

UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

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

Plaintiff,

v.

GOOGLE INC.,

Defendant.

ARB Case No. 17-059

ALJ Case No. 2017-OFC-00004

ADMINISTRATIVE REVIEW BOARD
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GOOGLE INC.'S RESPONSE TO OFCCP'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S JULY 14, 2017 RECOMMENDED DECISION AND
ORDER

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I. INTRODUCTION

In this appeal, Google Inc. (“Google” or the “Company”) and the Office of Federal Contract Compliance Programs (“OFCCP” or the “Agency”) agree on five fundamental items: (1) this is an alleged denial of access to records case only; (2) OFCCP admits Google has acted in good faith; (3) OFCCP has made no finding that Google has engaged in any discriminatory pay practices; (4) Administrative Law Judge Steven Berlin (“ALJ Berlin”) agreed with Google that OFCCP’s demands at issue in this matter (the “Subject Demands”) violate the *Fourth Amendment* of the U.S. Constitution; and (5) OFCCP has filed lengthy exceptions seeking to reverse ALJ Berlin’s decisions, while Google has filed no exceptions at all. Beyond this, the parties find little common ground.

Since the outset of this matter, OFCCP has taken the erroneous position that the Agency is permitted unfettered access into any federal contractor’s data, records, or information that OFCCP deems relevant, without constitutional or judicial limitation.¹ Contrary to the Agency’s position, the *Fourth Amendment* and OFCCP’s own regulations set out basic limitations on the scope of the Agency’s authority to obtain information from contractors. In his detailed July 14, 2017 Recommended Decision and Order (“Order”), ALJ Berlin correctly ruled OFCCP exceeded that authority for several reasons. For example, he found that OFCCP failed to satisfy its burden of proving that the Subject Demands were sufficiently limited in scope, a finding that OFCCP fails to contest in its exceptions. ALJ Berlin also determined that the evidence OFCCP proffered

¹ *Contra Peters v. U.S.*, 853 F.2d 692, 699-700 (9th Cir 1988) (“An administrative subpoena may not be so broad so as to be in the nature of a ‘fishing expedition.’”); *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 689 (D.C. Cir. 2017) (“Agencies are also not afforded unfettered authority to cast about for potential wrongdoing.”) (internal quotation marks omitted).

at the hearing was based on mere guesswork, misunderstandings and unreliable testimony that he could not credit and, therefore, OFCCP did not satisfy the generous standard of relevance.

Unfortunately, OFCCP continues to press its extreme, unsupportable, and now judicially rejected position, accusing ALJ Berlin of applying the wrong legal standard and challenging his authority to rule on this matter. ALJ Berlin, however, applied the very standard of review advanced by OFCCP, when he properly found that OFCCP's Subject Demands violated, in whole or in part, the administrative subpoena standard of the *Fourth Amendment*. A brief description of the Subject Demands reveals their unreasonable and overbroad nature:

- **Subject Demand 1** seeks the names and personal contact information, including home addresses, telephone numbers, and personal e-mails, for *all* of the 25,000-plus employees in Google's corporate headquarters affirmative action plan in Mountain View, California ("Corporate Headquarters AAP") as of September 1, 2014 ("the 2014 Snapshot") and September 1, 2015 ("the 2015 Snapshot") without any exception or limitation whatsoever.² Tr. 7-8; Ex. 6 at 2-3; Stip. Fact 14; OFCCP Pre-hearing Statement 5.³
- **Subject Demand 2** seeks the entire job and salary history, including pay prior to joining Google, for all of the 25,000-plus employees in Google's Corporate Headquarters AAP, without any exception or limitation whatsoever. Tr. 42-43, 76; OFCCP Pre-hearing Statement 4 n.3.
- **Subject Demand 3** seeks the production of a massive database containing dozens of compensation metrics for all people employed at Google's Corporate Headquarters AAP as of September 1, 2014. Ex. 6 at 2-3; Stip. Fact 14; OFCCP Pre-hearing Statement 4.

Attempting to justify its Subject Demands, OFCCP takes positions contrary to well-established law. OFCCP argues that its own regulations somehow trump the administrative

² The 2015 Snapshot contains 21,114 employees. Stip. Fact 10. The 2014 Snapshot, if produced, would contain a similarly large number of employees. The total number of employees in the two Snapshots, accounting for overlap, exceeds 25,000.

³ Google submits Excerpts of Records with the present Brief. The excerpts include orders, briefing, exhibits, transcripts, and other documents from the proceedings before ALJ Berlin that Google cites in the present Brief. "Ex." refers to Hearing Exhibits from the hearing. "Tr." refers to the Hearing Transcript for the hearing.

subpoena standard of the *Fourth Amendment*, and that reviewing courts have little or no discretion to evaluate the constitutionality of its demands for production.⁴ These positions stand in sharp contrast not only to the reasonableness Google has demonstrated in this matter and the reasoned rulings of ALJ Berlin, but also to the applicable standard itself. The administrative subpoena standard requires that OFCCP's demands must be "reasonable" – *i.e.*, they must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984) (internal quotation marks omitted); *United Space All. v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011) (same). OFCCP's regulations do not trump or lessen the Agency's burden to prove each of these elements.

Despite OFCCP's arguments to the contrary, ALJ Berlin correctly cited the administrative subpoena standard, and found that it is considerably lower than the probable cause standard applicable to criminal warrants. Order 20-21. ALJ Berlin also correctly applied the binding precedent from the U.S. Supreme Court, which establishes that the administrative subpoena standard has significance. *Id.*; *Lone Steer*, 464 U.S. at 415 (the fact that the administrative subpoena standard is considerably lower than the probable cause standard "in no way leaves an employer defenseless . . ."; in fact "it "*provide[s] protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it . . .*") (emphasis added).

While ALJ Berlin determined that OFCCP's Subject Demands could not stand as written due to OFCCP's failure to satisfy each of the elements of this standard, he acted reasonably by

⁴ In fact, prior to this appeal, OFCCP even contended that ALJ Berlin had no discretion whatsoever to evaluate the propriety of the Subject Demands. Order 22-23.

not striking the Subject Demands in their entirety with prejudice. He exercised his authority to narrow the Subject Demands to ensure each satisfied the administrative subpoena standard. For example, ALJ Berlin narrowed OFCCP's unlimited Subject Demand 1 by ordering Google to produce the names/contact information for 5,000 employees to be selected by OFCCP, which can be increased to 8,000 employees if OFCCP deems necessary. ALJ Berlin thereby satisfied OFCCP's stated reasons for the relevance of the contact information – *i.e.*, to conduct interviews, to ensure a sufficient number of interviews take place, and to ensure that such interviews remain confidential. Similarly, although ALJ Berlin correctly determined that Google need not provide job/salary history information because OFCCP failed to satisfy the *Fourth Amendment* standards, he did not prevent the Agency from requesting some or all of the information in the future, provided it satisfies the administrative subpoena standard, something it has failed to do to date. Lastly, ALJ Berlin ruled that Google must provide most of the information OFCCP seeks in Subject Demand 3. However, he narrowed Subject Demand 3 by excising those elements of the demand that were too burdensome, overbroad, or that sought irrelevant evidence.

In its Exceptions to the Administrative Law Judge's July 14, 2017 Recommended Decision and Order (hereinafter "OFCCP Brief"), OFCCP, rather than move forward with its compliance evaluation and accept ALJ Berlin's findings, asks the Administrative Review Board ("ARB" or the "Board") to overrule ALJ Berlin's decision and compel Google to comply with the Subject Demands in their entirety. OFCCP's arguments fall under three central themes: (1) ALJ Berlin failed to accord deference to OFCCP's opinion as to what is relevant; (2) ALJ Berlin improperly applied *Fourth Amendment* standards; and (3) ALJ Berlin did not properly evaluate

the evidence before him. As discussed below, and in more detail later in this brief, these arguments lack merit and do not provide any basis for reversing the Order.

First, the U.S. Supreme Court recently reiterated that a reviewing court need not give deference to a federal government agency's opinion that its requests are "relevant" under the administrative subpoena standard. *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159, 1169 (2017) (holding that "[a] district court deciding whether evidence is 'relevant' under Title VII *need not defer* to the EEOC's decision on that score; it must simply answer the question cognizant of the agency's broad authority to seek and obtain evidence") (emphasis added).

Second, ALJ Berlin applied the appropriate administrative subpoena standard. On this score, the Order speaks for itself – as reiterated throughout the Order, and as required by the Supreme Court, ALJ Berlin evaluated the evidence OFCCP submitted to him in its attempt to meet its burden of proof under the administrative subpoena standard, and the parties agreed that it was the appropriate standard for him to apply. As the Supreme Court stated in *McLane*:

The decision whether the evidence sought is relevant *requires* the district court to *evaluate the relationship between the particular materials sought and the particular matter under investigation* - an analysis variable to the nature, purposes and scope of the inquiry.

Id. at 1167-68 (emphasis added, internal quotation marks omitted). ALJ Berlin's analysis of the evidence OFCCP proffered in an attempt to meet the administrative subpoena standard was not only proper – the Supreme Court mandates it.

Third, the record overwhelmingly demonstrates that ALJ Berlin correctly evaluated the evidence before him. His Order consists of a detailed review of the evidence OFCCP (not he) proffered at the hearing in support of its burden of proof, as well as a detailed analysis of whether OFCCP's evidence satisfied the administrative subpoena standard. Indeed, it is OFCCP,

not ALJ Berlin, which omits critical portions of the record evidence relied upon in the Order. Moreover, OFCCP does not challenge ALJ Berlin's credibility determinations in favor of Google's witnesses. When OFCCP does cite to ALJ Berlin's Order, it cherry-picks sentences and describes them wholly out of context in an unsuccessful attempt to obfuscate the evidence favoring Google. Absent from the OFCCP Brief is any record evidence whatsoever contradicting the unrebutted testimony of any of Google's witnesses.

OFCCP is attempting to create claims out of whole cloth by asking for anything it can possibly think of, regardless of relevance, scope, or burden. The Agency contends such massive Subject Demands are justified by an analysis OFCCP conducted – an analysis the Agency refuses to disclose or describe -- that purports to show gender pay disparities in Google's workforce. Further, the Agency argues that OFCCP, and only OFCCP, has the authority to determine relevance – an argument with no support in the case law. In the end, OFCCP has the burden of proving the Subject Demands meet the constraints of the *Fourth Amendment*, and ALJ Berlin correctly found that the Agency failed to do so. Accordingly, Google respectfully requests that the ARB affirm ALJ Berlin's Order in its entirety.

II. STATEMENT OF THE CASE

A. OFCCP's Compliance Evaluation

On September 30, 2015, OFCCP sent a scheduling letter to Google initiating a compliance evaluation of Google's Corporate Headquarters AAP, which includes a workforce in excess of 21,000 employees. Ex. 5; Order 4. At the outset, OFCCP demanded massive amounts of information from Google. Order 4; Ex. 5. The Company cooperated in good faith, including by producing a compensation snapshot for 2015 – *i.e.*, a spreadsheet containing dozens of

compensation data points for each of the 21,114 Mountain View Google employees in the 2015 Snapshot. Order 6; Stip. Facts 10, 11, 12, 13, 18.⁵

After OFCCP conducted a two-day onsite of the Corporate Headquarters in April 2016, during which the Agency met with Google's HR personnel, head of compensation, recruiter, and hiring managers, the compliance evaluation took an extreme turn. Specifically, "OFCCP requested in two letters a large amount of additional information and materials." Order 2; Exs. 6, 8. The new demands included more than 60 requests covering a wide range of topics. Exs. 6, 8. Google agreed to produce much of what OFCCP requested. Order 2. At the same time, Google also informed OFCCP that the Company believed the Agency's requests were overbroad, sought irrelevant information, imposed undue burdens on the Company, and needed clarification. Ex. 7 at 1; Ex. 9 at 1-6. Google asked OFCCP to provide some information on "what compensation issues, if any, [OFCCP] has identified during the first eight months of this review," to ensure that the information sought was indeed relevant. Ex. 7 at 1. Without such information, Google believed it could not "properly evaluate OFCCP's extraordinarily broad and burdensome data and information requests." Ex. 9 at 1. The parties negotiated for months over many of OFCCP's requests and reached resolution on almost all of them. OFCCP, however, refused to provide Google any meaningful information that would allow for an evaluation of the reasonableness of the Agency's demands. Eventually, the parties reached an impasse on the three Subject Demands. Order 2.

⁵ ALJ Berlin found that to date, Google has already "produced nearly 1.3 million data points about its applicant flow; 400,000 to 500,000 data points on compensation; and 329,000 documents, totaling about 740,000 pages" in response to OFCCP requests. Order 4. OFCCP does not challenge this finding in the present appeal. Indeed, OFCCP does not dispute that Google has acted in good faith during the compliance evaluation and during this litigation. *Id.* at 2; Tr. 7; Pre-hearing Conference Transcript 19-20.

B. OFCCP's Denial of Access Complaint and ALJ Berlin's Denial of OFCCP's Motion for Summary Judgment

On December 27, 2016, OFCCP filed an Administrative Complaint seeking a court order compelling Google to respond to the Subject Demands in their entirety or face debarment as a federal contractor and cancellation of its federal contracts. Six weeks after initiating this action, OFCCP filed for summary judgment. ALJ Berlin denied OFCCP's motion on March 15, 2017. MSJ Order. ALJ Berlin properly determined that OFCCP's motion failed on the merits, because he found unresolved questions regarding the relevance of the Subject Demands and the burdens they imposed. *Id.*

C. Summary of Hearing Testimony

ALJ Berlin presided over a two-day trial that started on April 7, 2017. OFCCP put on three witnesses: (1) OFCCP Regional Director Janette Wipper; (2) OFCCP Deputy Regional Director Jane Suhr; and (3) Michael Brunetti, an economics professional. Google called three witnesses: (1) Google Vice President of Compensation Frank Wagner; (2) Google Senior Legal Operations Manager Kristin Zmrhal; and (3) OFCCP Regional Director Wipper. The following is a summary of the testimony.

1. Frank Wagner Testimony

Frank Wagner serves as Google's Vice President of Compensation. Tr. 166. Mr. Wagner testified about Google's policies and practices relating to employee compensation from personal knowledge gained from his over twenty years of experience with Google. ALJ Berlin found Mr. Wagner's testimony credible because it "was detailed, consistent, and not contradicted on cross-examination." Order 14. He also found that Mr. Wagner had "extensive, personal

knowledge of the matters under discussion that he has derived from his work in Google's executive leadership on compensation issues over the past ten years." *Id.*

Among other things, Mr. Wagner's testimony showed that OFCCP did not understand Google's compensation policies and procedures, and that Subject Demands 2 and 3 were overbroad and sought irrelevant evidence. *See id.* at 14-15. To take just one example, he testified that approximately 20% of Google's employees on the 2015 Snapshot were Campus Hires - *i.e.*, employees hired directly from a university. Tr. 197-198. Prior salary history for Campus Hires (*i.e.*, the person's salary just before joining Google) plays no role in setting that person's compensation. *Id.* at 171-172; 197. For Campus Hires, "neither prior salary nor the ability to negotiate impacted their starting salary" and "there was no negotiation and prior salary was not considered." *Id.* at 198. Furthermore, Google "do[es] not look at their compensation in any prior job for a new grad, period, ever." *Id.* at 216. ALJ Berlin credited Mr. Wagner's testimony on this issue, and rejected conflicting evidence from OFCCP's witnesses on the same topic. Order 14, 15, 17.

Subject Demands 2 and 3 both request information on prior salary on all Google employees, including Campus Hires (one fifth of the total), even though such information has no bearing on compensation. Ex. 6 at 2-3; Stip. Fact 14; OFCCP Pre-hearing Stmt. 4, 4 n.3. ALJ Berlin's finding that OFCCP sought information irrelevant to compensation is one reason supporting his ultimate conclusion that Subject Demands 2 and 3 were unconstitutional. *See* Order 29, 36-37.

Mr. Wagner testified that Google sets employee salary by using a market reference point ("MRP"). *Id.* at 169-170. The MRP is based on "market data for that role, which Google

“gather[s] . . . for [each] role . . .” *Id.* at 169. After the establishment of a MRP for a position, Google sets a “standard offer baseline” target compensation for that position at 80% of the MRP. *Id.* at 170-171. When employees are promoted, Google models their new salary at 85% of the MRP of their new job. *Id.* at 200. There are two exceptions. First, if moving the employee to 85% of the modeled salary for their new job would result in a pay increase of less than 5%, Google will increase their pay at least 5%. *Id.* at 200-201. Second, in some situations, moving the employee to 85% of the modeled salary for their new job would result in a pay increase of more than 20%. Google will only increase that employee’s pay by 20%. *Id.* at 201. However, as Mr. Wagner testified, these exceptions do not apply to the overwhelming majority of promotional increases. Indeed, for approximately 80% of promotions, compensation is “not affected by prior salary” because the 5% minimum/20% maximum rules are not triggered. *Id.* at 203. And in 90% of the cases, employee compensation post-promotion is within 1% of Google’s model. *Id.* at 202. An employee’s “job history at Google is not taken into consideration when setting compensation” for the post-promotion job. *Id.* at 182. Neither is their salary history (the “salaries associated with each of the jobs they’ve previously held at Google”) taken into consideration when setting compensation for the post-promotion job. *Id.* Instead, the only salary history that becomes relevant is the “immediate salary prior to the promotion for the people subject to the 5 percent minimum and 20 percent maximum.” *Id.* at 204.

2. *Kristin Zmrhal Testimony*

Kristin Zmrhal is Google’s Senior Legal Operations Manager. Tr. 261. Ms. Zmrhal testified about Google’s efforts to respond to OFCCP’s information and document demands during the compliance evaluation, including potential expense and time commitments required to

comply with the Subject Demands. ALJ Berlin found Ms. Zmrhal to be credible. Order 14, 14 n.60.

Ms. Zmrhal is “responsible for managing a team of project managers and technologists that collects data, documents from Google employees and Google internal repositories.” *Id.* at 262. Ms. Zmrhal’s testimony showed Google’s response to OFCCP’s demands to date in the compliance evaluation has been unreasonably burdensome to the Company. For example, due to the extensive nature of OFCCP’s requests and concerns regarding employee privacy, Google was forced to task computer engineers with creating new software scripts to access requested information. *Id.* at 266-267. Google also hired outside consultants when the burden became too large for its internal team. *Id.* at 267. In total, Google employees, consultants, inside attorneys, and outside counsel have spent 2,300 hours responding to OFCCP requests. *Id.* at 269-270. Google’s “conservative” cost estimate associated with compliance is \$250,000. *Id.* at 272-274. Outside counsel fees for responding to OFCCP’s requests to date have totaled \$210,000. *Id.* at 275. In all, Google’s expense in responding to OFCCP’s document demands has been just under \$500,000 to date. *Id.* at 275. Google also “evaluated about how much time it would take to collect [the] information” sought by the Subject Demands. *Id.* at 276. Ms. Zmrhal testified it would take “400 to 500 hours” for Google to collect the information requested. *Id.* at 277. The cost associated with that collection would be “as much as \$100,000.” *Id.* That estimate, however, does not include the cost of reviewing or redacting information, which cannot be ascertained until the data is collected. *Id.*

3. *Janette Wipper Testimony*

Ms. Wipper served as OFCCP's key witness during its case in chief. Google also called her as a witness during its defense. Generally, she testified regarding the Agency's investigation and offered explanations for why OFCCP seeks the information requested in the Subject Demands. She testified that OFCCP's review period is "two years from when the scheduling letter is issued to the contractor." *Id.* at 35. She stated that the compliance evaluation "two-year scope" in the instant matter would start in "September 2015" when OFCCP sent its scheduling letter to Google, and "would go back to September 2013." *Id.*; *see also id.* at 40. However, Ms. Wipper also testified that the Subject Demands look back beyond the Agency's review period. *Id.* at 46-47.

On direct, OFCCP's counsel asked Ms. Wipper to explain why the Agency's Subject Demands (specifically the 2014 Snapshot) were relevant to the compliance evaluation. Ms. Wipper testified, "[W]e reviewed and analyzed the [2015] snapshot and ran regressions on that And because we found systemic compensation disparities against women pretty much across the entire workforce, we wanted to look to see what happened the year before." *Id.* at 47-48.⁶

When asked by her counsel to explain why OFCCP's Subject Demand for salary history was relevant, Ms. Wipper said, "[I]f we're finding a pay disparity, we want to find out if the cause is happening from starting salary. So that's why we would ask for the initial salary" and an employee's history of pay. *Id.* at 42-43. When asked by her counsel to explain why OFCCP's Subject Demand for job history was relevant, she said, "[I]t's very similar and

⁶ These statements were contrary to the position the Agency repeatedly took prior to the hearing that its witnesses would not testify about the Agency's preliminary findings. *See, e.g.,* Ex. 8 at 3; OFCCP Reply in Support of MSJ 27; OFCCP Pre-hearing Stmt. 22-24. After testifying for the first time about OFCCP's preliminary findings at the hearing in April 2017, Ms. Wipper provided no details or data to support the OFCCP's accusation, and did not explain the Agency's methodology in any way. The Company has never been provided with this information.

interrelated to the salary history. . . . [W]e need the history of every job change that associates with the salary change.” *Id.* at 45.

Ms. Wipper testified that the “reason why [OFCCP] asked for the employee contact information” was “to conduct confidential employee interviews.” *Id.* at 41. But, Ms. Wipper admitted OFCCP would not interview all of Google’s Mountain View employees. *Id.* at 151-152 (“[N]o, we wouldn’t want to talk to all of them. . . . [W]e would want to talk to a sufficient amount of people – a sample.”).

ALJ Berlin found that portions of Ms. Wipper’s testimony were not credible. Most notably, he found that Ms. Wipper “was evasive” during her testimony, “as though she was advocating.” Order 16. ALJ Berlin went so far as to twice call her testimony “conclusory.” *Id.* at 27, 28. Ultimately, wherever the record showed inconsistencies between the testimony of Google Vice President of Compensation Wagner and Ms. Wipper, ALJ Berlin credited Mr. Wagner. *Id.* at 16-17.

4. Jane Suhr Testimony

OFCCP District Director Jane Suhr offered contradictory testimony regarding the time periods when Google has been a federal contractor. Ms. Suhr also testified regarding the 2016 on-site visit OFCCP carried out at Google’s facility. Among other things, she testified that contrary to OFCCP’s conclusion, Frank Wagner had not told her an “individual’s entire employment history [prior to Google] with respect to salary was relevant to setting compensation at Google.” *Id.* at 76. She also could not remember if she ever asked “Wagner or anyone on his team about whether or not starting position or title has any bearing on compensation.” *Id.* at 85.

ALJ Berlin found portions of Ms. Suhr’s testimony unreliable, because it “lacked the

foundation and understanding” that ALJ Berlin observed in Google’s witnesses. Order 14. Ultimately, wherever the record showed inconsistencies between the testimony of Mr. Wagner and Ms. Suhr, ALJ Berlin credited Mr. Wagner. *Id.* at 15, 17.

5. Michael Brunetti Testimony

Originally identified by OFCCP as an expert witness, Michael Brunetti testified about a Form 10-K filed with the U.S. Securities and Exchange Commission by Alphabet Inc., Google’s parent company. Unsurprisingly, the Court rejected OFCCP’s request to qualify Mr. Brunetti as an expert on the topic of whether Google’s burden in producing documents responsive to the Subject Demand was “insignificant compared to its total operating costs.” Tr. 103. The Court noted it could draw its own inferences regarding a Form 10-K. *Id.* Mr. Brunetti later testified that he does not “know anything about how Google maintains its employment records,” and is “not familiar with any of the data or network systems that Google maintains.” *Id.* at 105. He also admitted that he “can’t possibly testify how difficult or burdensome it actually will be on Google to respond on these requests, other than in a monetary sense,” and that “money alone [does not] correlate to burden.” *Id.*

D. ALJ Berlin’s July 14, 2017 Order

Despite applying a legal standard that favors OFCCP, ALJ Berlin rejected the Agency’s arguments in a detailed 43-page order, ruling that all three of the Subject Demands violate the U.S. Constitution in whole or in part.

1. Subject Demand 1: Employee Contact Information

OFCCP argued that the contact information of all 25,000-plus employees in Google’s Corporate Headquarters AAP was relevant because the Agency would like to interview Google

employees during the audit. Order 13. However, Regional Director Wipper testified her Agency would *not* interview all 25,000-plus employees, and only would seek to speak to “a sample.” Tr. 151-152. OFCCP asserted it sought all employees’ contact information so that Google would be unaware which employees the Agency contacted. Order 29-30. As ALJ Berlin put it, OFCCP sought to ensure it could conduct interviews while hiding the participating employees “in plain sight.” *Id.* at 30.

Rejecting OFCCP’s argument, ALJ Berlin ruled Subject Demand 1 unconstitutional because it was “over-broad, intrusive on employee privacy, unduly burdensome, and insufficiently focused on obtaining relevant information.” *Id.* at 31. ALJ Berlin generally found that OFCCP’s request for the contact information was relevant to the audit’s purpose, because anecdotal evidence obtained through interviews regarding compensation can affect the Agency’s investigative findings. *Id.* at 29-30. However, ALJ Berlin reasoned that providing all of the employees’ contact information would burden employee privacy rights and burden Google’s relations with its employees, who had not consented to have their addresses, email addresses, phone numbers, and names given to a law enforcement agency. *Id.* at 31-32. He noted that placing all employees’ contact information in the Agency’s possession imposed an unreasonable burden by creating a risk that the employees’ contact information may be hacked, which OFCCP conceded at trial happened within federal agencies. *Id.* at 31. Accordingly, ALJ Berlin ultimately found OFCCP’s request for all 25,000-plus employees’ contact information – when OFCCP had no intention of interviewing all of them – overbroad and insufficiently limited. *Id.* at 31-32.

However, ALJ Berlin did not strike subject Demand 1 in its entirety, but modified it to

ensure it comported with the requirements of the administrative subpoena standard and the reasons OFCCP offered for the demand. He ruled that Google must provide 5,000 employees' contact information, plus an additional 3,000 employees' information should OFCCP determine that the first 5,000 prove insufficient. *Id.* at 32-33. Under his ruling, OFCCP may select the people whose information Google must provide. *Id.* at 33. He reasoned that "this should give OFCCP ability to contact – confidentially and without Google's knowledge – all employees whom OFCCP believes are likely to have information relevant to the investigation (plus others whom OFCCP randomly selects), keep those employees hidden in plain sight, and at the same time protect the private contact information of as many Google employees as possible." *Id.* Given that ALJ Berlin had the power to strike Subject Demand 1 entirely, and that he found OFCCP exhibited a "persistent neglect of Google's employees' privacy," *see id.* at 39-40, his compromise ruling on Subject Demand 1 represents a reasonable result for the Agency, not legal error.

2. Subject Demand 2: Job History and Salary History

In Subject Demand 2, OFCCP seeks the complete job history and salary history at Google back to 1998 for all 25,000-plus employees included in the 2014 and 2015 Snapshots, including the salary each employee earned prior to joining Google. Ex. 6 at 2; Stip. Fact 14; OFCCP Pre-hearing Stmt. 4, 4 n.3; Tr. 42-43, 76. When OFCCP's counsel asked Ms. Wipper on direct to explain why this Subject Demand was relevant, she testified OFCCP sought the information based on unidentified academic "research," which allegedly states "that negotiation at hire with respect to salary has a disparate impact or could have a disparate impact on women," a concept referred to as "anchoring bias." Tr. 52. When asked to explain why salary history was

relevant, Regional Director Wipper testified OFCCP sought the information to explain the cause of the pay disparity affecting women the Agency allegedly found. *See id.* at 42-43, 47-48. When asked the relevance of job history, she offered the same explanation. *Id.* at 45.

ALJ Berlin ruled Subject Demand 2 violated the *Fourth Amendment* for several reasons. First, he found that OFCCP had not shown Google acted as a contractor during the entire time period between Google's founding in 1998 and the initiation of OFCCP's compliance evaluation in 2015, which meant that portions of the salary and job history requested fell outside OFCCP's jurisdiction. Order 34-35. As such, he found that OFCCP failed to meet its burden to show the requested salary and job history back to Google's founding in 1998 was sufficiently limited in scope and relevant. *Id.* at 34-35. He also found that OFCCP had failed to submit any evidence whatsoever regarding alleged anchoring bias or negotiation bias at Google (OFCCP's articulated bases for the request):

Despite having several investigators interview more than 20 Google executives and managers over two days and having reviewed over a million compensation-related data points and many hundreds of thousands of documents, OFCCP offered nothing credible or reliable to show that its theory about negotiating starting salaries is based in the Google context on anything more than speculation.

Id. at 38. In doing so, he relied on Frank Wagner's unrebutted and consistent testimony summarized above evidencing that the data OFCCP seeks is overbroad and irrelevant. *See id.* at 36-38, 10-11.

Furthermore, ALJ Berlin found that compliance with Subject Demand 2 was unreasonably burdensome. *Id.* at 39. Relying on testimony from Google witness Kristin Zmrhal, he stated:

The burden on Google is considerable. [To protect employee privacy,] Google intentionally makes it difficult to access the kind of information OFCCP is

requesting. It stores the information in different electronic locations, not all together. For the information it has produced thus far, it essentially had to create “back door” access to extract what was requested while keeping confidential other information. It had to review every document and each data entry to be certain that it was not divulging confidential employee information beyond what OFCCP was requesting. Although Google has a litigation support staff who help respond to discovery demands, complying with OFCCP’s requests exhausted those resources and required Google to hire an outside contractor. Similarly, although Google has in-house attorneys, it retained outside counsel in addition. This is a real disruption of Google’s ordinary, productive processes.

Id. He also rejected OFCCP’s argument that no burden imposed by a government request can be unreasonable when dealing with a company that is large or successful. *Id.* at 40.

3. Subject Demand 3: 2014 Snapshot

As discussed above, Google produced a 2015 Snapshot in response to the Agency’s initial document demands. The spreadsheet contained dozens of categories of information for each of Google’s thousands of Mountain View employees. Stip. Facts 10-13. In Subject Demand 3, OFCCP requested a 2014 Snapshot. Ex. 6 at 2-3; Stip. Fact 14. The 2014 Snapshot would contain all categories that appeared in the 2015 Snapshot, plus the various other categories of information OFCCP added to its list of demands in June 2016. Ex. 6 at 2-3. OFCCP argued the 2014 Snapshot is relevant because it will show whether the pay disparities OFCCP allegedly found in the 2015 Snapshot “existed over time, not just on the single day reflected on the” 2015 Snapshot. Order 27. Generally, ALJ Berlin accepted OFCCP’s proffer on relevance, stating he found “no reason to question the relevance of most of the data categories that OFCCP requests Google include on the [2014] snapshot.” *Id.* at 28. However, he “modif[ied] or exclude[d] some for lack of relevance or because of the burden imposed.” *Id.* at 28-29. For example, he ruled that categories of information relating to OFCCP’s request for job and salary history (*i.e.*, Subject Demand 2) were unreasonable, and Google does not need to include them in the 2014

Snapshot. *See id.* at 29, 33-40. He also excised OFCCP’s requests for locality information because of undue burden, as well as other requests. *Id.* at 28-29. Ultimately, however, ALJ Berlin ordered Google to produce a 2014 Snapshot containing much of what OFCCP requested in Subject Demand 3. *Id.* at 28-29.

III. STANDARD OF REVIEW

OFCCP incorrectly asserts that the ARB should review all parts of ALJ Berlin’s decision *de novo*. As discussed below, the ARB should apply substantial evidence review when examining ALJ Berlin’s factual findings, of which there are many. And, the ARB should apply *de novo* review when examining the purely legal question ALJ Berlin addressed – *i.e.*, the *Fourth Amendment* legal standard – and when evaluating ALJ Berlin’s ultimate conclusion that OFCCP violated the *Fourth Amendment*.

A. The ARB Reviews Factual Findings for Substantial Evidence.

“[N]o standard of review exists in [Executive Order] 11246, the implementing regulations, or [the] Secretary’s delegation of authority.” *OFCCP v. Bank of Am.*, ARB 13-099, at 9 (Dep’t of Lab. ARB Apr. 21, 2016). Accordingly, when reviewing the appeal of an ALJ’s decision in an OFCCP matter, the ARB “rel[ies] on the Administrative Procedure Act” (the “APA”). *Id.* The APA empowers a reviewing court to set aside a decision that is “unsupported by substantial evidence.” 5 U.S.C. § 706(2)(E).

When a court conducts an APA review of a Department of Labor decision involving OFCCP and the *Fourth Amendment*, it “is bound by the substantial evidence standard of review as to the factual findings of the administrative law judge.” *First Ala. Bank, N.A. v. Donovan*, 692 F.2d 714, 718 n.5 (11th Cir. 1982); *accord Robinson v. NTSB*, 28 F.3d 210, 215 (D.C. Cir.

1994); *Beverly Enters. v. Herman*, 130 F. Supp. 2d 1, 12 (D.D.C. 2000). “The substantial evidence test is a narrow standard of review requiring only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Robinson*, 28 F.3d at 215; accord *Beverly Enters.*, 130 F. Supp. 2d at 13 (“The court must accept decisions based on substantial evidence even if a plausible alternative interpretation of the evidence would support another view.”). The ARB has defined substantial evidence as evidence that “logically supports each of the material findings of fact and the record as a whole does not overwhelm the particular finding or expose the fact finding as genuinely unresolved.” *Bank of Am.*, ARB 13-099 at 9-10. In OFCCP matters, the ARB is empowered to “accept[] as [its] own the ALJ’s material fact findings that led up to the ALJ’s ultimate finding of fact . . . if those findings are supported by substantial evidence.” *Id.*

Regarding ALJ Berlin’s credibility findings, the ARB should not overturn such findings because the ARB members have had no opportunity to observe the trial witnesses’ demeanor and behavior. *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1078 (9th Cir. 1977) (“Weight is given [to] the administrative law judge’s determinations of credibility for the obvious reason that he or she ‘sees the witnesses and hears them testify, while the Board and the reviewing court look only at cold records.’”) (quoting *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)).

B. The ARB Reviews Purely Legal Questions *De Novo*.

Under the APA, a reviewing court applies *de novo* review when the decision under review concerns a purely legal question. 5 U.S.C. § 706 (“To the extent necessary to a decision and when presented, the reviewing court shall decide all relevant questions of law”); *First Ala. Bank*, 692 F.2d at 718 n.5; *Beverly Enters.*, 130 F. Supp. 2d at 12-13. Here, ALJ Berlin

analyzed one purely legal question: the correct standard under the *Fourth Amendment* applicable to OFCCP demands for documents and information. That standard is reviewed *de novo*. *Beverly Enters.*, 130 F. Supp. 2d at 12-13. The Board also evaluates ALJ Berlin’s ultimate conclusion that OFCCP violated the *Fourth Amendment* using the *de novo* standard. *See United Space All.*, 824 F. Supp. 2d at 78; *Bank of Am.*, ARB 13-099 at 9-10. However, “[e]ven under a *de novo* review,” the Board is empowered to accept ALJ Berlin’s “predicate fact findings.” *Bank of Am.*, ARB 13-099 at 9-10 (“Given the extensive hearing presentation before the ALJ and the ALJ’s firsthand observations, we accept the ALJ’s predicate fact findings supported by substantial evidence. We will review *de novo* the ALJ’s ultimate finding of discrimination and her legal conclusions.”).

IV. CONSTITUTIONAL AND REGULATORY FRAMEWORK

OFCCP’s summary of the legal framework omits certain key issues, which Google addresses below.

A. OFCCP Regulations Place Limits on the Agency’s Requests for Documents.

OFCCP correctly notes that it has the regulatory power to request that a federal contractor provide the Agency with access to records during a compliance evaluation. OFCCP Br. 15-16. But OFCCP’s ability to access records has limits. For example, the Agency’s own regulations state OFCCP can only access records that are “relevant to the matter under investigation” and “pertinent to compliance” with Executive Order 11246. 41 C.F.R. § 60-1.43. OFCCP’s regulations also permit a contractor to challenge requests the contractor believes seek irrelevant evidence. 41 C.F.R. § 60-1.20(f). In the Preamble to the 1997 revisions to OFCCP’s

regulations, OFCCP cited to 41 C.F.R. § 60-1.43 to explain why its authority to access records was not unfettered, but subject to appropriate limitations:

The concern that the provision would permit, if not encourage, unfettered access to confidential commercial proprietary data or irrelevant information is unjustified in OFCCP's view. Under the proposed rule, as under the current regulation, access is limited to records that may be relevant to the matter under investigation and pertinent to compliance with [Executive Order 11246] . . .

62 Fed. Reg. 44174, 44186 (1997). The statements in the Preamble reassure contractors and courts that the Agency's regulations contain appropriate limits on OFCCP's authority to access records consistent with the *Fourth Amendment*. Cf. *United Space All.*, 824 F. Supp. 2d at 91; Order 20-21. Otherwise the regulations would be unconstitutional.

B. The ARB and Administrative Law Judges May Rely on Decisions from Any Jurisdiction.

OFCCP regulations do not specify which case law that litigants or judges must follow. Accordingly, ALJ Berlin and the ARB are permitted to rely on the law of any jurisdiction, as long as those decisions follow or do not contradict existing binding precedent of the Secretary of Labor. See *U.S. Dep't of Labor v. United Airlines, Inc.*, 94-OFC-1, 1996 OFCCP LEXIS 59, at *19-20 (Dep't of Labor Nov. 29, 1996) (any authority is persuasive provided it does not conflict with binding Secretary of Labor decisions); see also *U.S. Dep't of Labor v. TNT Crust*, 04-OFC-3, 2007 OFCCP LEXIS 3, at *46-47 (Dep't of Labor Sept. 10, 2007). Furthermore, venue uncertainty means no one U.S. Circuit Court's precedent binds the ARB, or Department of Labor ALJs. Generally, an agency must follow the rulings of a reviewing court, *Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1091 (D.D.C. 1992), and appellate review of the ARB's OFCCP decisions is conducted pursuant to the APA, *United Space All.*, 824 F. Supp. 2d at 77-78. In cases, as here, where the ARB and ALJs cannot know what U.S. Circuit Court may ultimately

review their decisions, venue uncertainty exists. *See* 28 U.S.C. §§ 1391(b), (e)(1); *United States DOE v. Federal Labor Relations Auth.*, 106 F.3d 1158, 1162 n.8 (4th Cir. 1997) (while generally an agency “must follow the law of the circuit whose courts have jurisdiction over the cause of action . . . the venue provision . . . is such that the [agency] cannot know which circuit court of appeals will review its decision.”) (internal quotation marks omitted). Accordingly, no particular U.S. Circuit Court’s law controls the ARB or ALJ Berlin.

**V. ALJ BERLIN CORRECTLY CITED AND APPLIED THE APPLICABLE
FOURTH AMENDMENT STANDARD**

OFCCP document demands are akin to administrative subpoenas. Order 21; *United Space All.*, 824 F. Supp. 2d at 92. As a result, courts have repeatedly analyzed whether an OFCCP document demand complies with the *Fourth Amendment* by using the test for an administrative subpoena. *See, e.g., id.* at 91. Under this test, the subpoena must be “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *Lone Steer*, 464 U.S. at 414 (internal quotation marks omitted); *United Space All.*, 824 F. Supp. 2d at 91.

OFCCP bears the burden of proving its demands meet all of the constitutional requirements. *See U.S. v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 489 (5th Cir. 2014); *OFCCP v. United Space All., LLC*, 2017-OFC-00002, Pre-Hearing Order #5 (Dep’t of Labor Jan. 25, 2011) (“Plaintiff [OFCCP] will have the burden of establishing that OFCCP . . . made requests which were properly initiated and reasonably limited in scope.”).

ALJ Berlin’s Order applies the above legal framework. Order 20-21. Yet somehow OFCCP claims that ALJ Berlin applied the wrong standard. OFCCP Br. 16 (“OFCCP now provides [the ARB] the *Fourth Amendment* legal framework within which ALJ Berlin *should*

have analyzed the matter.”) (emphasis added). The standard ALJ Berlin articulated and applied uses the same words and cites the very same cases that OFCCP relies on. *Compare id.* at 16-18 *with* Order 20-21.

VI. SINCE OFCCP CONCEDES THAT THE SUBJECT DEMANDS ARE NOT SUFFICIENTLY LIMITED IN SCOPE, ITS EXCEPTIONS MUST FAIL.

OFCCP, Google, and ALJ Berlin all agree on at least one issue – overbreadth is a fundamental concern when a court evaluates whether OFCCP document demands are reasonable under the *Fourth Amendment*. OFCCP Br. 17 (OFCCP demands must be “sufficiently limited in scope”) (quoting *Lone Steer*, 404 U.S. at 415); Order 20-21 (same); *United Space All.*, 824 F. Supp. 2d at 91 (stating that the *Fourth Amendment* “notably focuses on the breadth of the subpoena”). However, while OFCCP’s appeal discusses relevance and burden, the Agency *never addresses overbreadth*, apart from cursory mentions when reciting the *Fourth Amendment* standard. *See, e.g.*, OFCCP Br. 17. This omission is striking because ALJ Berlin found each of the Subject Demands were overbroad. For example:

- ALJ Berlin found Subject Demand 1 overbroad because the Agency asked for more than 25,000 employees’ contact information, even though OFCCP has no intention of interviewing anywhere near that many people. Order 31 (finding the request “over-broad” and “insufficiently focused on obtaining the relevant information”).
- ALJ Berlin found Subject Demand 2 overbroad because the Agency requested all of Google’s Mountain View AAP employees’ (more than 25,000) job and salary history going back as far back as 1998, even though OFCCP failed to show it had jurisdiction over Google the entire time. *Id.* at 34-35. He also found Subject Demand 2 overbroad because the Agency sought salary/job history of all of Google’s Mountain View AAP employees when the un rebutted evidence shows that these factors have no impact at all on the pay of significant portions of this population, including, for example only, college hires. *Id.* at 36-38.
- ALJ Berlin found Subject Demand 3 (the 2014 Snapshot) overbroad in part. He found one data point requested in the spreadsheet (“any other factors related to

compensation”) was “so unfocused” that Google need not respond to it. *Id.* at 29. He also found several other data points requested (*e.g.*, department hired into; job history; salary history; starting “compa-ratio”; starting job code; starting job family; starting level; starting organization; and starting salary) were overbroad. *See id.* at 29, 33-41.

OFCCP concedes that overbreadth is one of the three key considerations courts use to analyze administrative subpoenas. OFCCP Br. 17. OFCCP bears the burden of proving its requests are not overbroad – *i.e.*, sufficiently limited. *Transocean Deepwater*, 767 F.3d at 489; *United Space All.*, 2017-OFC-00002, Pre-Hearing Order #5. While he did not do so exclusively, ALJ Berlin relied on overbreadth as a basis to rule the Subject Demands unconstitutional. Because OFCCP has not argued ALJ Berlin erred in ruling the Subject Demands are overbroad, the Agency has waived its right to challenge ALJ Berlin’s findings on overbreadth. *See Guam v. Reyes*, 879 F.2d 646, 648 (9th Cir. 1989) (“[I]ssues that clearly are not designated in the appellant’s brief normally are deemed waived.”) (internal quotation marks and punctuation omitted). As a result, even if OFCCP’s arguments regarding relevance and burden had merit, which they do not, ALJ Berlin’s Order should be affirmed in its entirety.

VII. OFCCP FAILED TO ESTABLISH THE SUBJECT DEMANDS COMPLY WITH THE *FOURTH AMENDMENT*.

A. ALJ Berlin Correctly Ruled that OFCCP Failed to Establish that Subject Demand 1 Complies with the *Fourth Amendment*.

ALJ Berlin concluded Subject Demand 1, as written by OFCCP, violated the *Fourth Amendment*, and therefore imposed limits on OFCCP’s request in order to make the request reasonable. Order 32-33. As discussed below, OFCCP’s exceptions to these findings lack merit, and the ARB should affirm ALJ Berlin’s ruling.

1. Subject Demand 1 Is Overbroad.

ALJ Berlin's overbreadth findings regarding Subject Demand 1 are amply supported by key testimony from Ms. Wipper, which OFCCP completely ignores in its exceptions. Ms. Wipper testified that OFCCP requested employee contact information so that the Agency could interview employees and gain evidence relevant to the compliance evaluation. *Id.* at 29-30. However, she further testified OFCCP could not and would not interview all 25,000-plus employees whose personal contact details the Agency demanded. Tr. 151-152 (“[W]e wouldn’t want to talk to all of them.”). Instead, she testified that to obtain the information the Agency was seeking, “we would want to talk a sufficient amount of people – a sample.” *Id.* at 152. ALJ Berlin concluded that the considerable gulf between what OFCCP wanted (a sample) and what OFCCP actually requested (detailed contact information for every single employee without exception) established Subject Demand 1 is overbroad.

2. Ms. Wipper’s Testimony Shows the Unreasonably Burdensome Nature of Subject Demand 1.

ALJ Berlin also correctly found Subject Demand 1 is unreasonably burdensome. Order 31-32. Specifically, he found the request subjects Google employees to a burdensome risk of hacking, because OFCCP seeks to place their personal contact information into the federal government’s computer systems, which are susceptible to data breaches. *Id.* at 31. In this appeal, OFCCP challenges this finding regarding the risk of hacking. *Id.* at 32-34.⁷ According to OFCCP, “there is nothing in the record supporting ALJ Berlin’s alarmist language related to potential data breaches.” *Id.* at 32. Not so – OFCCP itself supplied the record evidence. Ms.

⁷ ALJ Berlin also found Subject Demand 1 unreasonably burdened Google’s relationships with its employees by intruding on worker privacy. Order 32. OFCCP has not challenged this finding. *See* OFCCP Br. 31-34.

Wipper testified that the federal government – of which OFCCP is a part – suffered a “major data breach” in 2015, in which the “personal data of government employees was breached.” Tr. 155-156. ALJ Berlin was aware of the 2015 data breach at the federal government. *Id.* at 155. OFCCP’s testimony supported ALJ Berlin’s finding that placing Google’s employees’ contact information on federal computers creates a risk of data breach. ALJ Berlin took official notice of data breaches at the federal government because he was aware of them. *See* Order 31. Such notice is expressly permitted by regulation. 29 C.F.R. § 18.84; 29 C.F.R. § 18.201. These data breaches further support ALJ Berlin’s finding regarding a risk of hacking. More importantly, OFCCP ignores the rest of ALJ Berlin’s reasoning, which correctly examined the *Fourth Amendment* factors together. Though he found OFCCP generally proved Subject Demand 1 sought relevant evidence, he ultimately concluded other concerns – unreasonable burden and overbreadth – rendered the demand unreasonable as a whole. Order 29-33.

3. *ALJ Berlin Appropriately Narrowed Subject Demand 1 to Align with OFCCP’s Stated Purpose for the Information.*

OFCCP raises only one other challenge to ALJ Berlin’s ruling on Subject Demand 1. Specifically, the Agency asserts ALJ Berlin “reaches an arbitrary conclusion of limiting OFCCP access to 5,000-8,000 Google employees without any foundation or support.” OFCCP Br. 34. However, ALJ Berlin’s narrowing of Subject Demand 1 is anything but random or arbitrary – it was made in direct response to OFCCP’s own evidence at the hearing.⁸

ALJ Berlin assessed Subject Demand 1’s constitutionality by considering several factors together (overbreadth, burden, and relevance). Order 29-34; *United Space All.*, 824 F. Supp. 2d

⁸ The parties do not dispute that an administrative law judge has the power to narrow unconstitutional OFCCP demands in order to make them consistent with the *Fourth Amendment*. Pre-Hearing Conference Transcript 33-34 (OFCCP stating, “[W]e do agree that the Court does have discretion” to narrow the Subject Demands).

at 91. For Subject Demand 1, these factors conflicted with one another. OFCCP attempted to prove relevance by explaining that the Agency seeks to confidentially interview employees by contacting them directly, without having to go through Google. Order 29-30. Additionally, “OFCCP want[ed] contact information for a large number of employees so that it may interview some limited number of them while hiding the selected informants in plain sight: Google [would] have no way of knowing who the informants are.” *Id.* But, OFCCP failed to prove Subject Demand 1 was sufficiently limited in scope or not unduly burdensome, as discussed above. *Id.* at 31. This left ALJ Berlin with the task of balancing OFCCP’s desire to conduct confidential interviews against the serious *Fourth Amendment* deficiencies in Subject Demand 1. He struck a practical balance between the competing issues by narrowing OFCCP’s request to 5,000 interviewees (and potentially 3,000 more, if necessary). Order 32-33. The narrowing was a reasonable solution aimed at balancing both parties’ interests and not arbitrary in the least.

B. ALJ Berlin Correctly Ruled that OFCCP Failed to Establish that Subject Demand 2 Complies with the *Fourth Amendment*.

As discussed below, ALJ Berlin correctly determined that OFCCP failed to show the constitutionality of Subject Demand 2.

1. ALJ Berlin Properly Found Subject Demand 2 to be Overbroad.

OFCCP must prove Subject Demand 2 is “sufficiently limited in scope” – *i.e.*, not overbroad. *United Space All.*, 824 F. Supp. 2d at 91. ALJ Berlin found OFCCP failed to do so. Specifically, he found that “OFCCP is seeking huge amounts of sensitive data, not only for many years *before* the generally applicable limit of two years on review periods; it is seeking data for many years during which it has no explicit investigative role.” Order 35. For example, Ms. Wipper testified the “temporal scope of a compliance evaluation” is “two years from when the

scheduling letter is issued to the contractor.” Tr. 35. Specifically, she stated that the temporal scope of OFCCP’s present compliance evaluation “would go back to September 2013,” because the scheduling letter in this matter is dated September 30, 2015. *Id.* at 35; *see also id.* at 40; Ex. 5.

A DOL Final Rule called “Government Contractors, Affirmative Action Requirements, Executive Order 11246,” 62 Fed. Reg. 44174 (Aug. 19, 1997), establishes the two-year limit. *Id.* at 44178 (“Reviews of contractors’ compliance with the Executive Order and regulations cover a two-year period. The policy and practice are to examine the contractor’s personnel policies and activities for the two years preceding the initiation of the review, and to assess liability for discriminatory practices dating back two years.”); *accord* OFCCP MSJ 6 (arguing OFCCP has a two-year review period) (quoting 62 Fed. Reg. 44174, 44178).⁹ Accordingly, ALJ Berlin based his finding that OFCCP’s investigatory power is subject to a “generally applicable limit of two years” in the Agency’s own regulations and testimony. Order 34-35. Based on that conclusion, ALJ Berlin correctly found Subject Demand 2 to be overboard because it goes well beyond the two-year period, requesting job and salary history to 1998. *Id.* at 34-35; 33. OFCCP disputes none of these facts. *See* OFCCP Br. 34-38.¹⁰

⁹ The Agency’s two-year limit in compliance evaluations aligns with OFCCP’s record retention regulation, which states, “Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later.” 41 C.F.R. § 60-1.12(a). It is logical that OFCCP’s recordkeeping rule for contractors aligns with the Agency’s power to look back in time; it would make no sense for OFCCP to have the power to look at records the regulations do not require contractors to maintain.

¹⁰ Furthermore, ALJ Berlin found OFCCP’s own evidence shows the Agency already had the opportunity to request some of the information covered by Subject Demand 2 during a 2007 compliance review of Google’s Mountain View facility, but apparently chose not to ask for it at that time. Order 39 (“Whatever OFCCP did at that time, there seems to be little reason to revisit now what should have been encompassed in that audit.”).

ALJ Berlin further found that OFCCP failed to show continuous jurisdiction over Google during the time period that Subject Demand 2 covers, which goes from September 1, 2015 back to 1998. Order 35. The record supports this. While OFCCP has jurisdiction over federal contractors, *see* 41 C.F.R. § 60-1.20(a), Deputy Regional Director Suhr only testified that Google acted as a contractor for unspecified periods in 2007, 2010, 2011, and 2012. Tr. 64-65. OFCCP nevertheless contends that it proved OFCCP has had jurisdiction over Google continuously “since at least 2007” to the present. OFCCP Br. 3. Even if that were an accurate characterization of the evidence OFCCP set forth – and it is not¹¹ – that would not undermine ALJ Berlin’s conclusion that the Agency failed to show it had jurisdiction over a large section (1998 to 2006) of the period that Subject Demand 2 covers.

In short, a wide gap exists between the limit of OFCCP’s investigatory power (a two-year review period) and what OFCCP has sought in Subject Demand 2 (all job and salary history going back in time to the beginning of all employees’ tenures with Google). This gap shows Subject Demand 2 is overbroad, just as ALJ Berlin concluded.

2. *OFCCP Failed to Prove Subject Demand 2 Seeks Relevant Evidence.*

Even if OFCCP had proven jurisdiction over Google from 1998 to the present, which it did not, ALJ Berlin’s decision should be upheld since he correctly found that OFCCP failed to meet its burden of proving Subject Demand 2 seeks relevant information. Order 33-34. While

¹¹ OFCCP relies on Deputy Regional Director Jane Suhr for its claim of continuous jurisdiction since 2007. OFCCP Br. 3, 3 n.2. But ALJ Berlin refused to credit her testimony on jurisdiction because it was inconsistent and contradictory. Order 8 n.44. OFCCP does not challenge ALJ Berlin’s credibility findings regarding Ms. Suhr’s testimony. OFCCP also improperly directs the Board to the Federal Procurement Database System website as support for the Agency’s claim regarding jurisdiction. OFCCP Br. 3, n.2, 15 n.16. The Board should disregard the website because it is not part of the record, and binding regulations require the ARB to make its decision only “on the basis of the record” that the ALJ considered. 41 C.F.R. § 60-30.29; *OFCCP v. Yellow Freight Sys., Inc.*, 89-OFC-40, 1995 OFCCP LEXIS 78, at 2 (Dep’t of Labor, Sept. 18, 1995).

OFCCP argues that ALJ Berlin erred in analyzing the Agency's evidence on relevance, the Agency completely misunderstands (or ignores) ALJ Berlin's analysis.

ALJ Berlin's task was to review OFCCP's evidentiary showing regarding Subject Demand 2's relevance, and then to decide if the Agency proved by a preponderance of the evidence that its request for job history and salary history sought information relevant to OFCCP's compliance evaluation. *United Space All.*, 824 F. Supp. 2d at 91. To do so, ALJ Berlin required a "yardstick" by which to measure the relevance of the information sought. OFCCP itself provided that yardstick, by offering evidence aimed at demonstrating relevance. The Agency set forth the explanation during its case in chief through the direct examinations of Regional Director Wipper and Deputy Regional Director Suhr. Ms. Wipper testified that OFCCP found compensation disparities in the 2015 Snapshot Google provided to OFCCP. Tr. 48. Ms. Wipper then went on to testify that OFCCP sought job history and salary history (*i.e.*, Subject Demand 2) because the Agency believed "anchoring bias" may be the cause of the pay disparities OFCCP allegedly observed in the 2015 Snapshot. *Id.* at 52, 130-131, 147-149; Order 26. As discussed above, "anchoring bias" is the concept that women, on average, negotiate salary less successfully than do men. The theory is that women entered Google's workforce with lower pay relative to men. Raises during employment are based on existing pay rates, and thus women's lower pay at hire theoretically leads to ongoing pay disparity even for female employees who have worked at Google since the company was formed in 1998. Order 26. Thus, OFCCP argued that job and salary history (Subject Demand 2) is relevant to OFCCP's

anchoring bias theory, which in turn could explain the alleged pay disparities. *Id.*¹²

However, ALJ Berlin received credible evidence from Google regarding its compensation policies and practices through the testimony of Google Vice President of Compensation Frank Wagner. *See, e.g., id.* at 170-171 (prior experience), 171-172 (prior salary), 197-198 (prior salary). At many points, Mr. Wagner's testimony regarding Google's compensation policies and practices differed from that of Ms. Suhr and Ms. Wipper. Order 14-15.¹³ In resolving the conflicting testimony, ALJ Berlin credited Mr. Wagner wherever his testimony differed from that of Ms. Wipper or Ms. Suhr. *Id.* at 15, 17. ALJ Berlin found that OFCCP's witnesses misunderstood Google's compensation practices. *Id.* at 15-17.

ALJ Berlin found OFCCP's witnesses less credible for many reasons. *Id.* at 14 ("Suhr's testimony lacked the foundation and understanding I observed from Wagner."); 15 ("Suhr has a vague sense – not a full and accurate understanding – of how Google sets starting salaries"); 15 ("Suhr had to recant her testimony . . ."); 16 ("Wipper had limited personal knowledge" of

¹² The only evidence the Agency offers the Board related to the relevance of Subject Demand 2 consists of two short excerpts of testimony by Ms. Wipper, the witness ALJ Berlin twice called "evasive." OFCCP Br. 36; Order 16, 30. In the cited testimony, Ms. Wipper claims an employee's entire salary history (going back as far as 1998) is relevant to the "cause of disparities that we're finding at the pay level," and that the relevance for job history is "very similar and interrelated to the salary history." OFCCP Br. (citing Tr. 42, 45). Though OFCCP refuses to clearly state it, the cited testimony again ties back to the anchoring bias theory. Specifically, Ms. Wipper claimed information about salary at the time of hiring is relevant to compensation disparities today. *Cf.* Tr. 244-255 (OFCCP attempted to obtain testimony regarding anchoring bias until ALJ Berlin halted the testimony).

¹³ For example, Ms. Suhr testified that Mr. Wagner told her that an employee's "prior salary" (*i.e.*, salary before joining Google) is a "relevant component to setting compensation." Tr. 75. Ms. Wipper testified similarly. *Id.* at 50. However, Ms. Suhr later admitted that Mr. Wagner did not "tell [her] that [an] individual's entire employment history with respect to salary was relevant to setting compensation at Google." *Id.* at 76. She also admitted that she did not ask if prior salary was relevant to some employees' compensation but not others. *Id.* at 76.

Mr. Wagner's testimony on this issue rebuts Ms. Suhr and Ms. Wipper's accounts. Specifically, he testified that Campus Hires – *i.e.*, employees hired directly from university – made up 20% of Google's employees on the September 2015 snapshot. *Id.* at 197-198. For these employees, prior salary history plays no role in setting compensation. *Id.* at 171-172; 197. Google "do[es] not look at their compensation in any prior job for a new grad, period, ever." *Id.* at 216; *see also id.* at 171.

Google's practices and policies); 16 (Wipper's testimony had "errors in the details" regarding Google practices); 16 ("Wipper was evasive, as though she was advocating."); 16 ("Wipper thought Google managers had discretion to offer as a starting salary anywhere 'between 80 and 120 percent of their mid-point' [but] Mr. Wagner's more persuasive and detailed testimony showed there is no 'mid-point' . . . and there is no basis for [OFCCP's] assertion [that] Google offers new hires as much annual pay as 120 percent of the market reference point.").

Notably, OFCCP does not challenge ALJ Berlin's credibility findings, and thus the Board should uphold them. Order 38; *see also Penasquitos Vill.*, 565 F.2d at 1078. ALJ Berlin was left with the inescapable conclusion that OFCCP relied on misunderstandings and unreliable testimony that he could not credit. *Id.* at 38. Indeed, ALJ Berlin found that OFCCP's anchoring bias theory – the Agency's explanation for why Subject Demand 2 socks relevant evidence – was based on mere guesswork. *Id.* ALJ Berlin, therefore, correctly concluded that OFCCP did not meet its burden to show, on the basis of reliable evidence, that Subject Demand 2 sought relevant information. *Id.*

OFCCP argues that its "investigation should not be limited by ALJ Berlin's decision to accept in total Google's description of its compensation practices." OFCCP Br. 37. The Agency further contends that even if it failed to meet its burden to prove relevance, "[a]t a minimum, OFCCP must be able to establish the veracity of [Mr. Wagner's] statements" regarding compensation policies. *Id.* at 37-38. Put differently, OFCCP argues that even if the ARB agrees with ALJ Berlin's conclusions as to the speculative nature of the Agency's proof and the unreliability of its witnesses, the Board should nevertheless enforce Subject Demand 2. OFCCP Br. 37-38. The Board cannot tolerate such a contention. This case has featured extensive

briefing, dozens of exhibits, testimony from five witnesses, complex motion practice, and a two-day trial. The entire point of this process was for ALJ Berlin to resolve disputes, make factual findings, and come to legal conclusions. To accept OFCCP's argument, the Board would essentially nullify the *Fourth Amendment* rights of all federal contractors because the Agency could justify any demand simply by asserting a need to verify information. Of course, the law rejects such a proposition. See *United Space All.*, 824 F. Supp. 2d at 91.

OFCCP's citation to *E.E.O.C. v. McLane Co.*, 857 F.3d 813 (9th Cir. 2017), changes nothing. OFCCP Br. 38. The language OFCCP quotes – “The EEOC does not have to take [the employer's] word for it” – is dictum. See 857 F.3d at 815-16 (key holding is that district court applied wrong legal test). Furthermore, the present matter is distinguishable for two reasons. First, the key dispute in *McLane* was over the district court's test for an administrative subpoena in a complaint-based EEOC investigation. *Id.* at 815-16. However, the employer also made an additional argument about the merits of the alleged discrimination itself – *i.e.*, the employer asked EEOC to accept the employer's argument that no discrimination occurred. *Id.* at 816. In contrast, here, OFCCP has yet to charge Google with discrimination in the first place. Order 2. Google has had no occasion to make any arguments on the merits of any potential discrimination allegation, and the Company's arguments are strictly limited to the access to records dispute. As a result, Google does not ask OFCCP to believe Google's defenses to discrimination charges.

Furthermore, the *McLane* trial court ruled the subpoenaed information was irrelevant because the EEOC did not actually need the information to complete its investigation. 857 F.3d at 817. (The Ninth Circuit's key holding was that this test was improper. *Id.* at 815-16.) In contrast, ALJ Berlin here ruled that OFCCP failed to prove the relevance of Subject Demand 2

because the Agency built its evidentiary showing on speculation and unreliable testimony, not that OFCCP did or did not need the information. Order 38. Speculative and unreliable evidence cannot support a showing of relevance under the administrative subpoena test and casts light on nothing. *Cf. Montship Lines, Ltd. v. Fed. Mar. Bd.*, 295 F.2d 147, 155 (D.C. Cir. 1961) (holding an administrative subpoena invalid because the agency put forth no basis for determining the relevancy of the information demanded); *Int'l Union of Elec., Radio & Mach. Workers*, 648 F.2d 18, 28 (D.C. Cir. 1980), *modified*, No. 78-2262, 1981 U.S. App. LEXIS 20804 (D.C. Cir. Jan. 22, 1981) (“[S]peculation does not establish relevance.”). If the ARB were to interpret *McLane* as OFCCP does (*i.e.*, relevance is merely a matter of where OFCCP decides, in its sole discretion, to point its flash light), then the administrative subpoena standard would become a nullity.

3. *ALJ Berlin Correctly Determined That Subject Demand 2 Is Unreasonably Burdensome.*

ALJ Berlin also correctly found that compliance with Subject Demand 2 would be unreasonably burdensome for many reasons – *e.g.*, the Company needed to create new software scripts to gather data and review the massive amounts of information to ensure there was no inadvertent production of private employee data. Order 39-40. ALJ Berlin found that complying with the Subject Demands “would take 400 to 500 person hours just to collect the information,” at a cost of \$100,000. *Id.* at 14. After that, Google would also need to review the documents to redact out private employee information. *Id.* The testimony of Google Senior Legal Operations Manager Kristin Zmrhal supports ALJ Berlin’s findings (*see* Summary of Hearing Testimony). OFCCP does not challenge Ms. Zmrhal’s expertise in her field. OFCCP Br. 35-36. Nor does OFCCP challenge the foundation of her testimony, including all the work she has participated in

and overseen while supporting Google's response to OFCCP's compliance evaluation. *Id.* at 35-36. Nor does OFCCP identify any testimony in which Ms. Zmrhal contradicted herself, recanted prior testimony, or was impeached by OFCCP's counsel on cross-examination. *Id.* at 35-36. Usurping the ALJ's role to weigh evidence and witness credibility, OFCCP offers only its own unsupported opinion that Ms. Zmrhal's testimony was "speculative" and "does not provide a clear cost estimate for each of the three [Subject Demands] individually." *Id.* at 36. This argument lacks any merit. As ALJ Berlin found, she based the estimate on her considerable experience responding to the numerous other requests made by OFCCP in this compliance review. Order 14; Tr. 275-277.¹⁴

4. *ALJ Berlin Correctly Ruled that Google Need Not Comply with Subject Demand 2 at This Time.*

Ultimately, ALJ Berlin ruled Google need not comply with Subject Demand 2 at all at this time. Order 33. However, he noted that in the future, OFCCP could issue a new demand for similar information "if OFCCP can make a showing of relevance sufficient to make its requests reasonable." *Id.* at 39. As with Subject Demand 1, ALJ Berlin's ruling is reasonable. Rather than permanently enjoining the Agency from obtaining any information covered by Subject Demand 2, he recognized that the relationship between the parties will continue, and some information may be appropriate for a future document demand, which unlike here, must be crafted in a reasonable fashion. *Id.*

¹⁴ OFCCP also argues, without any evidentiary support or explanation, that Ms. Zmrhal's "testimony . . . never touched on the applicable standard." OFCCP Br. 35. OFCCP's argument is a *non-sequitur*, as a fact witness such as Ms. Zmrhal would not testify about legal standards. In any event, ALJ Berlin properly concluded, based on her testimony, that compliance with Subject Demand 3 would impose a "real disruption of Google's ordinary, productive processes." Order 40. As discussed herein, this finding and analysis meet the legal standard in *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977), the case on which OFCCP principally relies in its burden arguments in this appeal. OFCCP Br. 21.

C. ALJ Berlin Correctly Ruled that OFCCP Failed to Establish Subject Demand 3 Complies with the *Fourth Amendment*.

In Subject Demand 3, OFCCP requested a 2014 Snapshot containing compensation data for the 19,000-plus employees at Google's Mountain View facility as of September 1, 2014. Ex. 6 at 2-3; Stip. Fact 14. As requested, the 2014 Snapshot would contain all categories that appeared in the 2015 Snapshot, plus the various other categories of information OFCCP added to its list of demands in June 2016. Ex. 6 at 2-3. ALJ Berlin ordered Google to produce a 2014 Snapshot containing much of what OFCCP requested in Subject Demand 3. *Id.* at 28-29. He also found several categories of data OFCCP demanded Google include in the 2014 Snapshot unconstitutional, either because they lacked relevance or imposed an undue burden. *Id.* at 28-29. The ARB should affirm ALJ Berlin's ruling.

1. OFCCP Concedes ALJ Berlin Correctly Found Subject Demand 3 Partially Unconstitutional.

OFCCP's appeal contains sections dedicated to challenging ALJ Berlin's analysis of the evidence regarding Subject Demand 1 (employee contact information) and Subject Demand 2 (job and salary history). OFCCP Br. 31-34; 34-38. But OFCCP's brief does not contain any argument asserting that ALJ Berlin incorrectly analyzed the evidence regarding Subject Demand 3 (the 2014 Snapshot). *See* OFCCP Br. Table of Contents. In fact, OFCCP offers but one paragraph that even remotely addresses any evidence related to the 2014 Snapshot. *See* OFCCP Br. 29-30. However, that paragraph does not specifically challenge ALJ Berlin's excision of certain requested categories. Instead, OFCCP merely argues, in a conclusory fashion, that Regional Director Wipper's testimony regarding alleged pay disparities purportedly found in the 2015 Snapshot justifies the production of everything in the 2014 Snapshot. *Id.* at 29-30. Due to

OFCCP's lack of argument regarding Subject Demand 3, the Agency has conceded that ALJ Berlin's Order with respect to this demand is appropriate and lawful. *Reyes*, 879 F.2d at 648.

2. ALJ Berlin Did Not Err in Narrowing Subject Demand 3.

ALJ Berlin found four categories of information OFCCP demanded Google include in the 2014 Snapshot to be unconstitutional. **First**, ALJ Berlin found OFCCP's request for "any other factors related to compensation" not sufficiently limited. Plainly, this request is overbroad, as it has no limits whatsoever. Order 29. This category violates the *Fourth Amendment*. *United Space All.*, 824 F. Supp. 2d at 91. **Second**, ALJ Berlin stated that those components of information sought as part of the 2014 Snapshot also encompassed by Subject Demand 2 (job and salary history) will be treated according to his ruling on Subject Demand 2. Order 29. As already discussed, ALJ Berlin found Subject Demand 2 overbroad, unduly burdensome, and seeking irrelevant information, and that Google need not produce any part of Subject Demand 2. As a result, these categories in the 2014 Snapshot violate the *Fourth Amendment*, as well. *See United Space All.*, 824 F. Supp. 2d at 91. **Third**, ALJ Berlin found OFCCP's request for employees' dates of birth unduly burdensome because it created an unreasonable and unneeded risk of identity theft. Order 29 n.80. OFCCP contends date of birth information is relevant because it is a proxy for employee experience. OFCCP Br. 11. But, as ALJ Berlin correctly concluded, an employee's year of birth is sufficient for that purpose. Order 29, n.80. By asking for specific dates of birth for the entire Corporate Headquarters AAP workforce, OFCCP sought "personally identifiable information that could lead to identity theft or similar adverse results," an unreasonable burden for Google and its employees that violates the *Fourth Amendment*. *Id*; *see United Space All.*, 824 F. Supp. 2d at 91. **Fourth**, ALJ Berlin found locality for all

employees to be unduly burdensome. Order 29. OFCCP offered no evidence to the contrary. Because the evidentiary record clearly supports ALJ Berlin's decision on each category, the ARB should uphold his rulings.

VIII. ALJ BERLIN DID NOT APPLY A PROBABLE CAUSE STANDARD.

OFCCP asserts ALJ Berlin "institute[d] a probable cause standard" when examining OFCCP's relevance showing, and therefore applied the wrong law to this case. OFCCP Br. 20. However, OFCCP identifies only a single line from ALJ Berlin's 43-page decision as the basis for the Agency's argument. *See id.* Specifically, OFCCP writes that ALJ Berlin found "OFCCP is not entitled to documents absent proving it had previously 'identif[ied] actual policies and practices that *might* cause the disparity, and then craft[ed] focused requests for information that bears on these identified potential causes.'" *Id.* (emphasis added).

OFCCP's argument fails for several reasons. *First*, the section of ALJ Berlin's Order that OFCCP quotes is contained in a lengthy discussion regarding OFCCP's failure to establish the relevance of Subject Demand 2 (job and salary history), which is just one of the three Subject Demands. *Id.* at 33-39. ALJ Berlin found Subject Demand 2 unreasonable on several grounds before the quoted language that appears in the Order. *See, e.g., id.* at 33-35. Accordingly, even if OFCCP's interpretation of the quoted language were accurate (which it is not), that cannot justify OFCCP's claim that ALJ Berlin applied an incorrect legal standard to the entire case.

Second, OFCCP has cherry-picked phrases from ALJ Berlin's Order and placed them out of context. In the section that OFCCP selectively quotes, ALJ Berlin highlights his factual finding that OFCCP improperly based Subject Demand 2 on speculation alone. *Id.* at 38. Examining the entire paragraph shows that ALJ Berlin simply provides support for his

conclusion that the Agency’s proffered reason for making Subject Demand 2 has no factual grounding. ALJ Berlin did not require the Agency to meet a probable cause standard. *Id.*

Third, under the standard for administrative warrants (which OFCCP claims ALJ Berlin erroneously used), the government must establish probable cause based on one of two showings: (1) “specific evidence of an existing violation” or (2) “a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.” *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320 (1978) (internal quotations omitted). If ALJ Berlin had actually used the administrative warrant test, he would have required OFCCP to make one of these two showings. But the language OFCCP quotes does not require the Agency to establish either. ALJ Berlin merely found that OFCCP had not “taken sufficient steps to learn how Google’s system works, identify actual policies and practices that *might* cause the disparity, and then craft focused requests for information that bears on these identified *potential* causes.” Order 38 (emphasis added). He did not demand specific evidence of an existing violation or that unidentified administrative inspection standards must be satisfied.

IX. OFCCP’S REMAINING CONTENTIONS OF ALLEGED INFIRMITIES IN ALJ BERLIN’S ORDER LACK MERIT.

OFCCP sets forth a number of other unsupported, and often confusing, objections to ALJ Berlin’s Order in its exceptions. For the reasons set forth below, the ARB should reject these arguments.

A. ALJ Berlin Did Not Improperly Rely on OFCCP’s Motivations.

OFCCP claims that “*Fourth Amendment* review of administrative subpoenas must not focus on the motivation for issuance.” OFCCP Br. 7. The Agency goes on to argue ALJ Berlin committed legal error by “consider[ing] the agency’s motivations for requesting the information”

in the Subject Demands. *Id.* at 18-19. However, OFCCP incorrectly states the controlling rule of law, and ALJ Berlin did not err in applying the actual standard. OFCCP uses the term “motivation” in an undefined and vague way. *Id.* at 7. Without explaining what “motivation” might mean in this context, OFCCP erroneously asserts judges are prohibited *from evaluating the reason why an agency has requested documents.* *Id.* The law does not support this assertion. The administrative subpoena standard is fact-based. *Lone Steer*, 464 U.S. at 415. As such, OFCCP was required to prove that, and ALJ Berlin was required to evaluate whether, the Agency Subject Demands were sufficiently limited in scope and relevant in purpose. *Id.*

B. ALJ Berlin Did Not Incorrectly Conflate Legal Theories of Discrimination or Limit OFCCP to a Single Legal Theory.

OFCCP also contends that ALJ Berlin “consistently conflates adverse impact and disparate impact, which leads him to many incorrect findings.” OFCCP Br. 27-28. However, OFCCP does not provide any explanation for what this means or its importance to its exceptions, and provides no citation for this language. Instead, OFCCP describes the difference between disparate impact and *disparate treatment* theories of discrimination in a footnote, a distinction which OFCCP does not accuse ALJ Berlin of misunderstanding, and not related in any manner to OFCCP’s unexplained contention regarding *adverse impact* and *disparate impact.* *Id.* at 28 n.27. In any event, adverse impact is simply a predicate element of the disparate impact theory of discrimination, and there is nothing in the Order showing that ALJ misunderstood this.

OFCCP’s conclusory statement that ALJ Berlin limited OFCCP to a single theory of discrimination also lacks foundation. OFCCP Br. 28-29. As noted above, OFCCP, not ALJ Berlin, tried to demonstrate the relevance of salary and job history for all of Google’s Headquarters employees by offering Regional Director Wipper’s testimony that the Agency

wished to determine if anchoring bias caused the disparities allegedly found in Google's compensation data. Accordingly, ALJ Berlin had no choice but to address it in his Order.

C. ALJ Berlin Properly Followed *McLane* and *Shell Oil*.

OFCCP also claims that ALJ Berlin improperly "distinguished" *McLane Co. v. E.E.O.C.*, 137 S. Ct. 1159 (2017), and *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54 (1984), by noting those cases involved complaint-driven investigations, while the present matter is not complaint-driven. OFCCP Br. 26 (citing Order 26). In other words, OFCCP suggests ALJ Berlin refused to follow *McLane* and *Shell Oil*.

To the contrary, ALJ Berlin properly relied on *McLane* for the straightforward proposition that in the context of administrative subpoenas, "the term 'relevant' [must] be understood 'generously,'" and in the context of an OFCCP audit, which does not involve a specific charge of discrimination, "the result is an investigation in which a vast amount of information could be relevant." Order 24-25 (quoting *McLane*, 137 S. Ct. at 1165, and *Shell Oil*, 466 U.S. at 68-69). At many points in the Order, ALJ Berlin analyzed OFCCP's evidentiary showing of relevance with generosity, exactly as *McLane* and *Shell Oil* require. For example, ALJ Berlin found that OFCCP showed Subject Demand 1 (employee contact information) sought relevant evidence merely because interviews with employees *might* be a source of useful evidence. *Id.* at 29-30. ALJ Berlin also found that most items in the 2014 Snapshot requested in Subject Demand 3 sought relevant evidence, reasoning that the information *might* explain the disparities OFCCP has allegedly found in the 2015 Snapshot Google already produced. *Id.* at 27-29 ("I also find no reason to question the relevance of most of the data categories that OFCCP requests Google include on the snapshot.").

Furthermore, ALJ Berlin's observation that *McLane* and *Shell Oil* involved complaint-based investigations is correct, non-controversial and only helpful to OFCCP. In any administrative subpoena lawsuit, the agency must prove its requests seek relevant evidence. The agencies in *McLane* and *Shell Oil* attempted to establish relevance by arguing their requests sought information related to the allegations in the complaints of discrimination. *McLane*, 133 S. Ct. at 1165-66; *Shell Oil*, 466 U.S. at 64. *McLane* and *Shell Oil* stated courts should analyze relevance by comparing the requests to the allegations in the complaints. *McLane*, 133 S. Ct. at 1165-66; *Shell Oil*, 466 U.S. at 64. Here, OFCCP has not filed a complaint alleging wrongdoing by Google, so ALJ Berlin's task differed from that of the courts in *McLane* and *Shell Oil*, because he could not compare the Subject Demands to a complaint. Instead, using a generous standard, ALJ Berlin appropriately compared the Subject Demands to OFCCP's showing relating to relevance. Order 24-26. The Agency attempted to establish relevance by putting forth two types of evidence: (1) testimony listing factors that Google told OFCCP were relevant to compensation, and (2) testimony that OFCCP found pay disparities at Google. Tr. 42-60. ALJ Berlin's discussion of *McLane* and *Shell Oil* simply notes this non-controversial dynamic.

D. OFCCP Wholly Misconstrues ALJ Berlin's Discussion of OFCCP Directive 307.

OFCCP also argues that ALJ Berlin held that "OFCCP must engage in an 'iterative process' to establish the relevance of information, insisting that the Agency must 'identify specific areas' of concern to obtain requested information." OFCCP Br. 25 (quoting Order 25-26). In essence, OFCCP suggests ALJ Berlin has invented unprecedented legal requirements for the Agency. However, once again, OFCCP has taken ALJ Berlin's words out of context and flipped the meaning of his Order on its head.

ALJ Berlin's comments fell within his non-controversial review of OFCCP's testimony and processes that *the Agency itself proffered to the court* in an unsuccessful attempt to satisfy the relevance prong of the administrative subpoena standard. The language that OFCCP claims represents legal error is contained in a section of ALJ Berlin's Order in which he articulated the relevance standard under the *Fourth Amendment*. Order 26. As part of that discussion, he described OFCCP Directive 307 in detail. *Id.* Directive 307's subject is "Procedures for Reviewing Contractor Compensation Systems and Practices," and its "purpose" is "[t]o outline the procedures for reviewing contractor compensation systems and practices during a compliance evaluation." OFCCP Directive 307 (Dep't of Labor Feb. 28, 2013).

ALJ Berlin addressed Directive 307 because OFCCP asked him to do so. In OFCCP's case in chief, Ms. Wipper testified in response to her counsel's questions that Directive 307 "explain[s] to the contractors how OFCCP undertakes reviews of compensation policies." Tr. 36. She further testified that Directive 307 "describes the practices and procedures that the Agency *will follow* in investigating compensation discrimination" and "describes . . . the process for investigating compensation, the types of information to look at." *Id.* at 36 (emphasis added). She went on to testify at length on why the Agency believes the Subject Demands seek relevant evidence. Tr. 42-60. Similarly, in OFCCP's Post-Hearing Brief, the Agency stated Directive 307 "describes how the agency evaluates compensation practices" and cited the Directive extensively. OFCCP Post-Hearing Br. 5-6.

In direct response to OFCCP's evidence that Directive 307 governs the Agency's review of a contractor's compensation system, ALJ Berlin described the Directive in his discussion of the *Fourth Amendment* relevance standard:

To bring sufficient focus to its investigations and narrow the scope of relevance, OFCCP Directive 307 gives guidance on the conduct of compensation audits. It describes an iterative process involving a wide range of experts, tools, sources, steps, and case-by-case adjustments as the OFCCP learns more. A primary source of information, of course, must be the contractor, which will be asked what factors are relevant to compensation. OFCCP considers “whether these factors, in conjunction with other legitimate factors, if any, actually explain pay, are implemented fairly and consistently applied, and whether they should be incorporated into a statistical analysis, on a case by case basis.” The investigation is to be tailored to the contractor’s compensation practices. The model that OFCCP uses for analysis must be refined to fit the information gathered.

Applying this regime, OFCCP should be able to identify specific areas that are relevant to its investigation rather than willy-nilly search anywhere and everywhere for practices that might be causing a disparity in the compensation data. Relevance need not and cannot be established on conjecture or speculation.

Order 26. ALJ Berlin accurately summarizes Directive 307, as it does, in fact, describe a process with iterations, during which the Agency eventually narrows and refines its investigative focus. *Compare id.* with OFCCP Directive 307. With this context, it becomes clear ALJ Berlin did not require OFCCP to engage in an “iterative process,” as the Agency argues.

E. OFCCP, Not ALJ Berlin, Cites the Incorrect Standard for Undue Burden.

Finally, OFCCP argues that ALJ Berlin applied an incorrect standard when evaluating the unreasonably burdensome nature of OFCCP’s Subject Demands. Relying on *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977), OFCCP argues that an administrative subpoena can only be deemed unduly burdensome if “compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” OFCCP Br. 21. OFCCP claims that ALJ Berlin “ignores” the *Texaco* rule, and improperly relied on *E.E.O.C. v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014), which OFCCP contends is “an outlier.” OFCCP Br. 22. *Royal Caribbean* held, among other things, that “what is unduly burdensome depends on the particular facts of each

case and no hard and fast rule can be applied to resolve the question” of undue burden. *Id.* at 763 (citations and internal punctuation omitted).

OFCCP’s argument fails for several reasons. **First**, as explained earlier, the only precedent binding on ALJ Berlin is that of the U.S. Supreme Court and the Secretary of Labor. Accordingly, the standard that must be applied to this case is that announced by the Supreme Court in the *McLane* case:

. . . the decision whether a subpoena is overly burdensome turns on the nature of the materials sought and the difficulty the employer will face in producing them. These inquiries are *generally not amenable to broad per se rules*; rather they are the kind of fact-intensive, close calls better suited to resolution by the district court than the court of appeals.

137 S. Ct. at 1168 (emphasis added, internal quotations omitted). The *McLane* standard closely follows the Eleventh Circuit decision in *Royal Caribbean*, since both explicitly reject the rigid, *per se* approach to the burden analysis employed in the *Texaco* decision and that OFCCP improperly urges the ARB to follow. In fact, all the decisions OFCCP cites on pages 21 and 22 of its brief are not binding on ALJ Berlin or the ARB, because they do not come from the Supreme Court or Secretary of Labor. Accordingly, if ALJ Berlin had ignored the decisions OFCCP cites, such as *Texaco*, it does not represent legal error.

Second, ALJ Berlin *did not ignore* the case law in question. In fact, ALJ Berlin begins his discussion of undue burden case law by quoting *Texaco*, the very case OFCCP claims he ignored, and stated that the *Texaco* rule is “generally helpful” to his analysis. Order 27. ALJ Berlin then went on to discuss the *Royal Caribbean* decision and its rule. *Id.*

Third, while ALJ Berlin used a *Royal Caribbean*-style analysis, he also used the *Texaco* rule when he evaluated the Subject Demands. For example, when analyzing Subject Demand 2

(job and salary history), ALJ Berlin found the parties' evidence showed compliance with OFCCP's demands would be a "real disruption of Google's ordinary, productive processes." Order 39. This conclusion was well supported by Google witness Kristin Zmrhal's testimony. Tr. 264-277. ALJ Berlin credited her testimony and found that Google had to create a "'back door' access to extract what was requested," hire outside contractors and outside counsel, all to comply with OFCCP's demands. Order 39. This represents exactly the type of analysis OFCCP claims ALJ Berlin "ignore[d]" in his opinion. OFCCP Br. 22.

Fourth, to the extent OFCCP's brief argues that the ARB should adopt OFCCP's interpretation of the burden analysis, such a contention fails. OFCCP proposes that burden must be assessed in isolation, and only in consideration of a contractor's assets. *Id.* at 24. *McLane* rejected such a *per se* rule in favor of one "that turns on the nature of the materials sought and the difficulty the employer will face in producing them." *McLane*, 137 S. Ct. at 1168. While OFCCP relies on *Texaco* in support of its assertions on burden, in actuality OFCCP's proposed rule strains reason and goes well beyond the holding in *Texaco*. *Texaco* did not discuss a contractor's finances and recognized that burden can include non-financial considerations, as OFCCP's own economics expert testified at trial. Tr. 105 ("[M]oney alone [does not] correlate to burden."); see *Texaco*, 552 F.2d at 883 (disruption of "normal operations" -- which is not limited to monetary concerns -- can constitute unreasonable burden). Under OFCCP's extreme and unreasonable interpretation of *Texaco*, no demand could ever be burdensome for Google (or any other sizable company for that matter). OFCCP Br. 24. ALJ Berlin found OFCCP's demands so burdensome that they failed the *Texaco* standard. Order 40 ("Google's compliance with OFCCP's earlier demands hindered its normal operations, and the additional steps that this

Order will require imposes a greater burden.”); 39 (Complying with the Subject Demands “is a real disruption of Google’s ordinary, productive processes.”)

Lastly, OFCCP’s argument that courts should never balance relevance against burden also conflicts with *Lone Steer*, which the parties agree controls this case. The *Fourth Amendment* demands that OFCCP’s requests be reasonable. *Lone Steer*, 464 U.S. at 414. Courts assess reasonableness on a case-by-case basis by examining whether the requests are “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *See id.* OFCCP had the burden to meet each and every one of these elements, which it failed to do. The Supreme Court’s legal framework plainly represents a balancing test, because the Court held that judges should evaluate reasonableness by weighing certain factors together, and not in isolation. *Id.* at 415.

X. CONCLUSION

For the foregoing reasons, Google respectfully requests that the ARB affirm the Order in its entirety. The record overwhelmingly establishes that ALJ Berlin appropriately found that OFCCP’s Subject Demands do not meet the constitutionally-mandated elements of the administrative subpoena test. Contrary to OFCCP’s positions, this test has significance. When examined in light of the extreme nature of the Subject Demands, and OFCCP’s failure to meet its burden in this case, the administrative subpoena standard acts to prohibit the very type of government overreach the record establishes here. To uphold the Subject Demands in the face of this detailed and well-examined record would effectively render the administrative subpoena standard a nullity, thereby permitting OFCCP unfettered access to the files of all federal

government contractors regardless of scope, relevance and burden. The *Fourth Amendment* demands otherwise.

Respectfully submitted,

Dated: September 22, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September 2017, I caused true and correct copies of

Google Inc.'s Response to OFCCP's Exceptions to The Administrative Law Judge's July 14, 2017 Recommended Decision and Order, and

Google Inc.'s Excerpts of Record in Support of Response to OFCCP's Exceptions to The Administrative Law Judge's July 14, 2017 Recommended Decision and Order

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