to share any preliminary findings or internal

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		analyses"), Exhibit I at pgs. 2-8 and Exhibit J at pgs. 2-9 (demonstrating Google's good faith attempts at compromise).

B. Defendant's Statement of Disputed Facts

In addition to the disputed facts set forth in Section A above, Defendant hereby submits the following list of disputed facts.

1. OFCCP failed to follow its procedures when it requested data beyond the maximum two-year investigation period. Camardella Decl. ¶ 37.
2. OFCCP failed to follow its procedures when it requested a second compensation snapshot as of September 1, 2014 without finding special circumstances or exceptions. Camardella Decl. ¶ 38.
3. OFCCP has articulated no evidence that Google has or would retaliate or take any adverse action against any employee for participating in an interview with OFCCP, nor is Google aware of any such actions. Camardella Decl. ¶ 36.
4. OFCCP has articulated no evidence that Google is ensuring that its employees will not talk directly to OFCCP, nor is Google aware of any such actions. Camardella Decl. ¶ 39.
5. Google repeatedly informed OFCCP in writing regarding the "unduly burdensome" nature of the "the massive amount of data" sought by the request for unlimited job and salary history data and the second compensation data snapshot. Camardella Decl. ¶ 40 and Exhibit C at pg. 3 (Google expresses concerns regarding the "sheer size" of OFCCP's requests), Exhibit E at pgs. 3-5 ("Google respectfully submits that the foregoing overwhelming demonstrates the burdensome nature of OFCCP's requests."), Exhibit F at pgs. 4-5 ("Absent an explanation [of any issue OFCCP found in the data Google had already provided OFCCP] the Company does not

understand how OFCCP's request for such voluminous information can be relevant or reasonable."), Exhibit I at pg. 9 (citing to the "unreasonably burdensome" standard of *Lone Steer/United Space Alliance*), and Exhibit J at pg. 3 ("In sum, as demonstrated below, OFCCP's lack of transparency prevents Google from weighing the relevance of the information requested against the extreme burdens and costs of producing same.").

6. The compliance evaluation has not been delayed, as Google already has produced, and continues to produce, to OFCCP information and data unrelated to the Subject Demands during the course of this proceeding. Camardella Decl. ¶ 41.

7. Google never consented to the Subject Demands. Camardella Decl. ¶ 42.

8. Google never waived its rights under the *Fourth Amendment*. Camardella Decl. ¶ 43.

9. The Subject Demands for the names, home addresses, home telephone numbers and personal e-mails for all of Google's employees in its corporate headquarters affirmative action plan ("AAP") as of September 1, 2015 and/or September 1, 2014 is not limited at all or is insufficiently limited and/or is not relevant in purpose. Camardella Decl. ¶ 44.

10. The Subject Demands for the complete job and salary history of all of Google's employees in its corporate headquarters affirmative action plan as of September 1, 2015 and/or September 1, 2014 is not limited at all and/or is insufficiently limited, is not relevant in purpose and/or is unreasonably burdensome. Camardella Decl. ¶ 45.

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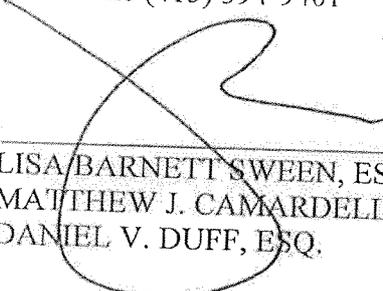
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11. The Subject Demand for a second compensation snapshot, for the over 19,500 Google employees in its corporate headquarters AAP as of September 1, 2014 is not limited at all and/or is in sufficiently limited, is not relevant in purpose and/or is unreasonably burdensome. Camardella Decl. ¶ 46.

Respectfully submitted,

Dated: February 23 2017

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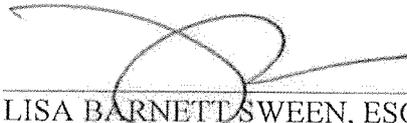
LISA BARNETT SWEENEY, ESQ.
MATTHEW J. CAMARDELLA, ESQ.
DANIEL V. DUFF, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of February, 2017, I caused a true and correct copy of the foregoing Defendant's Statement of Disputed Facts to be served by sending a copy of same via U.S. Mail and e-mail to:

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Feb. 23, 2017