UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

February 23, 2024

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 2023A00015
WALMART INC. (BETHLEHEM) Respondent.	)	

Appearances: Sirin Ozen Hallberg, Esq., for Complainant
Dan Brown, Esq. and K. Edward Raleigh, Esq., for Respondent

ORDER ON MOTION TO DISMISS FIRST AMENDED COMPLAINT

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. Pending before the Court is Respondent's Motion to Dismiss the First Amended Complaint. For the reasons set forth herein, the Respondent's motion is granted in part and denied in part.[1]

I. BACKGROUND AND PROCEDURAL HISTORY

Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, filed a Complaint Regarding Unlawful Employment Practices with the Office of the Chief Administrative Hearing Officer (OCAHO) on December 13, 2022, alleging Respondent, Walmart Inc. (Bethlehem), violated 8 U.S.C. § 1324a(a)(1)(B). On February 17, 2023, Respondent filed an Answer to Complaint and a Motion to Dismiss. On March 29, 2023, the Court granted Complainant's Motion for Leave to Amend Complaint and denied Respondent's original Motion to Dismiss as moot. *United States v. Walmart Inc. (Bethlehem),* 17 OCAHO no. 1475a (2023).[2]

[1] The Court will rule on Respondent's pending Motions to Dismiss in nineteen related matters (OCAHO Case Nos. 2023A00016-34) at a later date.

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages,

On April 11, 2023, Complainant filed the First Amended Complaint Regarding Unlawful Employment Practices (FAC).

On June 9, 2023, Respondent filed its Answer to First Amended Complaint and Motion to Dismiss Complainant's First Amended Complaint (Motion to Dismiss FAC), and on July 24, 2023, Complainant filed a Response to the Respondent's Motion to Dismiss Complainant's First Amended Complaint (Complainant's Response). Thereafter Respondent filed a Motion to Strike Complainant's Response to Respondent's Motion to Dismiss on July 28, 2023, requesting in the alternative to file a reply to Complainant's Response. On September 28, 2023, this Court issued an Order denying the Motion to Strike, granting Respondent leave to reply to Complainant's Response, and seeking supplemental briefing on whether the proceedings should be consolidated. *United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475d (2023). On October 19, 2023, Respondent filed its Reply in Support of Respondent's Motion to Dismiss the First Amended Complaint (Respondent's Reply), and on November 2, 2023, Respondent filed a brief on consolidation and Complainant filed a Sur-Reply to the Respondent's Reply in Support of Respondent's Motion to Dismiss the First Amended Complaint (Complainant's Sur-Reply).[3]

II. STANDARDS - MOTION TO DISMISS

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted); 28 C.F.R. § 68.10.[4] Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Spectrum Tech. Staffing*, 12 OCAHO no. 1291, at 8; *see* 28 C.F.R. § 68.1 (providing that "[t]he Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings). When considering a motion to dismiss for failure to state a claim, the Court must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Spectrum Tech. Staffing*, 12 OCAHO no. 1291, at 8 (quoting *Zarazinski v. Anglo Fabrics Co., Inc.*, 4 OCAHO no. 638, 428, 436 (1994)). OCAHO's Rules of Practice and Procedure require the complaint to contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3). Motions to dismiss for failure to state a claim are generally disfavored and will only be granted in

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seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] The Court thanks the parties for their briefing on the issue of consolidation, which will be addressed at a later date.

[4] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

extraordinary circumstances. *United States v. Split Rail Fence Co., Inc.,* 10 OCAHO no. 1181, 6 (2013) (CAHO declined to modify or vacate interlocutory order) (citing *Lone Star Indus., Inc. v. Horman Family Trust,* 960 F.2d 917, 920 (10th Cir. 1992); and then citing *United States v. Azteca Rest., Northgate,* 1 OCAHO no. 33, 175 (1988)).

III. MATERIALS OUTSIDE THE COMPLAINT

Complainant's Response includes images of several representative Forms I-9 and their associated audit trails. Complainant asserts that the Court may consider these materials because they were incorporated by reference into the FAC. Respondent argues that Complainant has provided "no legal support for its contention that I-9s and their audit trails are inherently incorporated by reference into § 274A complaints." Reply Support Mot. Dismiss 14. Rather, Respondent asserts that the Forms I-9 and audit trails are essential pieces of evidence appropriate for consideration and summary decision, and if Complainant wishes the Court to consider them, then Complainant should amend the Complaint to include them. *Id.*

Generally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "The [C]ourt may, however, consider documents incorporated into the complaint by reference[.]" *Id.* at 113-14. The screenshots of representative "properly completed" Forms I-9 in Complainant's Response are not referenced in the FAC, and will not be considered. Complainant does reference and discuss the content of each of the Forms I-9 and corresponding audit trails at issue in the FAC, and specifically writes that it is incorporating these documents by reference. *See* First Am. Compl. 4 n.1. As such, the Court may consider the screenshots of Forms I-9 containing errors that Complainant includes in its Response as incorporated by reference.

However, Complainant has only attached representative sample Forms I-9 and audit trails for several employees/violations, and has not attached the remaining documents. While the Court may consider these sample Forms I-9 in its analysis, it cannot infer from these "representative" samples that any other Forms I-9 contain the same information; in other words, while the additional Forms I-9 and audit trails may have been incorporated by reference into the First Amended Complaint, they are not presently before the Court for consideration. As such, for violations without Forms I-9 and audit trails before the Court, the Court is limited in its review to the allegations in the FAC and attached violations chart.

IV. OCAHO'S CONSTITUTIONAL AUTHORITY

A. Parties' Positions

Respondent first moves to dismiss the FAC because "relief cannot lawfully be granted by OCAHO." Mot. Dismiss 7. Specifically, Respondent argues that because OCAHO ALJs are inferior officers, and "are subject to two layers of for-cause protections," this Court "cannot adjudicate this charge because [OCAHO ALJs] are unconstitutionally insulated from Presidential

removal in violation of Article II of the Constitution." *Id.* at 7, 9 and 10-11. Although Respondent "never requested the ALJ to issue an opinion deciding whether OCAHO is unconstitutional," Respondent nevertheless asks "the [presiding] ALJ . . . exercise [her] discretion to dismiss claims that [OCAHO] does not have the constitutional authority to adjudicate." Reply Support Mot. Dismiss 3-4. Complainant responds that this "challenge to the removal restrictions for OCAHO ALJs fails because 'the President has sufficient control' over ALJs 'to satisfy the Constitution.'" Resp. Mot. Dismiss 7 (quoting *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021)).

B. Authorities

"OCAHO's Administrative Law Judges (ALJs) are 'appointed pursuant to 5 U.S.C. [§] 3105,' to hear cases arising under 8 U.S.C. §§ 1324a-1324c." *Sharma v. NVIDIA Corp*., 17 OCAHO no. 1450h, 2 (2023) (quoting 28 C.F.R. § 68.2). A removal action "may be taken against an [ALJ] appointed under [5 U.S.C. § 3015] . . . only for good cause established and determined by the Merit Systems Protection Board[.]" 5 U.S.C. § 7521(a). Members of the Merit Systems Protection Board, in turn, "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). These two provisions, working together, are the "two layers of for-cause protections" referred to by Respondent. The removal provisions in 5 U.S.C. § 7521 apply not only to OCAHO ALJs, but also to ALJs at the Social Security Administration, the Department of Labor, the Federal Trade Commission, and other agencies. *See Shapiro v. Social Sec. Admin.,* 800 F.3d 1332, 1336 (Fed. Cir. 2015) (identifying 5 U.S.C. § 7521 as the source of good-cause removal requirements for Social Security Administration administrative law judges); *Decker Coal Co.*, 8 F.4th at 1130 (noting that 5 U.S.C. § 7521 applies to Department of Labor ALJs); *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 181 (2023) (noting that both Securities and Exchange Commission and Federal Trade Commission ALJs are removable only for good case under 5 U.S.C. § 7521).

Respondent filed a Complaint and a Motion for Preliminary Injunction before a United States District Court Judge in a related federal case. There, Respondent raised the same arguments about the removal protections for OCAHO ALJs and requested a preliminary injunction against the proceedings before this Court as a remedy. *See* Complaint, *Walmart Inc. v. King*, No. 6:23cv40 (S.D. Ga., filed June 16, 2023); Plaintiff's Motion for Preliminary Injunction, *Walmart Inc. v. King*, No. 6:23cv40 (S.D. Ga., filed June 16, 2023).

C. Analysis

To decide whether OCAHO ALJs are unconstitutionally protected from Presidential removal and therefore lack the ability to adjudicate the claims in this case, the Court would need to rule on the constitutionality of 5 U.S.C. § 7521, in relation to the removal provisions governing the Merit Systems Protection Board at 5 U.S.C. § 1202(d).[5]

[5] The Fifth Circuit found in *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446, 451, 463 (5th Cir. 2022) that the challenged administrative adjudication at the Securities and Exchange "suffered" multiple "constitutional defects" including that "the statutory removal restrictions for SEC ALJs are unconstitutional." SEC ALJs and OCAHO ALJs are subject to the same removal

The Chief Administrative Hearing Officer has observed, "it is not clear that [an OCAHO] ALJ could . . . address[]" questions regarding the constitutionality of OCAHO's review structure, *A.S. v. Amazon Web Servs. Inc.*, 14 OCAHO no. 1381h, 2 n.4 (2021), and the situation before the Court now presents a similar conundrum because it would involve addressing the constitutionality of ALJ removal protections broadly. As explained below, the Court finds that OCAHO is not required to address the constitutional issue under these circumstances and declines to do so.

The Supreme Court "has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise." *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021). Because "[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . access to the courts is essential to the decision of such questions." *Califano v. Sanders*, 430 U.S. 99, 109 (1977). Additionally, "[u]nder Supreme Court . . . precedent, agencies generally do not have authority to declare a statute unconstitutional." *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146, 1151 (Fed. Cir. 2021) (citing, inter alia, *Oestreich v. Selective Serv. Sys. Loc. Bd. No. 11*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.")); *see also Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 673 (6th Cir. 2018) ("This administrative agency, like all administrative agencies, has no authority to entertain a facial constitutional challenge to the validity of a law.").

Administrative agencies are not necessarily barred from addressing constitutional arguments, as the "rule" that constitutional adjudication is generally beyond the purview of administrative courts "is not mandatory." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994). Under certain circumstances, administrative courts may have an obligation to address constitutional questions. For example, the D.C. Circuit found that the Federal Communications Commission (FCC) "[had] an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress," when the petitioner brought a constitutional challenge to the

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protections. However, the Fifth Circuit "[did] not address whether vacating" the administrative decision below "would be appropriate based on [the removal protections] alone." *Id*. at 466. Moreover, as the Fifth Circuit noted in support of its finding that the removal protections were inappropriate, the SEC's structure allows "the Commission [to have] *ex parte* discussions with the prosecutors to determine whether to pursue securities-fraud claims" and "the Commission itself decides what claims should be brought by the prosecutors. Only then do the ALJs resolve the claims, which are then again reviewed by the Commission." *Id*. at 465 n.20. OCAHO's structure differs from that of the SEC as § 1324a cases are brought by the Department of Homeland Security, without consultation from OCAHO or indeed the Department of Justice, of which OCAHO is a part. Because the Fifth Circuit did not conclude whether the removal protections alone would invalidate an administrative decision and because OCAHO's structure differs from that of the SEC, there is insufficient guidance in *Jarkesy* for the Court to dismiss the cases arising in the Fifth Circuit at this time. The Supreme Court heard oral arguments in *Securities and Exchange Commission v. Jarkesy*, and is expected to issue a decision at the conclusion of the term. *See Sec. & Exch. Comm'n v. Jarkesy*, 143 S. Ct. 2688 (2023) (granting cert.)

FCC's license allocation process. *Graceba Total Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 115 F.3d 1038, 1041-42 (D.C. Cir. 1997).

Here, Respondent in effect asks this Court to declare 5 U.S.C. § 7521 unconstitutional, by way of a motion to dismiss. This Court finds that even if it were able to address the underlying constitutional issue (a question it does not resolve here), it is not obligated to do so under the circumstances. The constitutional issue before this Court is distinguishable from those in which administrative courts were obligated to address constitutional challenges. In *Graceba Total Communications, Inc.*, for example, the appellants brought a "constitutional challenge to a minority and gender preference rule employed in a license auction" run by the adjudicating agency. 115 F.3d at 1039. The "case raise[d] questions about . . . fact-specific, policy-laden concerns," leading the D.C. Circuit to conclude "its resolution would benefit from the agency's expertise." *Id*. at 1042. The constitutional issue before this Court, on the other hand, is not closely tied to the facts of the case, and does not relate to the claims that brought the parties to this forum. A ruling on this issue would, instead, be a decision on a "purely constitutional" matter about which this Court "[has] no special expertise." *Carr*, 141 S. Ct. at 1361. Moreover, this is an issue that applies to ALJs across a number of agencies, and the issue is therefore more appropriately addressed in a forum that has broader expertise in constitutional issues.

As support for its argument that the Court should dismiss the claims because of a lack of constitutional adjudicatory authority, Respondent cites to cases arising under 8 U.S.C. § 1324b in which OCAHO ALJs sua sponte stayed proceedings in light of *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), and a case in which an OCAHO ALJ dismissed the case for lack of subject-matter jurisdiction. *See* Reply Support Mot. Dismiss 3-4. However, both situations differ from the motion currently before the Court.

First, Respondent has not asked for a stay of proceedings, but a dismissal of the claims. The sua sponte stays issued in § 1324b cases were issued in response to unresolved questions regarding OCAHO's own specific review structure for § 1324b cases, in the aftermath of the *Arthrex* decision.[6] *See e.g., Zajradhara v. HDH Co., Ltd*., 16 OCAHO no. 1417c, 6 (2022) ("[T]he Court finds itself in a position wherein it is unable to execute this case disposition.") (citing, inter alia, *A.S.*, 14 OCAHO no. 1381h, at 2 n.4). Here, by contrast, Respondent has filed a motion to dismiss, and the removal protections it points to apply to a variety of ALJs across multiple agencies.

It is true that OCAHO regularly dismisses claims over which it lacks subject-matter jurisdiction, because it is "a forum of limited jurisdiction." *Zajradhara v. E-Supply Enters*., 16 OCAHO no.

[6] On October 12, 2023, the Department of Justice published an interim final rule providing for review by the Attorney General of OCAHO ALJ final orders in cases arising under 8 U.S.C. § 1324b, resolving the issue that led to the stays. *See* Office of the Chief Administrative Hearing Officer, Review Procedures, 88 Fed. Reg. 70,586 (Oct. 12, 2023) (codified at 28 C.F.R. pt. 68); *but see Space Exploration Techs., Corp. v. Bell*, Civil Action No. 1:23-cv-00137, 2023 WL 8885128, at *3 (S.D. Tex. Nov. 8, 2023).

1438f, 5 (2023). However, Respondent has not argued that the Court lacks subject-matter jurisdiction over any of the claims in this matter. Instead, Respondent argues that (in essence) this Court lacks the authority to adjudicate any claims before it because of the ALJ removal protections in 5 U.S.C. § 7521. This Court has considerable expertise in reading and interpreting "the jurisdiction prescribed by Congress" to it in 8 U.S.C. §§ 1324a-1324c, *id*., but, as discussed above, it lacks the same expertise (and perhaps even authority) to address Respondent's constitutional argument.

The constitutional question of whether the President retains sufficient control over OCAHO's ALJs is better addressed by a federal court, whose "judicial Power . . . extend[s] to all Cases, in Law and Equity, arising under [the] Constitution." U.S. Const. art. III, § 2. In *Axon Enterprise, Inc.*, 598 U.S. at 196, the Supreme Court found "[a] district court can . . . review" challenges to administrative proceedings based on constitutional arguments about ALJ removal protections. Respondent's constitutional arguments in both its Complaint and its Motion for Preliminary Injunction in federal court parallel those raised in the Motion to Dismiss before OCAHO now. *See* Complaint, *Walmart Inc. v. King*, No. 6:23cv40 (S.D. Ga., filed June 16, 2023); Plaintiff's Motion for Preliminary Injunction, *Walmart Inc. v. King*, No. 6:23cv40 (S.D. Ga., filed June 16, 2023). The District Court is a more appropriate avenue to litigate this constitutional issue and, should it find for Respondent, to consider a remedy.

Considering the above, the Court does not rule on whether it lacks the authority to adjudicate the claims in this case because the ALJ removal protections in 5 U.S.C. § 7521 unconstitutionally insulate its ALJs from presidential oversight.

V. PLEADING STANDARD

A. Positions of the Parties

Respondent next moves to dismiss Complainant's "allegations regarding electronic I-9s and their audit trails" for failure to meet OCAHO's pleading standards. Mot. Dismiss 16. Specifically, Respondent argues that while Complainant attaches to the FAC a chart containing the factual allegations for each violation, Complainant nowhere identifies the "legal basis" for those allegations, and that the allegations regarding electronic I-9s and their audit trails are impermissibly "vague, confusing, and ambiguous." *Id.* at 18. Complainant responds that the FAC meets OCAHO's pleading standard: that OCAHO does not require Complainant to plead the "legal basis" for its allegations, but rather, "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." Resp. Mot. Dismiss 14, 19 (quoting 28 C.F.R. § 68.7(b)) (internal quotations omitted).

B. OCAHO's Pleading Standard

OCAHO's Rules of Practice and Procedure provide, as relevant here, that "[e]very pleading shall contain a caption setting forth the statutory provision under which the proceedings is instituted," and that complaints shall contain: (1) "A clear and concise statement of facts, upon which an

assertion of jurisdiction is predicated"; (2) "The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred"; and (3) "A short statement containing the remedies and/or sanctions sought to be imposed against the respondent." 28 C.F.R. § 68.7(a)-(b).

"Statements made in the complaint only need to be 'facially sufficient to permit the case to proceed further,' . . . as '[t]he bar for pleadings in this forum is low.'" *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 3 (2022) (quoting *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012), and then quoting *United States v. Facebook, Inc.*, 14 OCAHO no. 1386b, 5 (2021)). "OCAHO's pleading standard does not require a complainant [to] proffer evidence at the pleadings stage . . . Rather, pleadings are sufficient if 'the allegations give adequate *notice* to the respondents of the charges made against them.'" *Id.* (quoting *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1097, 10 (2003)); *see also Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, at 9 ("Unlike complaints filed in the district courts, every complaint filed in this forum, whether pursuant to § 1324a, § 1324b, or § 1324c, has already been the subject of an underlying administrative process as a condition precedent to the filing of the complaint . . . An OCAHO complaint thus will ordinarily come as no surprise to a respondent that has already participated in the underlying process.").

C. Allegations in the FAC Regarding Electronic I-9s and Audit Trails

In the First Amended Complaint, Complainant alleges two counts.

In Count I, Complainant alleges that Respondent hired individuals for employment in the United States but "failed to prepare and/or present or, in the alternative, failed to properly complete or ensure the proper completion of the Forms I-9," and therefore, "is in violation of [INA] Section 274A(a)(1)(B)," which "renders it unlawful . . . for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of . . . 8 U.S.C. [§] 1324a(b)." First Am. Compl. 4, 47. In an attached chart, Complainant details the facts supporting each violation, which include only one type of violation involving electronic Forms I-9 and audit trails: the audit trail shows that only the employer signed into the electronic system used to complete the Form I-9 and appears to have signed Section 1 as the employee, and therefore, the Form I-9 was "[n]ot prepared or, in the alternative, not properly completed because the employer failed to ensure the proper completion of Section 1." (Count I, No. 1).[7]

In Count II, Complainant alleges that Respondent hired individuals for employment in the United States but "failed to properly complete the Forms I-9," and therefore, "is in violation of [INA] Section 274A(a)(1)(B)," which "renders it unlawful . . . for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of . . . 8 U.S.C. [§] 1324a(b)." First Am. Compl. 48, 55. In an attached chart, Complainant alleges four

[7] The Court has listed each different type of allegation involving electronic Forms I-9 briefed by the parties, attached to this order as "Electronic Form I-9 and Audit Trail Allegations List." The Court will refer to different violations by their location on the Allegations List.

main allegations involving electronic Forms I-9 and audit trails. These include: 1) no paper Form I-9 appears to have been completed, and the audit trail is deficient as it "fails to show who was signed into the form . . . with respect to required signatures and attestations" (Count II, No. 1); 2) a scan or upload of the original paper signed Form I-9 was not provided, "showing that the employer did not properly retain the original paper Form I-9 in an electronic format" (Count II, No. 2); 3) the Form-I-9 was provided without an audit trail (Count II, No. 3); and 4) the "Form I-9 lacks both a signature… in Sections 1 and 2" and the Lookout audit trail is deficient as it "fails to show who was signed into the form . . . with respect to required signatures and attestations" (Count II, No. 4).

D. Sources of Electronic Form I-9 Requirements

For both Counts I and II, Complainant alleges that Respondent violated 8 U.S.C. § 1324a(a)(1)(B), which renders non-compliance with § 1324a(b) unlawful. Section 1324a(b) creates three general requirements for Forms I-9. First, § 1324a(b)(1) provides that a person or entity must attest that it has verified that an individual is not an "unauthorized alien" by examining work authorization and identification documents (the "Section 2" attestation). Second, § 1324a(b)(2) provides that an individual must attest that the individual is a citizen or national of the United States, a permanent resident, or otherwise authorized to work (the "Section 1" attestation). Third, § 1324a(b)(3) provides that employers "must retain a paper, microfiche, microfilm, or electronic version of the [Form I-9] and make it available for inspection "

Beyond these three general requirements in § 1324(a)(b), DHS regulations allow for the electronic completion, signature, and retention of electronic Forms I-9, with specific standards for completion. *See* 8 C.F.R. §§ 274a.2(e)-(i) (as amended by Electronic Signature and Storage of Form I-9, Employment Eligibility Verification, 71 Fed. Reg. 34,510 (June 15, 2006) (interim final rule) and 75 Fed. Reg. 42,575 (July 22, 2010) (final rule)); *see also United States v. Agri-Systems*, 12 OCAHO no. 1301, 14 (2017) ("A Form I-9 can be electronically generated or retained, subject to several regulatory provisions, including compliance with 8 C.F.R. §§ 274a.2(e)-(i)."). These regulations are the source of the requirements governing the creation and presentation of audit trails. *See, e.g.*, 8 C.F.R. § 274a.2(f)(1) ("A person or entity who chooses to complete and/or retain Forms I-9 electronically must maintain and make available to an agency of the United States upon request documentation of the business processes that [e]stablish the authenticity and integrity of the Forms I-9, such as audit trails."). These DHS regulations specifically mention four ways that an electronically completed Form I-9 may violate 8 U.S.C. § 1324a. *See* 8 C.F.R. §§ 274a.2(f)(2), (g)(2), (h)(2), (i); *see also id.* §§ 274a.2(b)(2)(ii), (b)(2)(iii)(B) (providing that refusal or delay in presentation of Forms I-9 and failure to comply with regulations for presentation of microfilm or microfiche criteria may violate 8 U.S.C. § 1324a).[8]

[8] As Respondent notes, on August 22, 2012, Executive Associate Director of Homeland Security Investigations James A. Dinkins issued a Memorandum to Assistant Directors, Deputy Assistant Directors, and Special Agents in Charge at DHS with the subject "Guidance on the Collection and Audit Trail Requirements for Electronically Generated Forms I-9." James A. Dinkins, Guidance on the Collection and Audit Trail Requirements for Electronically Generated Forms I-9" (Aug. 22, 2012), *available at* https://www.ice.gov/doclib/foia/dro_policy_memos/collect-audit-forms-i9.pdf

E. Analysis

In the First Amended Complaint, Complainant does not specify which of these specific statutory or regulatory provisions Respondent allegedly violated, only pointing generally to §§ 1324a(a)(1)(B) and (b). Respondent argues that, for Complainant's allegations involving electronic Forms I-9 and audit trails, this is insufficient notice of the charges against it. Mot. Dismiss 16-20 (citing, inter alia, *United States v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 94-95 (1988), and *United States v. Lazy Days S., Inc.*, 13 OCAHO no. 1322a, 3 (2019)). Specifically, Respondent argues that Complainant's allegation in the alternative in Count I makes it unclear what error is present in the Form I-9, and that even when the allegations are not alleged in the alternative in Count II, they are impermissibly ambiguous, often mentioning both required attestations and audit trails, but not citing to the specific statutory provision or the regulations. *Id.* at 19-20. Respondent writes that "[n]either the ALJ nor Respondent should have to guess what legal provisions support Complainant's theories." *Id.* at 20.

In its Response, Complainant argues that the allegations in the FAC, along with the incorporated electronic Forms I-9 and audit trails, provide sufficient notice for Respondent to offer defenses to the allegations therein. Resp. Mot. Dismiss. 14-24. Complainant notes that the FAC alleges that Respondent violated the statute, and provides a statement of the facts pointing to acts Respondent failed to take, which "give rise to an inference of employer sanctions under § 1324a." *Id.* at 18. Complainant argues that unlike in *Mester Manufacturing Company*, it has alleged the "correct and applicable sections of law for each count" with "specificity and a clear and concise statement of facts." *Id.* at 21. Finally, Complainant argues that Respondent has notice of the allegations in the FAC from the previous administrative process. *Id.* at 24.

But Respondent replies that Complainant's allegations remain ambiguous, and moreover, Complainant cannot introduce specific statutory and regulatory cites for its allegations for the first time in its opposition briefing. *See generally* Reply Support Mot. Dismiss 16-31.

In *Mester Manufacturing Company*, the Court considered whether a complaint warranted dismissal, when the Notice of Intent to Fine (NIF) attached to the complaint incorrectly cited INA § 274A(b)(1) for failure to prepare/present Forms I-9, a violation that properly falls under § 274A(b)(3). 1 OCAHO no. 18, at 61, 91-92. The Court found that "[w]here the factual allegations are not consistent with the specification of law said to have been violated, the flaw is pervasive. Here, where the legal specification cannot be identified with certainty . . . the flaw is fatal to the charge." *Id.* The Court noted that the Immigration and Naturalization Service (INS)'s intent was unclear from the record, given that one could read the NIF to intend a charge under either section, and on briefing, the INS referenced both failure to properly complete and failure to present. *Id.* at 93-94 (finding that this incorrect citation constituted a "source of uncertainty and confusion," because it was "unclear on which theory the Service tried the case"). The Court also noted that

(Dinkins Memo). This Memorandum includes a flowchart to "illustrate the minimum acceptable standards for electronically generated Forms I-9" to ensure compliance with the electronic Form I-9 regulations. *Id.* at 2.

this was "not a case where the judge can substitute an obviously omitted portion of a regulatory citation" because it was "absolutely unclear what citation to substitute because among the three elements, the factual allegation, the statutory specification and the regulatory specification, no two are consistent as charged," which did not provide adequate notice. *Id.* at 95; *cf. Lazy Days S., Inc.*, 13 OCAHO no. 1322a, at 3 (finding allegation that the respondent "failed to prepare and/or present Form I-9s" sufficient to plead a violation of 8 U.S.C. § 1324a(a)(1)(B)) (citing *Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, at 5-6).

In *Sharma*, 17 OCAHO no. 1450, at 7, a case arising under 8 U.S.C. § 1324b, the Court found that the complainant met OCAHO's pleading standard "because he [] identified a theory by which [the] Respondent allegedly violated 8 U.S.C. § 1324b" and "succinctly yet clearly" informed the respondent why the complainant brought the suit.

While Complainant does not provide a specific statutory or regulatory cite for the allegations in the attached chart, for the majority of the allegations, the factual allegations provide sufficient notice of Complainant's theory of the violation at issue. *See Sharma*, 17 OCAHO no. 1450, at 7. Complainant provides the relevant statutory citation, and in the attached violations charts provides a description of the facts leading it to believe that Respondent has violated this statutory provision. These two allegations, together, are sufficient at this stage to satisfy OCAHO's pleading standard.[9] Unlike in *Mester Manufacturing Company*, there is no inconsistency between the factual allegations and the cited statutory provision. That inconsistency, and resulting inability to substitute a citation, made it impossible to discern the complainant's intended theory of the case, and thus provided insufficient notice. And, as the ALJ discussed in *Lazy Days South, Inc.*, Complainant may set forth allegations in the "conjunctive and alternative," as long as the Complainant alleges enough to put the Respondent "on notice of the alleged violations." 13 OCAHO no. 1322a, at 3.

Specifically, in Count I, No. 1, the factual allegations provide background for the concluding sentence that "the employee did not attest or sign in Section 1," and thus that "the employer failed to ensure the proper completion of Section 1." Respondent insists that it is unclear whether Complainant is "alleging that an error occurred with the attestations during the initial completion of the I-9, or that an error appears to have occurred because of what information is provided" on the associated audit trail. Reply Support Mot. Dismiss 20. The Court agrees with Complainant that the charge that Complainant failed to properly complete the Form I-9 applies to violations of the requirements set forth in 8 C.F.R. § 274.2 as a whole, and that the allegations specifically relate to these requirements. *See, e.g.*, 8 C.F.R. § 274a.2(h) (providing that "[a]ny person or entity who

[9] In contrast, in *United States v. Garcia-Guaneros*, the ALJ dismissed a complaint where the sole count cited to § 1324c(a)(2), but there were no factual allegations in either the complaint or the incorporated Notice of Intent to Fine, and the citations to the law were incorrect. 13 OCAHO no. 1334, 2-3 (2019). The ALJ wrote: "Not only is the alleged violation of law unclear and inconsistent, and the prayer for relief inconsistent with the purported charge, but there is no statement of facts. Without any factual allegations, the complaint does not state a claim, and does not serve its function to provide notice to the Respondent." *Id.* at 2.

is required to ensure proper completion of a Form I-9 and who chooses electronic signature for a required attestation, but who has failed to comply with the standards set forth in this paragraph, is deemed to have not properly completed the Form I-9, in violation of section 274A(a)(1)(B) of the Act and 8 CFR 274a.2(b)(2))." Complainant asserts that these standards were not met in the specific ways it lists in the chart. Respondent is pulling apart the allegations to differentiate between errors on the Form I-9 and the appearance of errors on the Form I-9 due to the information on the audit trail, but such specificity is not required at this juncture.

Ultimately these requirements relate to the core process of properly effectuated employment verification, which, given the electronic format, require different steps to ensure the attestation has been read by the signatory, and the identity of the person producing the signature. *See* 8 C.F.R. § 274a.2(h)(1); *see also id.* § 274a.2(f)(1)(iii) (requiring documentation of business processes that establish the authenticity and integrity of electronic Forms I-9, such as audit trails). The Court is inclined, for purposes of the motion to dismiss, to agree with Complainant that the audit trails are part of an electronic Form I-9, not least because they must be produced with the Form I-9, and therefore separating allegations relating to the audit trails and the attestations is unnecessary. The Court acknowledges that Respondent reserves this argument for further development, however, with the benefit of facts not appropriate for motions to dismiss.

Similarly, in Count II, Complainant asserts the factual allegation that the Forms were not properly completed in the ways detailed in the chart. Count II, No. 3 alleges that the Form-I-9 was provided without an audit trail, a simple and clear statement, and Count II, No. 4 alleges two violations, the first of which is quite clear: "Form I-9 lacks . . . a signature . . . in Sections 1 and 2." Count II, No. 1 contains a good deal of background factual allegations, but ultimately concludes that the audit trail does not show "who was signed into the form . . . with respect to required signatures and attentions." This is a clear statement of fact which relates to the requirements of 8 C.F.R. § 274a.2 and, as noted above, the core requirements of the verification process.

Therefore, Complainant has, by providing factual allegations, given adequate notice of the reason it is bringing the suit. *Cf. Mester*, 1 OCAHO no. 18, at 93-94.

However, in Count II, No. 2, while Complainant alleges that Respondent "did not properly retain the original paper Form I-9 in an electronic format" in the attached chart, the heading for Count II relates to failure to "properly complete" the Form I-9. In addition, allegation C in Count II states, "[r]espondent failed to properly complete Forms I-9 for the two hundred eighty (280) individuals listed in paragraph A." First Am. Compl. 55. Respondent argues that a failure to properly retain a Form I-9 is not equivalent to a failure to properly complete a Form I-9, Mot. Dismiss 24, and the Court agrees. The term is broad, but not so elastic as to stretch to encompass the retention requirements, which relate to keeping already completed forms. Given the lack of a specific statutory or regulatory citation, the differences between the heading and factual allegation in the FAC, and the factual allegations in the attached chart create the type of inconsistency identified in *Mester Manufacturing Company*, where it is "unclear what citation to substitute." While the factual allegation in the attached chart is clear enough, the Court does not believe it appropriate to essentially edit the allegations in the Complaint to conform to the chart. Moreover, as discussed

below, Count II, No. 2 does not contain sufficient allegations to state a claim upon which relief can be granted.

As such, Respondent's motion to dismiss Count II, No. 2 for failure to meet OCAHO's pleading standard is granted, and the motion is denied as to the remaining allegations.[10]

VI. VIOLATION UNDER STATUTE OR REGULATIONS

Respondent next moves to dismiss Complainant's claims involving audit trails and electronic I-9s for failure to state a claim, as "the facts alleged cannot constitute a violation recognized under the I-9 Statute or the Electronic I-9 Regulations," and "any decision to impose liability on Respondent for such errors would violate principles of fair notice." Mot. Dismiss 20, 35. Complainant responds that its allegations constitute "well-pleaded violations of 8 U.S.C. § 1324a(a)(1)(B) and § 1324a(b)," and that Respondent's arguments regarding notice fail "as a matter of law and fact." Resp. Mot. Dismiss 28, 49.

In this section, the Court will only consider allegations which were directly addressed by Respondent in its Motion to Dismiss.

A. Failure to Ensure Proper Completion of Section 1: Only Employer Logged In (Count I, No. 1)

Respondent argues that Count I, No. 1—which alleges that only the employer signed into the electronic system used to complete the Form I-9, and therefore, the Form I-9 was "[n]ot prepared or, in the alternative, not properly completed because the employer failed to ensure the proper completion of Section 1"—is not a violation under the electronic I-9 regulations. Mot. Dismiss 22-23 (citing 8 C.F.R. §§ 274a.2(f)(2), (g)(2), (h)(2), (i)).

Complainant responds that the regulations require the creation of an audit trail establishing "the date it was accessed, who accessed it, and what action was taken," Resp. Mot. Dismiss 28 (citing 8 C.F.R. § 274a.2(e)(8)(i) and § 274a.2(g)(iv)), and that because the audit trails for these Forms I-9 reflect that only the employer signed in to complete Section 1, Respondent "has failed to demonstrate that the Form I-9 was prepared or completed consistent with the requirements of 8 C.F.R. § 274a.2(b)(1)(i) and § 274a.2(h)," *id.* at 28-29. Complainant further argues that the simple presence of a signature on Section 1 of an electronic Form I-9 does not satisfy 8 C.F.R. § 274a.2(e)-(i), and attaches representative examples of audit trails reflecting Respondent's representatives

[10] Respondent attaches to its Motion to Dismiss the FAC as Appendix C a list of Forms I-9 for which Complainant alleges Respondent did not properly retain the original in an electronic format. As discussed in the Conclusion, given the volume of alleged violations at issue, the Court orders the parties to meet and confer and provide the Court with a submission regarding which claims are subject to dismissal on this ground. To the extent that the parties agree that Appendix C is an accurate list of the Count II, No. 2 allegations, the parties may so inform the Court in their submission.

logging in to the Guardian/LawLogix system at the time of the completion of the Section 1 employee attestation. *Id.* at 31, 35-36. Therefore, Complainant asserts that Respondent "failed to meet its legal obligation to prepare or, in the alternative, to ensure the proper completion of, the Forms I-9 for the employees named in Count I." *Id.* at 37.

In its Reply, Respondent argues that Complainant's allegations remain ambiguous, that Complainant now asserts a theory of fraud/misrepresentation, which would require different preparation for a defense than a violation of the regulations, and provides new regulatory cites for the first time in its opposition briefing. Reply Support Mot. Dismiss 16-31. Complainant responds that it has not raised a new theory of fraud/misrepresentation, but rather, that Count I, No. 1 specifically alleges that the employer "appears to have attested and signed as the employee in Section 1," based on audit trail sign-in information. Sur-Reply Mot. Dismiss 12; *see generally id.* at 12-14.

Section § 1324a(b)(2) provides that an individual must attest on the Form I-9 that he or she is a citizen, permanent resident, or alien authorized to work in the United States. Taking Complainant's allegations in the FAC as true, that the audit trail reflects that only the employer signed into the electronic system to complete the Form I-9, and appears to have attested and signed as the employee and therefore, Respondent did not ensure proper completion of Section 1, this adequately alleges a violation of § 1324a(b)(2). Simply stated, Complainant charges that the employee did not attest to his or her *own* employment authorization in Section 1.

Complainant also argues in its opposition briefing that Count I, No. 1 is a violation of the audit trail regulations, specifically, 8 C.F.R. § 274a.2(b)(1)(i) and § 274a.2(h). *See* Resp. Mot. Dismiss at 28-29. These provisions provide more detail to the general requirement in § 1324(a)(b)(2). Section 274a.2(b)(1)(i) generally provides that an entity must ensure that an individual completes Section 1 at the time of hire and signs the attestation with a signature meeting the regulatory requirements in § 274a.2(h). Section 274a.2(b)(1) describes what an employer must do to meet § 1324(a)(b)(2); thus, failure to meet the regulatory provisions means an employer has not satisfied the statute. As such, Complainant's citation to these provisions is essentially cumulative.

Therefore, Respondent's motion to dismiss Count 1, No. 1 for failure to state a claim is denied.

B. Failure to Properly Retain Original Paper I-9 in Electronic Format (Count II, No. 2)

Second, Respondent argues that Count II, No. 2, relating to the proper retention of electronic Forms I-9, does not constitute a violation of §1324a or the electronic Form I-9 regulations.

In Count II, No. 2, Complainant alleges:

> Form I-9 has a "Facsimile of Paper I-9" watermark that indicates "Paper Form Signed By" during the time when the company indicated it began using the Guardian/LawLogix system, but a "scan and upload of the original signed form" was not provided by the

> employer, showing that the employer did not properly retain the original paper Form I-9 in an electronic format.

Respondent argues that this does not constitute a violation of the electronic I-9 regulations, which authorize electronic retention of Forms I-9 subject to certain limitations. Mot. Dismiss 23-25 (citing 8 C.F.R. § 274a.2(a)(2)). Nor do the regulations specify that failure to comply with the retention requirements for electronic I-9s violate § 1324a. *Id.* at 24.

Complainant responds that Forms I-9 which were originally completed on paper cannot be stored by "recreating the information contained on an original paper (wet-ink) Form I-9 in an electronic Form I-9 retention system." Resp. Mot. Dismiss 48. The regulations require, instead, "scanning and uploading a copy of the original . . . into such a system," pursuant to 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(2)(i). *Id.*

The statute and regulations provide specific requirements for the electronic retention of paper I-9s. 8 U.S.C. § 1324a(b)(3) provides that an employer "must retain a paper, microfiche, microfilm, or electronic version" of a Form I-9 and make it available on request. 8 C.F.R. § 274a.2(b)(2)(i) provides more detail:

> A paper (with original handwritten signatures), electronic (with acceptable electronic signatures that meet the requirements of paragraphs (h) and (i) of this section or original paper scanned into an electronic format, or a combination of paper and electronic formats that meet the requirements of paragraphs (e), (f), and (g) of this section), or microfilm or microfiche copy of the original signed version of Form I-9 must be retained by an employer . . .

Complainant alleges that Respondent presented an electronic Form I-9 indicating "Paper Form Signed By," and did not present a scan and upload of the original signed form, but does not address whether Respondent retained an original paper copy, an electronic copy with a proper electronic signature under 8 C.F.R. § 274a.2(h), a combination of formats meeting the requirements for retention, documentation, and security under 8 C.F.R. § 274a.2(e), (f), or (g), or a microfiche/microfilm copy—the other retention options listed in the regulations. Therefore, the FAC contains insufficient factual allegations to determine whether this states a claim for a violation of 8 C.F.R. § 274a.2(b)(2)(i).[11]

[11] Because the Court dismisses Count II, No. 2 for failure to meet OCAHO's pleading standard and failure to state a claim, the Court need not address Respondent's argument that because 8 C.F.R. § 274a.2(b)(2)(i) does not specifically assert that an error constitutes a violation of § 1324a(b), this is not a legal violation for which the Court may hold Respondent liable.

C. Deficient Audit Trail: Count II, Nos. 1 and 4

Finally, Respondent argues that Complainant's allegations in Count II, Nos. 1 and 4, relating to the sufficiency of audit trails, are not violations of the Electronic I-9 regulations. Mot. Dismiss. 22-23.

In Count II, No. 1, Complainant alleges:

> Form I-9 has a "Facsimile of Paper I-9" watermark that indicates "Paper Form Signed By" but no paper Form I-9 appears to have been completed. Rather, this formatting appears to reflect how the original Lookout Forms I-9 were transferred to and retained in the Guardian/ LawLogix system. Notably, while the associated Guardian/LawLogix audit trail shows the transfer information and associated Form I-9 contents, the original Lookout audit trail is deficient as it fails to show who was signed into the form at various stages of completion, including with respect to required signatures and attestations.[12]

In Count II, No. 4, Complainant alleges:

> Form I-9 lacks both a signature (with an accompanying attestation) in Sections 1 and 2, and a compliant audit trail due to the deficiency of the Lookout audit trail. The Lookout audit trail is deficient as it fails to show who was signed into the form at various stages of completion, including with respect to required signatures and attestations.

Respondent argues that these allegations do not constitute violations, as Complainant "does not allege there are errors or omissions on the face of the listed I-9s," but rather "the I-9's audit trails make it *appear as if* there is an error on the I-9." Mot. Dismiss 22 (emphasis in original).

[12] Respondent characterizes this allegation in the Motion to Dismiss as:

> This appears to be the original Lookout Form I-9 which was transferred to and retained in the Guardian/LawLogix system. Notably, while the associated Guardian/LawLogix audit trail shows the transfer information and associated Form I-9 contents, the original Lookout audit trail is deficient as it fails to show who was signed into the form at various stages of completion, including with respect to required signatures and attestations.

Mot. Dismiss 22. These versions are slightly different; the Court has used the exact allegation as it is alleged in the chart attached to the FAC.

Respondent argues that this is not a violation of the electronic Form I-9 regulations either, as Complainant does not allege that it did not make its audit trail available upon request, nor do the errors involve alteration, loss or erasure of electronic records. *Id.* at 23 (citing 8 C.F.R. § 274a.2(f)(2), and then citing 8 C.F.R. § 274a.2(g)(2)). Respondent further argues that Complainant has not alleged that the Forms I-9 were not signed. *Id.* (citing 8 C.F.R. §§ 274a.2(h)(2), (i)).

Complainant responds that Respondent "failed to produce a secure and permanent record (e.g. an audit trail) that establishes the date the original form was accessed, who accessed it, and what action was taken . . . corresponding to the completion of the original form, rather than its transfer to a second electronic Form I-9 system for retention." Resp. Mot. Dismiss 44 (citing 8 C.F.R. §§ 274a.2(e)(8)(i) and (g)(iv)). Because Respondent did not "establish the authenticity and integrity" of the original Forms I-9, and transferred them to a second electronic system for retention, Complainant argues that these Forms I-9 cannot be deemed "properly completed." *Id.* Specifically, Complainant argues that if a paper Form I-9 was completed, Respondent should have submitted the original paper form, a scanned version of the paper Form I-9, or an electronic Form I-9 with an audit trail. *Id.* at 45. Complainant attaches a representative Form I-9 and audit trail reflecting "Paper Form Signed by" on the Section 1 signature line, a "facsimile of Paper Form" stamp, and an audit trail reflecting completion over a year after the Section 1 completion date. *Id.* at 45-47.

For Count II, No. 4, Complainant alleges that the Forms I-9 lack signatures in Sections 1 and 2 and therefore asserts a violation of 8 U.S.C. §§ 1324a(b)(1) and (2). It also charges other violations, discussed below.

The allegation in Count II, No. 1 relates to 8 U.S.C. §§ 1324a(b)(1) and (2) but, as it refers to issues with the required attestations, this allegation does not assert a violation of these provisions standing alone, given that Complainant does not allege that these sections were not signed. Therefore, the Court must look to the electronic Form I-9 regulations.

For both allegations, Complainant alleges that the audit trail does not show who signed into the Form I-9 during completion, including during signatures and attestations. This alleges a violation of the electronic Form I-9 regulations, specifically 8 C.F.R. § 274a.2(f)(1)-(f)(2), which provides that an entity choosing to complete and/or retain Forms I-9 electronically must maintain and make available documentation of the business processes that, inter alia, establish the authenticity and integrity of the Forms I-9, such as audit trails, and "[i]nsufficient or incomplete documentation is a violation of [§ 1324a(a)(1)(B)]." Audit trails are defined in 8 C.F.R. § 274a.2(e)(8)(i) as "a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time."

Here, where the audit trail does not show who signed into the system, and the signatures are themselves insufficient to demonstrate who signed (either containing no signature, or a watermark that indicates "Paper Form Signed By" on an electronic Form I-9), this is insufficient to document the authenticity and integrity of the forms, and, if proven, is a violation of the electronic Form I-9 regulations and the statute.

D. Notice

Respondent argues that holding it liable for violations of the electronic I-9 regulations would violate principles of fair notice. Mot. Dismiss 25. Respondent argues that the regulations do not state with ascertainable certainty what is required of employers; specifically, the regulations do not specify that an audit trail must contain "login" or "sign-in" information, but rather, who has "accessed" a computer system. *Id.* at 27-29.[13] Even if the Court finds that the regulations constitute fair notice, Respondent argues that they can only constitute fair notice for Forms I-9 completed after the regulations were promulgated on June 15, 2006. *Id.* at 30-33. Finally, Respondent argues that the Court should decline to adopt Complainant's interpretation of its regulations and dismiss the allegations as "arbitrary and capricious" under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Id.* at 34-35.

As both parties note, the regulations define an audit trail as "a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time." 8 C.F.R. § 274a.2(e)(8)(i). Although the regulation uses the word "accessed," the Court does not find that it violates fair notice that Complainant would apply this regulation in situations where the audit trail does not show who "logged in" when the Sections 1 and/or 2 attestations were signed, as the "login" information serves to show who accessed the computer system.

The relevant electronic Form I-9 regulations were promulgated on June 15, 2006, in response to Public Law 108-390, 11 Stat. 2242, passed on October 30, 2004, but effective April 28, 2005. 71 Fed. Reg. 34,510. Prior to passage of the public law, DHS regulations did not permit the Form I-9 to be completed and stored electronically as an original record. *Id.* The rule was promulgated to offer additional flexibility to employers. *Id.* The rule provided that employers who were currently complying with the recordkeeping and retention requirements of existing regulations were not required to do anything differently, and businesses could, as of the date of the rule, adopt new systems. *Id*. at 34,511-12. The rule did recognize that there was a gap: "the effective date of the underlying statute authorizing electronic retention of Form I-9 was April 28, 2005. DHS will not require that forms created between that date and the effective date of the rule must comply with this rule." 71 Fed. Reg. 34,510, 34,512. To the extent that any electronic Forms I-9 were created during the period between April 28, 2005 and June 15, 2006, any allegations based on the regulations are dismissed, subject to the exception below. *See id.*; Mot. Dismiss 26 (citing, inter alia, *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998)). Prior to that date, however, there was no authority to create and store Form I-9s electronically. The only permitted forms of retention were paper, microfilm, or microfiche. 71 Fed. Reg. 34,510.

The rule was an interim rule, and was finalized on July 22, 2010, effective August 23, 2010. 75 Fed. Reg. 42,575. The final rule made minor changes, but included that employers may change

[13] Because the Court dismisses Count II, No. 2 for failure to meet OCAHO's pleading standard and failure to state a claim, the Court need not address Respondent's argument here relating to the retention standards.

electronic storage systems as long as the new systems meet the performance requirements of the regulations. *Id.*; 8 C.F.R. § 274a(2)(e)(4). To the extent the allegations arise from changes from one system to the next after July 22, 2010, the Respondent was on notice that the new systems had to be compliant.

As such, Respondent's motion to dismiss claims based on violations of the electronic Form I-9 regulations to forms created between April 28, 2005 and June 15, 2006, and that were not thereafter transferred into a new system after July 22, 2010, is granted.

As to whether the Court should dismiss the violations based on the electronic Form I-9 regulations as arbitrary and capricious, the Court declines to do so. While Respondent is correct that there are few OCAHO cases interpreting the electronic Form I-9 regulations, the regulations themselves provide clear notice of the requirements, and OCAHO ALJs are charged with adjudicating cases arising under 8 U.S.C. § 1324a. Respondent's reference to 5 U.S.C. § 706(2)(A) and *Emp. Sols. Staffing Grp. II, LLC v. OCAHO*, 833 F.3d 480 (5th Cir. 2016) are not persuasive, as both address review in a court of the United States of an administrative agency decision, not review by an OCAHO ALJ of a complaint filed by DHS.

VII. GOOD FAITH COMPLIANCE

Respondent argues that Complainant charged Respondent with "substantive" violations, but that the violations are actually "technical," and Complainant has not alleged that it provided Respondent with the required notice and opportunity to correct these violations or that Respondent acted in bad faith. Mot. Dismiss 37-38. Respondent argues that some of the errors, particularly those involving electronic I-9s and their audit trails, present issues of first impression as to whether they should be considered substantive or technical. *Id.* at 37. Respondent further argues that others, such as late-completed attestations, are designated as technical. *Id.*

Errors in satisfying the requirements of the employment verification system are known as "paperwork violations," which are categorized as either substantive or technical and procedural. *United States. v. Cawoods Produce, Inc.,* 12 OCAHO no. 1280, 8 (2016) (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum)). "IRCA provides that an entity will not be penalized for a 'technical or procedural' failure of the employment verification system, unless the government first explained the basis for the failure and provided the employer a period of not less than ten business days after the explanation within which to correct the violations, and the employer did not correct the failure voluntarily within such period." *Id.* (citing 8 U.S.C. § 1324a(b)(6); and then citing *United States v. DJ Drywall, Inc*., 10 OCAHO no. 1136, 3 (2010)).

"If the employer does not receive notice and the ten-day correction period for technical and procedural violations, the employer cannot be held liable for the violations and such violations are not properly included in the Notice of Intent to Fine." *Id.* (citing *DJ Drywall*, 10 OCAHO no.

1136 at 3-4). The notification and correction period does not apply to substantive violations. *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8 (2015).

The Virtue Memorandum provides guidance as to which violations can be characterized as technical and procedural from those that are substantive. "While this office is not bound by the *Virtue Memorandum*, ICE is so bound and failure to follow its own guidance is grounds for dismissal of claims that are not in alignment with those guidelines." *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 12 (2013) (citing *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 6-7 (2013)).

A. Errors Involving Electronic Forms I-9

Respondent cites to OCAHO caselaw which provides that procedural violations are for "minor, unintentional violations of the verification requirements; it does not provide a shield to avoid the basic requirements of the act." Mot. Dismiss 38 (citing *United States v. LDW Dairy Corp*., 10 OCAHO no. 1129, 5 (2009)). Substantive errors are those that undermine the most important components, which are the individual attestation under § 1324a(b)(2), the employer attestation under § 1324a(b)(1), and the retention of the Form under § 1324a(b)(3). *Id.* at 39. Respondent states that the error becomes technical when it can be verified elsewhere on the form. *Id.* at 41-42. Respondent argues that the technical errors tend to be unintentional, arguing that errors are substantive when they are attributable to an employer's own actions. *Id.* at 42.

Under these principles, the audit trail allegations are technical, argues Respondent. *Id.* at 44. Respondent characterizes the audit trail allegations as: 1) an error in the way an audit trail displays the sign-in information at the time of attestation; 2) a failure to retain the original paper Form I-9 in an electronic format; and 3) failure to provide an audit trail. *Id.* Respondent argues that Complainant does not allege that the actual electronic signature is missing from the face of the Form I-9, an allegation that would be considered substantive, but is alleging that the audit trail makes it appear as if there are errors on the face of the form. *Id.* Such an error relates to the attestation section, but does not actually affect whether the verification was completed. *Id.* Further, substantive errors tend to involve intentional wrongdoing, whereas in this case Complainant's allegations suggest an unintentional mechanical failure within the electronic I-9 software. *Id.* at 45. Further, the audit trail errors should be treated like the preparer/translator section, in which audit trail issues are technical – the audit trail is an auxiliary part of the I-9, a secondary document with information about how the form was completed, and not mentioned in statutory requirements. *Id.*

Lastly, the errors must be treated as technical under principles of fair notice because the agency has not issued guidance about what electronic errors should be considered technical and substantive. *Id.* at 46.

Complainant responds that the violations are substantive because the audit trails are part of the face of the Form I-9 in that they provide an account of every action taken on the I-9, including showing who prepared or completed the Form I-9, as well as what information was completed when. Resp. Mot. Dismiss 64-65. Complainant argues that these errors cannot be characterized

as unintentional as some forms were correctly completed; thus, for those that were not, Respondent cannot say this was unintentional. *Id.* at 65. Further, the claim that audit trails are an auxiliary part of the Form I-9 and have no effect on whether the basic verifications were completed is incorrect because 8 C.F.R. § 274a.2(e)(8)(i)-(ii) specifically references audit trails as the associated records of electronic I-9s required to be produced to "maintain the authenticity, integrity, and reliability of the records." *Id.* at 66. Complainant argues that the audit trails are key components required to be produced along with the Forms during inspection. *Id.*

The Court finds that the violations alleged in the Complaint are substantive. As discussed above in Section V and VI *supra*, these violations go to the heart of the verification requirements. In other words, a deficient audit trail that does not show who completed the Section 1 or 2 attestations (coupled with a non-compliant or missing electronic signature), or an audit trail from which it appears the employer attested and signed Section 1 as the employee, such that the required attestations are unverifiable, or the failure to provide an audit trail at all, undermine the "basic requirements of the act," *LDW Dairy Corp.*, 10 OCAHO no. 1129, at 5, under § 1324a(b)(1)-(3). As noted above, the Court considers the audit trails to be part of the Form I-9, a visible record of what happened during the creation and signing of the forms. Recognizing again that Respondent believes more factual development is necessary on this point, for purposes of this motion, the Court considers that the audit trails are part and parcel of the Form I-9, an admittedly clumsy manifestation of the real time attestation process. The audit trail is too integral to the actions that created the form, as well as the integrity of the signatures, to be considered similar to the preparer's section. Ultimately, these violations are akin to substantive violations discussed in the Virtue Memorandum, such as failure to ensure that an individual signs the Section 1 attestation, failure to sign Section 2, or a failure to prepare or present. These relate directly to classic violations of the statute that have been considered to be substantive violations in a long line of OCAHO cases and in the Virtue Memorandum.

B. Untimely Forms I-9

Respondent argues that as to the allegations regarding attestations in certain I-9s that were completed after the employee's date of hire for Section 1, or after three business days had passed for Section 2, the Virtue Memorandum explicitly indicates that such errors are technical. Mot. Dismiss 46-49. *See* Virtue Memorandum App. A-F. Respondent concedes that OCAHO has been inconsistent on this point, but offers that "intentional wrongdoing indicates a substantive error – if an employee intentionally waits until after the Notice of Inspection" and then backdates the forms, the good faith compliance provision would not apply. *Id.* at 50. Such intentional conduct is not present in this case. *Id.*

Complainant cites to the regulations and to *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 10 (2010), which states that failure to attest to Section 1 on the date of hire "is not curable and is not a technical or procedural violation." Resp. Mot. Dismiss 63. Complainant argues that it is alleging failure to prepare a Form I-9 in a manner that properly captures an employee's signature and attestation in Section 1, which is a serious substantive violation. *Id.* (citing *U.S. v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 12 (2015)).

The Virtue Memorandum, in relevant part, provides that among the substantive violations are failure to "ensure that the individual dates section 1 for the Form I-9 at the time of hire if the hire occurred before September 30, 1996" and failure to "date section 2 of the Form I-9 within three business days of the date the individual is hired . . . if the date that section 2 was to be completed occurred before September 30, 1996." Virtue Memorandum §§ A.3.a.(B)(6) and (C)(4). It lists the same allegations as technical when the time of hire is after September 30, 1996. *Id.* §§ A.3.b.(A)(5) and (B)(5). In the Appendices, the violation is listed as "employee attestation not completed at time of hire" and "employer attestation not completed within 3 business days of hire" with the distinction between substantive and technical being the September 30, 1996 hire date. *Id.* App. A-C.

The weight of the OCAHO cases since have found that failure to timely prepare the Form I-9 is a substantive violation.[14] *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 7-8 (2014) ("While the omission of a particular date on a form that is actually timely prepared is a technical or procedural violation, that fact may not be construed to allow an employer to avoid timely preparing I-9s or to wait for an NOI before preparing them."). In *Dr. Robert Schaus, D.D.S.*, the Respondent raised the good faith provision as articulated in Virtue Memorandum, but the ALJ drew the distinction between the omission of a date on a timely prepared form I-9, and the failure to promptly prepare the Form I-9. *Id.* at 7. Other cases do not make this distinction, however, and also do not note the date distinction in the Virtue Memorandum: "OCAHO case law has long held that failure to timely prepare an I-9 is a substantive violation." *Id.* at 7 (citing *United States v. Platinum Builders of Cent. Fl., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing to Virtue Memorandum without noting the date distinction); and then citing *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 4 (2010) (citing to Virtue Memorandum in addressing argument that failure to properly complete section 2 of Form I-9 within three business days of hire is a procedural violation where dates of hire were 2007)); *see also United States v. Holtsville 811 Inc. D/B/A 7-Eleven (Store #39167)*, 11 OCAHO no. 1258, 6-9 (2015); *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). "The longer the delay in preparing an I-9 form, the more serious is the violation." *Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013); *United States v. El Camino, LLC*, 18 OCAHO no. 1479, 6-7 (2023); *United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 11 (2016) ("Failure to timely prepare a Form I-9 is a substantive violation.") (citation omitted); *United States v. Immacuclean Servs, LLC*, 13 OCAHO no. 1327, 3 (2017).

In *United States v. Occupational Res. Mgmt. Inc.*, 10 OCAHO no. 1166, 14-15 (2013) the ALJ addressed this issue at some length. In that case, the Respondents pointed out the Virtue Memorandum, to which the ALJ responded,

> The 1996 reforms did not repeal any provision of the statute or regulations, nor did they alter an employer's obligation to ensure preparation of I-9 forms in the time and manner required by the statute and regulations . . . The company seeks to blur the distinction between the inadvertent omission of a date or a delay in entering a date on an existing form that was actually prepared at the appropriate

[14] *But see United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 8-11 (2001).

> time, and a failure to prepare the form at all when required. A total failure to prepare an I-9 at all at the time of hire is still a substantive violation . . . According to [the respondent's] view, no penalty could attach to a subsequently prepared and deliberately perjured I-9 form, so that an employer would be free to wait until service of a Notice of Inspection, then prepare and backdate I-9s for all its employees many years after the forms should have been prepared . . . Waiting for months or years after these employees' hire dates to prepare their I-9s and then backdating them is not a technical or procedural violation nor does it reflect a good faith attempt to comply with the requirements.

Id. at 14-15. However, in *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 12-15 (2001), the ALJ considered timeliness failures and indicated that the government would have to provide notice and an opportunity to correct the violations. In that case the ALJ found that the violations occurred before the September 30, 1996, and were therefore substantive.

The distinction between a timeliness violation where the form was timely completed but the date was missing, and instances where the form was not timely completed, can be supported by the Virtue Memorandum itself, which provides that it is a technical violation to fail to "*date* section 1 of the Form I-9 within three business days." The Appendices A and B, however, provide that it is a substantive violation if the employee attestation is not *completed at the time of hire* if the employee was hired before September 30, 1996 and technical if hired after that date. The ALJ in *Occupational Res. Mgmt. Inc.* described the Virtue Memorandum as a good faith gatekeeping mechanism: if the company does not show good faith, there cannot be a safe harbor, which is the interpretation urged by Respondent in this case. In that case, the company backdated the forms.

While either of these distinctions may explain some of the ALJ decisions, ultimately ALJs are reluctant to consider timeliness violations procedural or technical in nature, because to do so would allow a company to avoid completing the form until years after hiring, indeed until such time as DHS serves a notice of inspection, defeating the purpose of the statute. Given the weight and consistency of recent caselaw interpreting this provision, this ALJ also finds that true timeliness violations, where the forms were not completed within the requisite time periods, are substantive violations. The reasons cited in the *Occupational Res. Mgmt. Inc.* case are compelling. Waiting months or years to complete the form is not a good faith attempt to comply with the statute, and as noted above, defeats the purpose of the statute. This ALJ does not believe evidence of bad faith is required, such as backdating the forms. It is enough if the forms are not completed in a timely manner (as opposed to forms that were timely completed but the date was omitted).

Further, OCAHO caselaw considers a timeliness violation to be frozen in time: "[A] paperwork violation that alleges a timeliness failure is 'frozen in time' at the point when the employer 'fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required.'" *United States v. T-Ray Constr. Co.,* 13 OCAHO no. 1346, 7 (2020) (quoting *WSC Plumbing*, 9 OCAHO no. 1061 at 11-12). Unlike other verification failures, timeliness violations cannot be cured. *WSC Plumbing*, 9 OCAHO no. 1061 at 16. No purpose would be served by providing a

notice of inspection and allowing the company to correct the violation. Adding a missing date to an otherwise timely completed form, on the other hand, can be corrected.

Lastly, OCAHO is not bound by the Virtue Memo, though this does not resolve whether OCAHO must enforce the memorandum as to DHS. *United States v. Super 8 Motel & Villella Italian Rest.,* 10 OCAHO no. 1191, 12 (2013). However, an agency "is not precluded from announcing new principles in an adjudicative proceeding" subject to the limitations of the APA. *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 294 (1974); *Saavedra v. Donovan,* 700 F.2d 496, 499 (9th Cir. 1983).[15] OCAHO ALJs carry the authority to resolve cases brought under § 1324a, and may take any action authorized by the Administrative Procedure Act. 28 C.F.R. § 68.28(a)(6). Accordingly, this ALJ finds that timeliness violations are substantive.

VIII. STATUTE OF LIMITATIONS

Lastly, Respondent argues that any errors in audit trails are not correctable, and thus the statute of limitations would begin to run on the date of the violation, comparing audit trail errors to timeliness violations. Mot. Dismiss 51 (citing *United States v. S. Croix Personnel Services, Inc.*, 12 OCAHO no. 1289, 10-11 (2016)).

Complainant argues that the substantive allegations do not allege timeliness failures. They allege verification/attestation failures and are therefore continuing violations. Resp. Mot. Dismiss 67.

OCAHO case law has long held that the five-year statute of limitations codified at 28 U.S.C. § 2462 is applicable to proceedings under § 1324a. *United States v. Visiontron* Corp., 13 OCAHO no. 1348, 5 (2020) (citing *United States v. St. Croix Personnel Servs., Inc.*, 12 OCAHO no. 1289, 10-11 (2016)); *see also Curran Eng'g Co.*, 7 OCAHO no. 975, at 882 (1997). A complaint is timely if filed within five years of the date on which a violation first accrued. *Id.* (citations omitted).

[15] Two exceptions limit this discretion: "First, agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy . . . The second limiting doctrine is that agencies may not use adjudication to circumvent the Administrative Procedure Act's rulemaking procedures." *Alaska Indus. Dev. & Exp. Auth. v. Biden*, No. 3:21-CV-00245-SLG, 2023 WL 5021555, at *17 (D. Alaska Aug. 7, 2023) (quoting *Anaheim v. F.E.R.C.*, 723 F.2d 656, 659 (9th Cir. 1984)). In this case, this is not a sudden change in direction as OCAHO ALJs have treated timeliness violations as substantive for more than two decades. Further, as noted above, because the timeliness violation cannot be cured, there is no change to how it would impact a business. Lastly, the adjudication does not circumvent the APA's rulemaking procedures as there was no formal rulemaking in this case, *see Ketchikan Drywall Services, Inc. v. Immigration and Customs Enforcement*, 725 F.3d 1103, 1113 (2013) (Virtue Memo was promulgated informally and therefore was not "undertaken pursuant to a 'relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement' that carries the force of law.").

"The accrual date of a violation depends on the specific violation. Generally, substantive paperwork violations are 'continuous' violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements." *Id.* (citing, inter alia, § 274a.2(b)(2)(i)(A)). These violations, which include failure to prepare or present an I-9, the employer's failure to sign section 2, and the employee's failure to sign section 1, continue until cured. *Id.* at 6; *Curran Eng'g*, 7 OCAHO no. 975 at 895 (citing *United States v. Rupson of Hyde Park, Inc.*, 7 OCAHO no. 940, 331, 332 (1997); and then citing *United States v. Big Bear Market*, 1 OCAHO no. 285 (1989)).

The exception is a paperwork violation that alleges a timeliness failure, as these violations are "frozen in time" at the point when the employer "fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required." *Id.* at 5; *WSC Plumbing*, 9 OCAHO no. 1061 at 11-12 (quoting *Curran Eng'g*, 7 OCAHO no. 975 at 897). Timeliness verification failures cannot be cured. *WSC Plumbing*, 9 OCAHO no. 1061 at 15 ("Once the requisite deadlines for completion of the I-9 form have passed, the timeliness violation is 'perfected,' and the employer is powerless to 'cure' it."); *see also Durable, Inc.*, 11 OCAHO no. 1229, at 12-13; *New China Buffet Rest.*, 10 OCAHO no. 1133, at 5.

As noted above, the audit trail allegations in Count I and II, taking the Complainant's allegations in the light most favorable to it, assert verification/attestation failures. Seen in this light, although the audit trails document the actions taken at a certain time, the alleged failure to verify or attest on the part of the employee/er can be cured as with any form, and the audit trails should reflect that action. As these are substantive paperwork violations, the statute of limitations does not begin to run until the violation has been cured.

IX. CONCLUSION

It is ORDERED that Respondent's Motion to Dismiss the allegations in Count II, No. 2, as described in the attached "Electronic Form I-9 and Audit Trail Allegations List," for failure to meet OCAHO's pleading standard and failure to state a claim is GRANTED; and it is further

ORDERED that Respondent's Motion to Dismiss claims based on violations of the electronic Form I-9 regulations as to Forms I-9 created between April 28, 2005 and June 15, 2006, and that were not thereafter transferred into a new system after July 22, 2010, is GRANTED; and it is further

ORDERED that the parties meet and confer, and provide the Court with a list of all claims subject to dismissal on these grounds by March 22, 2024.

SO ORDERED.

Dated and entered on February 23, 2024

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Honorable Jean C. King
Chief Administrative Law Judge