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

March 22, 2024

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

ORDER DECLINING TO MODIFY OR VACATE THE CHIEF ADMINISTRATIVE LAW JUDGE'S ORDER ON MOTION TO DISMISS FIRST AMENDED COMPLAINT

I. INTRODUCTION AND PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. On December 13, 2022, the United States Department of Homeland Security, Immigration and Customs Enforcement ("DHS" or "Complainant"), filed a complaint with the Office of the Chief Administrative Hearing Officer ("OCAHO") against Walmart Inc. (Bethlehem) ("Respondent").[1] The complaint charged the Respondent with two counts of violating 8 U.S.C. § 1324a(a)(1)(B). Count I of the complaint alleged that the Respondent hired 1,677 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" employment eligibility verification forms ("Forms I-9") for those individuals. Compl. at 4-47. Count II of the complaint alleged that the Respondent hired an additional 280 individuals for employment "but failed to properly complete the Forms I-9" for those individuals. Compl. at 47-55. The complaint sought a total civil money penalty of $4,587,936.45 for those alleged violations. Compl. at 56. The case was assigned to Chief Administrative Law Judge ("Chief ALJ") Jean C. King.

On February 17, 2023, Respondent filed an answer to the complaint as well as a motion to dismiss. In its answer, Respondent generally denied that it had violated 8 U.S.C. § 1324a and asserted six specific affirmative defenses. Answer at 2-8. In its motion to dismiss, Respondent argued that the complaint should be dismissed because it did not meet OCAHO's pleading standard, *see* Mot. to Dismiss at 4-18, and because OCAHO ALJs were unconstitutionally insulated from presidential oversight in violation of the Take Care Clause of the United States

[1] On the same day, Complainant filed nineteen additional complaints against different Walmart Inc. locations throughout the United States. *See United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475, 1 n.1 (2023).

Constitution, *see id.* at 18-21. Respondent therefore asserted that the complaint should be dismissed for failure to state a claim upon which relief can be granted. *Id.* at 21.

Complainant subsequently filed both a response to the Respondent's motion to dismiss and a motion for leave to amend the complaint, seeking to add to the complaint a list containing additional details about the alleged violations. On March 29, 2023, the Chief ALJ granted Complainant's motion to amend and ordered the Complainant to file its amended complaint within twenty-one days. *United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475a, 2 (2023). The Chief ALJ also ordered the Respondent to file an amended answer to the amended complaint within thirty days of service of the amended complaint. *Id.*

On April 11, 2023, Complainant filed its First Amended Complaint Regarding Unlawful Employment Practices ("FAC"). The FAC repeated the core allegations from the original complaint but made two notable changes. First, as promised in its motion to amend the complaint, the FAC included "Tab A," a lengthy table containing a description of the alleged deficiencies on the Form I-9 for each of the listed employees in both counts of the complaint. *See* First Am. Compl. at Tab A. Second, the FAC included a footnote accompanying both counts of the complaint indicating that "Complainant incorporates by reference into the descriptor 'Forms I-9' and the associated audit trails." *See id.* at 4 n.1, 48 n.2.

On June 9, 2023, Respondent filed an answer to the FAC and a Motion to Dismiss Complainant's First Amended Complaint ("Motion to Dismiss the FAC"). Respondent's answer to the FAC included a table in which it specifically admitted or denied each of the alleged Form I-9 violations and identified which of its now seven affirmative defenses were potentially relevant to each alleged violation. *See* Answer to First Am. Compl. at 3-154. Respondent's Motion to Dismiss the FAC advanced five principal arguments. First, Respondent again asserted that the FAC must be dismissed because OCAHO ALJs "are unconstitutionally insulated from Presidential removal in violation of Article II of the Constitution." Mot. to Dismiss First Am. Compl. at 7. Second, Respondent argued that "Complainant's allegations regarding electronic I-9s and their audit trails must be dismissed because they fail to meet OCAHO's Pleading Standard." *Id.* at 16. Third, Respondent asserted that for the allegations involving audit trails and electronic I-9s, the facts alleged by the Complainant could not constitute a violation under either the statute or regulations. *Id.* at 20. Fourth, Respondent argued that many of the alleged errors should be considered "technical" errors rather than substantive ones, and, thus, a penalty could not be imposed because the Respondent was not given notice and an opportunity to correct those errors. *See id.* at 35-38. Finally, Respondent asserted that "[t]he statute of limitations has run for any alleged audit trail deficiencies, and thus such allegations must be dismissed." *Id.* at 51. The Complainant filed a response to the Motion to Dismiss the FAC, generally countering each of Respondent's arguments. Respondent then filed a reply in support of its motion, to which Complainant filed a sur-reply.[2]

Following this extensive briefing, on February 23, 2024, the Chief ALJ issued an Order on Motion to Dismiss First Amended Complaint ("Order on Motion to Dismiss"). The Order on

[2] In the midst of this briefing, the Respondent also filed a motion to strike the Complainant's response to the Motion to Dismiss the FAC. The Chief ALJ denied this motion, *see United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475d (2023), finding that the "Respondent's arguments regarding the content of Complainant's opposition to its motion to dismiss are more appropriately raised in a reply," *id.* at 7.

Motion to Dismiss addressed each of the principal arguments made in the Respondent's Motion to Dismiss the FAC. First, as to Respondent's constitutional argument, the Chief ALJ found that "even if [the Court] were able to address the underlying constitutional issue," the Court "is not obligated to do so under the circumstances." Order on Motion to Dismiss at 6. Accordingly, the Chief ALJ declined to rule on whether OCAHO lacks the authority to adjudicate the claims in this case. *Id.* at 7.[3]

On the parties' arguments related to the pleading standard, the Chief ALJ found as follows:

> While Complainant does not provide a specific statutory or regulatory cite for the allegations in the [chart attached to the FAC], for the majority of the allegations, the factual allegations provide sufficient notice of Complainant's theory of the violation at issue. 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.

Id. at 11 (citation omitted). However, with respect to a certain category of allegations in the complaint, the Chief ALJ found that the FAC "does not contain sufficient allegations to state a claim upon which relief can be granted." *Id.* at 13. Accordingly, the Chief ALJ granted Respondent's motion to dismiss certain allegations in Count II of the FAC, but denied the motion as to the remaining allegations. *Id.*

Similarly, the Chief ALJ found that most of the alleged violations in the complaint contained sufficient allegations that, if proven, would constitute a violation of the relevant statute and regulations, *see id.* at 14, 17, though the Chief ALJ granted Respondent's motion to dismiss with respect to two specific categories of allegations, *see id.* at 15, 19. Regarding Respondent's argument that many of the alleged errors should be considered "technical" violations for which Respondent should have been provided notice and an opportunity to correct, *see* 8 U.S.C. § 1324a(b)(6), the Chief ALJ found that the violations alleged in the FAC were substantive rather than technical, *see* Order on Motion to Dismiss at 21, 24. Relatedly, the ALJ concluded that because the alleged violations were substantive, "the statute of limitations does not begin to run until the violation has been cured." *Id.* at 25. Ultimately, the Chief ALJ granted the Respondent's Motion to Dismiss two categories of allegations in the FAC, *see id.* at 25, and ordered the parties to "meet and confer and provide the Court with a list of all claims subject to dismissal" on those grounds by March 22, 2024, *id.* at 26. The Chief ALJ denied the motion to dismiss with respect to the other allegations. *See id.* at 13, 14.

On March 4, 2024, Respondent filed Respondent's Motion for Interlocutory Review of the Administrative Law Judge's Order on Respondent's Motion to Dismiss ("Respondent's Motion for Interlocutory Review"), pursuant to 28 C.F.R. § 68.53. On March 5, 2024, the Chief Administrative Hearing Officer ("CAHO") issued an order granting Respondent's Motion for Interlocutory Review, setting a briefing schedule, and staying the underlying proceedings ("Order"). In accordance with that briefing schedule, on March 18, 2024, both parties timely filed briefs related to the interlocutory review. Having reviewed the record, the Order on Motion to

[3] In effect, the Chief ALJ's declination constituted a constructive denial of Respondent's Motion to Dismiss the FAC on this argument. *See infra* Part IV.

Dismiss, the parties' briefs, and the relevant law, the undersigned declines to modify or vacate the Chief ALJ's Order on Motion to Dismiss for the reasons stated below. Accordingly, the Chief ALJ's order will be deemed adopted.

II. INTERLOCUTORY REVIEW AUTHORITY AND STANDARD OF REVIEW

The CAHO has discretionary authority to review interlocutory orders issued by OCAHO ALJs in cases arising under 8 U.S.C. § 1324a. *See* 28 C.F.R. § 68.53(a). However, the CAHO may only review an ALJ's interlocutory order where either the ALJ or the CAHO finds that "the order concerns an important question of law on which there is a substantial difference of opinion[,]" and "an immediate appeal will advance the ultimate termination of the proceeding or . . . subsequent review will be an inadequate remedy." *Id.* A party may request CAHO review of an interlocutory order by filing a motion containing "a clear statement of why interlocutory review is appropriate under the standards set out in [28 C.F.R. § 68.53(a)(1)]." 28 C.F.R. § 68.53(a)(2). In the instant case, Respondent filed a timely motion for interlocutory review, and I found that it had made the requisite showing for interlocutory review under 28 C.F.R. § 68.53(a)(1) and (2).

If interlocutory review is timely initiated, the CAHO's review is conducted in the same manner as review of final orders as provided for in 28 C.F.R. § 68.54(b)-(d). *See* 28 C.F.R. § 68.53(c). As such, the parties may file briefs or other written statements related to the administrative review, *see* 28 C.F.R. § 68.54(b)(1), and the CAHO may, within 30 days of the date of the ALJ's order, enter an order that modifies, vacates, or remands the ALJ's order, *see* 28 C.F.R. § 68.54(d)(1). "If the [CAHO] does not modify, vacate, or remand an interlocutory order . . . within thirty (30) days of the date that the order is entered, the [ALJ's] interlocutory order is deemed adopted." 28 C.F.R. § 68.53(c). As with any administrative review, in conducting an interlocutory review, "the CAHO exercises independent judgment and discretion free from ideological or institutional pressure." *United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 3 (2023).

Because interlocutory review is necessarily limited to questions of law, *see* 28 C.F.R. § 68.53(a), the undersigned applies a *de novo* standard of review. To that point, the undersigned is cognizant that Respondent is seeking interlocutory review of the denial of a motion to dismiss for failure to state a claim and that OCAHO has long held that "[m]otions to dismiss for failure to state a claim are generally disfavored, and will only be granted in extraordinary circumstances." *United States v. Split Rail Fence Co.,* 10 OCAHO no. 1181, 6 (2013). Accordingly, Respondent bears a significant burden in establishing its entitlement to relief on interlocutory review in the instant case.

III. ARGUMENTS OF THE PARTIES

Both parties timely filed briefs related to this interlocutory review. Respondent filed a brief titled Respondent's Brief in Support of Interlocutory Review by the Chief Administrative Hearing Officer of the Chief Administrative Law Judge's Order on Respondent's Motion to Dismiss ("Respondent's Br. in Support of Interlocutory Review" or "Respondent's Brief"). Complainant filed a brief titled Complainant's Brief in Support of Its Dismissal Request of the Respondent's Interlocutory Appeal ("Complainant's Br. on Interlocutory Review" or "Complainant's Brief").

A. Respondent's Brief

Respondent's Brief makes two principal arguments. First, Respondent argues that "[t]he Chief ALJ erred by not applying the plain meaning of" OCAHO's pleading regulation at 28 C.F.R. § 68.7(b). Respondent's Br. in Support of Interlocutory Review at 7. Respondent asserts that "Complainant's obligation to plead the 'alleged violations of the law' naturally involves providing a clear statement of the alleged legal violations, beyond just a general citation to the provisions of § 1324a." *Id.* at 8. Specifically, Respondent argues that the "plain meaning" of 28 C.F.R. § 68.7(b) "requires Complainant to provide information regarding what legal provisions of the I-9 Statute or Regulations Complainant alleges Respondent violated," and that "[t]he Chief ALJ accepted much less when [she] permitted Complainant to plead vague and confusing factual allegations combined with only a general body of I-9 law applicable to paperwork errors." *Id.* at 10-11. In sum, Respondent asserts that "Complainant cannot allege Respondent committed *some* violation of the I-9 Statute and rely on OCAHO to choose the provision and regulation that best fits." *Id.* at 13.

Second, Respondent argues that the Chief ALJ erred by considering information outside the four corners of the complaint in evaluating the Respondent's motion to dismiss. *See id.* at 13-19. Respondent asserts that the Chief ALJ made two general errors in this respect: "First, the Chief ALJ supplied legal theories that Complainant itself never proffered. Second, the Chief ALJ relied on material from outside the four corners of the Complaint that Complainant offered only in response to Respondent's Motion to Dismiss the FAC." *Id.* at 16. With regard to the legal theories, Respondent takes issue with the Chief ALJ's reliance on the electronic Form I-9 regulations, which Respondent asserts "were never mentioned or cited in the FAC." *Id.* at 16. Furthermore, Respondent alleges that the ALJ erred by considering screenshots of the contested Forms I-9 and their audit trails, arguing that these were not properly incorporated by reference into the complaint. *See id.* at 18. On these grounds, the Respondent requests that the CAHO modify the Chief ALJ's order and "apply the appropriate pleading standard." *Id.* at 20.

Apart from its arguments regarding why it believes the Chief ALJ erred, Respondent "acknowledges that it has admitted some of the allegations in the FAC" and, thus, "does not seek to dismiss those counts." *Id*. at 1, n.1. Consequently, it requests that the undersigned "dismiss the FAC except for those allegations admitted by Respondent." *Id*. at 3. In the alternative, Respondent obliquely requests that the undersigned "*sua sponte* order Complainant to file a more definite statement of the allegations." *Id.* at 7.

B. Complainant's Brief

In opposition to Respondent's Motion for Interlocutory Review, the Complainant argues that its FAC "satisfies the requirements set forth in 28 C.F.R. 68.7(b) by alleging violations of law with a clear and concise statement of facts for each alleged violation." Complainant's Br. on Interlocutory Review at 1. Furthermore, Complainant argues that "the ALJ properly limited her findings to the four corners of the FAC while following OCAHO case law." *Id.* at 2.

Regarding the pleading standard, Complainant points out that "the FAC, on its face, provided the relevant statutory provisions, 8 U.S.C. § 1324a(a)(1)(B) and § 1324a(b), required under OCAHO caselaw." *Id.* at 3. In effect, the Complainant argues that a more specific statutory or regulatory citation is unnecessary, because "the failure to prepare or properly complete a Form I-9 . . . is just as applicable to electronically generated, modified, and/or stored Forms I-9 as it is

to paper-based forms, irrespective of whether a regulatory provision specific to a feature of electronic Form I-9 generation, modification, or storage is cited." *Id.* at 5. Put another way, "an electronic Form I-9 generation, modification, and/or retention system serves as a vehicle for completing Forms I-9. Choosing to use such a system does not obviate the overarching requirements for properly completing Forms I-9." *Id.* at 6.

As it relates to consideration of matters outside of the pleadings, Complainant argues that the ALJ "did not rely on the screenshots of the audit trails but relied on the allegations in the FAC." *Id.* at 11. Finally, Complainant argues that the ALJ's order did not contradict OCAHO precedent on either of the two main questions at issue in this administrative review. *See id.* at 12-14. Accordingly, the Complainant urges that the CAHO "should decline to modify or vacate the Chief ALJ's order." *Id.* at 15.

IV. CONSTITUTIONALITY OF OCAHO PROCEEDINGS

Before turning to the merits of Respondent's request for interlocutory review, the undersigned notes that this case also raises an important issue at the intersection of constitutional and administrative law that has been percolating within both federal administrative agencies and federal courts over the past several years, namely the constitutionality—and potential remedy—of the dual-layer, for-cause civil service removal protections which are attached to most federal administrative adjudicators, including the adjudicators in OCAHO. Simplified somewhat, the argument goes that because many—if not most or all—non-temporary federal administrative adjudicators are inferior officers[4] under the Constitution, because non-term and non-probationary administrative adjudicators are protected by civil service laws enforced by the Merit Systems Protection Board ("MSPB")[5] which allow for removal of those adjudicators only for cause, *see* 5

[4] For purposes of the Constitution, officers are individuals who both occupy a continuing and permanent position established by law and "exercise significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (cleaned up). The Constitution further distinguishes between inferior and principal officers. U.S. CONST. art. II, § 2, cl. 2. Inferior officers are those directed by a principal officer, *i.e.*, "'directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). All federal ALJs, including OCAHO ALJs, occupy permanent positions established by law, 5 U.S.C. § 3105, and all federal ALJs exercise similar, significant authority pursuant to law, 5 U.S.C. § 556(c); accordingly, all federal ALJs appear to be inferior officers. *See Guidance on Administrative Law Judges After* Lucia v. SEC *(S.Ct.), July 2018,* 132 Harv. L. Rev. 1120 (2019) (discussing guidance from the Department of Justice's Office of the Solicitor General that after the decision in *Lucia*, "all ALJs" should be appointed as inferior officers); *see also A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381h, 2 n.4 (2021). However, there are also over 10,000 non-ALJ adjudicators working for the federal government, many—if not most—of whom occupy permanent positions and exercise significant authority. *See* Admin. Conf. of the U.S., *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 18-21 (Sept. 24, 2018), https://www.acus.gov/sites/default/files/documents/Administrative%20Judges%20Final%20Report%20Corrected%20-%20%289.24.18%29.pdf. Thus, many federal non-ALJ adjudicators may also be inferior officers. *See*, *e.g.*, *Arthrex*, 594 U.S. at 13 (noting that Administrative Patent Judges on the Patent Trial and Appeal Board within the Department of Commerce are inferior officers); *Duenas v. Garland*, 78 F.4th 1069, 1073 (9th Cir. 2023) (determining that immigration judges and appellate immigration judges within the Department of Justice are inferior officers). Indeed, many federal non-adjudicators may also be inferior officers based on the nature of their positions. *See, e.g.*, Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 546-558 (2018) (suggesting that numerous federal non-adjudicatory officials qualify as "officers" under the Constitution, ranging from certain employees of the Federal Emergency Management Agency to certain employees of the Internal Revenue Service).

[5] The MSPB generally lacks jurisdiction to review a removal action which consists, in substance, of the termination of an employee with a term appointment whose term expires based on an "expiration date specified as a basic condition

U.S.C. §§ 7511, 7513(a), 7521, 7541, 7543(a),[6] and because the MSPB members themselves are also removable only for cause, *see* 5 U.S.C. § 1202(d), this dual layer of for-cause protection inappropriately insulates the adjudicators from removal by the President, compromising his ability to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and violating Article II of the Constitution. *See generally Jarkesy v. SEC*, 34 F.4th 446, 463-65 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023); *cf. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495-98 (2010) (holding that two layers of removal protections for constitutional officers violates the Constitution because such a structure "subverts the President's ability to ensure that the laws are faithfully executed").

Respondent pressed this argument before the Chief ALJ, *see* Mot. to Dismiss First Am. Compl. at 7-16, but the Chief ALJ, despite a fulsome discussion of the issue, declined to rule on it explicitly, Order on Motion to Dismiss at 3-7. Although the Chief ALJ's inaction on that argument—combined with the partial denial of Respondent's Motion to Dismiss the FAC based on its other arguments—constituted a constructive denial of the Motion to Dismiss the FAC based on that argument, Respondent did not challenge that denial in its request for interlocutory review, though it may, of course, revisit that issue in any subsequent administrative review of a final order, *see* 28 C.F.R. § 68.53(d)(2). Nevertheless, the issue warrants a brief discussion to ensure clarity for both OCAHO adjudicators and the parties before them.

Whether an administrative agency can—or should—address arguments sounding in constitutional law in the first instance is a question upon which the Supreme Court has sent mixed messages that defy easy reconciliation. *Compare*, *e.g.*, *Carr v. Saul*, 593 U.S. 83, 92 (2021) ("[T]his 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."), *and Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . ."), *with Elgin v. Dep't of Treasury*, 567 U.S. 1, 23 (2012) (acknowledging that there may be "constitutional claims that [an agency] routinely considers, in addition to a constitutional challenge to a federal statute"), *and Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (observing that the rule that agency consideration of constitutional questions is generally beyond the agency's jurisdiction is not "mandatory").

The federal courts of appeals, too, have sent mixed messages regarding agency consideration of constitutional arguments. *Compare*, *e.g.*, *Graceba Total Commc'ns, Inc. v. FCC*,

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of employment at the time the appointment was made." 5 C.F.R. § 752.401(b)(11). Except in narrow circumstances, it also generally lacks jurisdiction to review removal actions of employees serving a probationary or trial period *See*, *e.g.*, 5 C.F.R. § 752.401(c)(1), (2), and (d)(10). It also lacks jurisdiction over removal actions against other discrete categories of employees, such as employees at certain federal intelligence agencies. *See generally* 5 C.F.R. § 752.401(d). Thus, this argument may not apply in the same way—or at all—to federal administrative adjudicators who are not subject to MSPB protections.

[6] The for-cause standard for removal for most non-ALJ federal administrative adjudicators subject to MSPB protections is found in 5 U.S.C. § 7513(a). The for-cause standard for removal for federal ALJs is found in 5 U.S.C. § 7521. The for-cause standard for removal for federal administrative adjudicators who are also members of the Senior Executive Service (SES) is found in 5 U.S.C. § 7543(a). Although the particular formulations differ, it is undisputed that almost all federal administrative adjudicators, including both ALJs and non-ALJs and both SES and non-SES adjudicators, are subject to a for-cause standard for removal.

115 F.3d 1038, 1042 (D.C. Cir. 1997) (finding that administrative agencies have "an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress"), *and Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) (noting both that "we are aware of no precedent that permits a federal agency to ignore a constitutional challenge to the application of its own policy merely because the resolution would be politically awkward" and that the failure of an agency to consider a constitutional argument raised by a respondent in an enforcement action "seems to us the very paradigm of arbitrary and capricious administrative action"), *with Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 544 (D.C. Cir. 1988) (holding that "[i]t was entirely correct for the [administrative agency] to decline to decide the [constitutional] issue . . . on the ground that the federal courts provide more appropriate forums for constitutional claims" and observing that "[a]dministrative agencies are entitled to pass on constitutional claims but they are not required to do so").[7] Some courts have also attempted to differentiate between constitutional challenges that are "correctable" by an agency—and, thus, can be addressed by an agency—and those that are not. *See*, *e.g.*, *Sola v. Holder*, 720 F.3d 1134, 1135-36 (9th Cir. 2013) ("The key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the [agency's] ken." (quoting *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir.1995))). [8] However, distinguishing constitutional claims that an agency can address from those it cannot is rarely

[7] Respondent's case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit ("Third Circuit"), so OCAHO is bound to apply the law of that Circuit to its case. *See* 28 C.F.R. § 68.56; *see also United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 11 n.9 (2023) (noting that OCAHO applies precedential authority from the circuit in which a particular case arises). However, the Third Circuit, too, has reached differing conclusions regarding the appropriateness of a federal administrative agency considering constitutional claims. *Compare Petruska v. Gannon Univ*., 462 F.3d 294, 308 (3d Cir. 2006) (observing that "as a general rule, an administrative agency is not competent to determine constitutional issues"), *with Bethlehem Steel Corp. v. Occupational Health & Safety Rev. Comm'n*, 607 F.2d 871, 876 (3d Cir. 1979) (first "[c]onceding, arguendo, that an administrative agency is not ordinarily considered the appropriate forum for the resolution of constitutional claims," but then finding that "there are compelling reasons for insisting that [F]ourth [A]mendment claims for the suppression of evidence in [agency] enforcement cases be tendered first to the [agency]").

[8]As noted in *Carr*, *Sola*, and other cases, the most frequent reason cited for restricting agency adjudication of constitutional issues is that such issues are beyond an agency's typical expertise. However, that observation appears more and more empirically questionable—at least for certain categories of constitutional arguments—as constitutional claims regarding agency adjudications have arisen more frequently in recent years, and agencies have become quite knowledgeable about such issues, particularly ones going to the heart of agency adjudications such as arguments based on the Appointments Clause or the Take Care Clause. Further, as a practical matter—because challenges to agency adjudication have become so common—agencies must be aware of both the statutory and constitutional underpinnings of their own existence in order to ensure their decisions may be affirmed upon judicial review. Moreover, not all agencies lack constitutional expertise to begin with. To the contrary, the Department of Justice not infrequently opines on constitutional law issues, including the constitutionality of statutes. *See, e.g.*, *Constitutionality of Statute Governing Appointment of U.S. Trade Representative*, 20 Op. O.L.C. 279 (1996) (concluding that 19 U.S.C. § 2171(b)(3) [now 19 U.S.C. § 2171(b)(4)] is unconstitutional). In fact, by statute, it is anticipated that "the Attorney General or any officer of the Department of Justice" may establish a policy to refrain from "enforcing, applying, or administering any [federal law] whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional." 28 U.S.C. § 530D(a)(1)(A)(i) (requiring the Attorney General to report to Congress any such policy). As OCAHO decisions are reviewable by the Attorney General, *see* 28 C.F.R. § 68.55, and as the Attorney General can unquestionably opine on constitutional issues, it is not clear that constitutional law issues are truly beyond the Department of Justice's expertise. Nevertheless, as discussed in more detail, *infra*, I need not—and do not—definitively resolve whether OCAHO can and should address constitutional law questions in the first instance.

straightforward, and the line between them is often nebulous and only clarified *post hoc* through litigation in federal court.

Indeed, most questions regarding the ability or appropriateness of a federal administrative agency to address constitutional claims have arisen indirectly in federal court in the context of either a challenge to whether a respondent met an administrative exhaustion requirement regarding the claim, *see, e.g., Sola*, 720 F.3d at 1135, or a challenge to whether a special statutory review scheme, which typically funnels claims to an administrative agency first followed by review by a federal court of appeals, displaces a district court's general federal-question jurisdiction over constitutional claims, *see, e.g.*, *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 185-88 (2023). Thus, perhaps unsurprisingly, there is little federal caselaw directly evaluating an agency's authority to consider constitutional claims.[9]

Moreover, attempts by some agencies to draw a line between constitutional claims they can hear (*e.g.*, those related to procedures or the application of statutes) and those they cannot (*e.g.*, challenges to the constitutionality of a statute itself) have been described as "dubious" by the Supreme Court. *See Elgin*, 567 U.S. at 16, n.5 ("Agencies are created by and act pursuant to statutes. Thus, unless an action is beyond the scope of the agency's statutory authority, an [individual's] claim that the agency 'acted in an unconstitutional manner' will generally be a claim that the statute authorizing the agency action was unconstitutionally applied to him."). Although a few types of constitutional arguments have clearly been placed beyond an administrative agency's purview—*e.g.*, a constitutional challenge to an ALJ's appointment which an ALJ cannot remedy and which an agency head could not directly remedy in the course of an adjudication, *see Carr*, 593 U.S. at 94—the overall question of an agency's ability to address constitutional questions remains unsettled. *Cf. Elgin*, 567 U.S. at 17 ("We need not, and do not, decide whether the [agency's] view of its power [*i.e.*, that it cannot decide constitutional issues] is correct, or whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction.").

Historically, OCAHO's general view has been that, except for arguments regarding the constitutionality of a statute itself, OCAHO adjudicators can and should decide constitutional questions that come before them, including questions related to the constitutional application of

[9] In most cases, including the instant case, it is a respondent who raises a constitutional claim as a defense to an agency enforcement action, and such a respondent logically would not also argue that the agency adjudicating its constitutional defense lacks authority to accept that defense. Moreover, even if the agency rejected a constitutional defense as beyond its authority, a respondent could simply raise the defense anew before an Article III court, which can consider the issue without having to decide whether the agency's view of its authority was correct. *See, e.g., Plaquemines*, 838 F.2d at 544 (noting that a federal court may reach a constitutional issue that an agency has declined to address). Further, if an adjudicating agency decides a constitutional issue adverse to the enforcement agency, the enforcement agency generally has no recourse to federal court—though it may have recourse within the Executive Branch—as one executive branch agency generally cannot bring suit against another. *See, e.g., Constitutionality of Nuclear Regul. Comm'n's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 138 (1989) ("The Office of Legal Counsel has long held the view that lawsuits between two federal agencies are not generally justiciable. . . . We relied on the principle that the federal courts may only adjudicate actual cases and controversies. A lawsuit involving the same person as plaintiff and defendant does not constitute an actual controversy. This principle applies to lawsuits between members of the executive branch." (citations omitted)). Consequently, review by a federal court of a direct challenge to an agency's ability to decide constitutional questions would involve an unusual set of facts or procedures that is unlikely to occur.

statutory provisions.[10] *See*, *e.g.*, *United States v. Nev. Lifestyles, Inc*. 3 OCAHO no. 463, 677, 679 (1992) ("Constitutional issues implicating statutory applicability are appropriate for consideration in administrative adjudications, *i.e.*, by administrative law judges (ALJs), where those issues pertain to the constitutionality of the statutory application, as distinct from the constitutionality of the statute itself. . . . Agency adjudicators are not only competent to consider certain constitutional issues, but are obliged to consider them."). To that end, OCAHO has regularly and unremarkably—and without any noted controversy—addressed constitutional arguments raised in its proceedings throughout its history. *See, e.g., Hossain v. Job Serv. N.D.*, 14 OCAHO no. 1352 (2020) (dismissing a complaint brought under 8 U.S.C. § 1324b based on the respondent's sovereign immunity under the Eleventh Amendment); *Nev. Lifestyles*, 3 OCAHO no. 463, at 682-88 (denying a challenge to the constitutionality of 8 U.S.C. § 1324a based on the Commerce Clause).

Furthermore, regardless of whether it is appropriate for OCAHO to consider constitutional issues on a blank slate as a matter of first impression, once a constitutional issue has been decided in a precedential decision by an appropriate court of appeals or the Supreme Court, OCAHO is obligated to faithfully apply that precedent. *See, e.g., supra* note 7. In such cases, OCAHO is no longer adjudicating a constitutional law question in the first instance; rather, it is simply applying established precedent—just as it applies any relevant precedent—even though that precedent involves an issue of constitutional law. In short, although there may be lingering, unresolved questions regarding to what extent, or under what types of circumstances, OCAHO is authorized to consider a constitutional law question in the first instance, once that question has been addressed by an appropriate federal court in a precedential opinion, OCAHO is bound to apply that precedent.

To illustrate that point, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") has—at least at first glance—rejected Respondent's argument regarding the constitutionality of dual-layer for-cause removal protections for ALJs. *See Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133-36 (9th Cir. 2021). Because Respondent's case arises in the Third Circuit, *Decker Coal* is not binding in the instant proceedings. However, for OCAHO cases arising in the Ninth Circuit, including those related to the instant case,[11] OCAHO adjudicators are bound to apply *Decker Coal* unless a party persuasively distinguishes it or unless the Supreme Court overrules or otherwise modifies it. Similarly, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") has accepted Respondent's argument regarding the constitutionality of dual-layer for-cause removal protections for ALJs, though not its remedy. *See Jarkesy*, 34 F.4th at 463-65. Again, that case is not binding in the instant proceedings, but for cases arising in the Fifth Circuit, unless a party persuasively distinguishes *Jarkesy* or unless the Supreme Court overrules or otherwise modifies it, OCAHO adjudicators are bound to apply that precedent. Indeed, although the federal circuit courts of appeals may be divided on the issue of the constitutionality of dual-layer for-cause removal protections for ALJs, *see K & R Contractors, LLC v. Keene*, 86 F.4th 135, 148 (4th Cir. 2023) (collecting cases), until the Supreme Court definitively resolves the issue,

[10] As discussed, *supra*, the Supreme Court has characterized this distinction as "dubious," *Elgin*, 567 U.S. at 16, n.5, and OCAHO has not had an occasion to revisit it or to re-assess its wisdom, particularly in light of more recent jurisprudence.

[11] Respondent's case is one of twenty pending cases arising in locations across the United States. Of those cases, two arise in the Third Circuit, two arise in the Fifth Circuit, seven arise in the Ninth Circuit, three arise in the Tenth Circuit, three arise in the Eleventh Circuit, and one each arises in the Second, Sixth, and Eighth Circuits, respectively. Unless overruled or modified, OCAHO will continue to apply relevant circuit court precedents in those cases.

OCAHO is bound to apply relevant, binding circuit court precedent where applicable even if it leads to different legal conclusions—though perhaps not different outcomes, *see infra*—across similar cases.

Additionally, Respondent's constitutional claim (*i.e.*, the dual-layer, for-cause removal protections afforded to OCAHO adjudicators violates Article II of the Constitution) is distinct from its proposed claim for relief (*i.e.*, the invalidation of the OCAHO proceeding altogether). Again, separate and distinct from any precedent regarding Respondent's constitutional claim, there may be binding precedent from either the Supreme Court or a relevant circuit court addressing the appropriateness of its proposed remedy, which OCAHO is obligated to follow. *See, e.g., Collins v. Yellen*, 141 S. Ct. 1761, 1787-89 (2021) (holding that actions taken by properly-appointed constitutional officers are not void absent a showing of harm, even if those officers are subject to unconstitutional removal restrictions); *Decker Coal*, 8 F.4th at 1136-37 (following *Collins* and noting that even if the ALJ removal protections were unconstitutional, that flaw would not invalidate the underlying proceedings); *K & R Contractors*, 86 F.4th at 148-49 (declining to decide the constitutionality of an ALJ's removal restrictions because, following *Collins*, the petitioner had not alleged any harm and, thus, could not obtain relief even if the restrictions were unconstitutional); *cf. Jarkesy*, 34 F.4th at 465-66 (declining to decide whether the underlying administrative proceedings were subject to vacatur solely because the ALJ's removal restrictions were unconstitutional).

Regarding Respondent's case more specifically, in the absence of binding Third Circuit precedent—and notwithstanding OCAHO's longstanding practice to the contrary—multiple points caution against resolving Respondent's constitutional argument regarding the dual-layer, for-cause removal protections of OCAHO adjudicators in the present posture of the case. First, Respondent did not seek interlocutory review of that issue—and the undersigned did not determine on my own initiative that the issue warranted interlocutory review, 28 C.F.R. § 68.53(a)(3)—and consideration of it without additional briefing from both parties would be ill-advised. Second, the Supreme Court recently noted that a claim similar to the one Respondent has made—*i.e.*, that an administrative adjudicator's civil service protections violate Article II—is generally outside an agency's expertise. *See Axon*, 598 U.S. at 194; *but see supra* note 8.[12] Third, the Supreme Court will likely issue a decision in *Jarkesy* within approximately the next three months, and that decision *may* provide clarity on the validity of Respondent's argument.[13] Thus, caution favors waiting for that decision rather than deciding the issue in an interlocutory posture in the instant case, particularly because Respondent may renew its argument if it seeks review at the conclusion of this proceeding

[12] As discussed, *supra*, however, *Axon* does not relieve an agency of any obligation to apply binding circuit court precedent when a relevant circuit court has already decided whether an administrative adjudicator's removal protections are or are not unconstitutional.

[13] The Supreme Court granted certiorari on three questions presented in *Jarkesy*, but only the last one regarding dual-layer, for-cause removal protections for ALJs is implicated in Respondent's case. *See SEC v. Jarkesy*, 143 S. Ct. 2688 (2023) (granting petition for a writ of certiorari); Petition for a Writ of Certiorari, *Jarkesy* (No. 22-859), 2023 WL 2478988 (Mar. 1, 2023). Further, at oral argument, only one Justice—briefly and without any follow-up—inquired about that issue specifically. *See* Transcript of Oral Argument at 79-80, *Jarkesy* (Nov. 29, 2023) (No. 22-859). Thus, it is possible that the Supreme Court could decide *Jarkesy* on grounds unrelated to the argument raised by Respondent. Nevertheless, prudence still dictates awaiting that decision before making a final determination on Respondent's argument in the instant case.

even though it did not raise the argument in its request for interlocutory review, *see* 28 C.F.R. § 68.53(d)(2).

Fourth, the scope of Respondent's argument has massive potential effects on the whole of the federal government well beyond OCAHO. If Respondent's constitutional argument—and also its proposed claim for relief, *but see supra*—were accepted, it would invalidate most patent, immigration, veteran benefits, and social security disability adjudicatory proceedings, nearly all of which are presided over by inferior officers who are subject to dual-layer, for-cause removal protections. Although there may be relevant granular distinctions among each of those classes of adjudicators, OCAHO should nevertheless tread cautiously before considering—and accepting—arguments that potentially would effectively nullify such large and important swaths of the federal administrative state. *Accord Decker Coal*, 8 F.4th at 1137 ("As a practical matter, we note that were we to accept Decker's argument [*i.e.*, that dual-layer, for-cause removal protections are unconstitutional] . . . it would have potentially catastrophic effects on numerous past and ongoing claim adjudications under various benefits programs administered throughout the federal government.").

Fifth, Respondent's argument, if accepted, would also potentially raise questions about the constitutionality of administrative review within OCAHO under 8 U.S.C. § 1324a(e)(7), 8 U.S.C. § 1324c(d)(4), and 28 C.F.R. §§ 68.53, 68.54, including—ironically—Respondent's own request for interlocutory review in the instant case. If, as Respondent argues, OCAHO ALJs are inferior officers subject to dual-layer, for-cause removal protections, then the undersigned, who "exercises administrative supervision over the [Chief ALJ]," 28 C.F.R. § 68.2, who is authorized to conduct interlocutory and final administrative reviews of certain ALJ decisions, *see* 28 C.F.R. §§ 68.53, 68.54, and who is subject to a for-cause removal standard, *see* 5 U.S.C. §§ 7541, 7543(a), enforced by the MSPB, *see* 5 U.S.C. § 7543(d), is an inferior officer subject to dual-layer, for-cause removal protections as well.[14] Consequently, Respondent's arguments regarding the constitutionality of the instant proceedings would apply equally to the undersigned as they do to the Chief ALJ. In other words, if "Complainant cannot obtain any relief from OCAHO," Mot. to Dismiss First Am. Compl. at 16, because the Chief ALJ is unconstitutionally too insulated from removal, then no party can obtain relief from the CAHO on an administrative review—including Respondent in the instant interlocutory review—for the same reason. In short, Respondent's underlying constitutional argument is not only in tension with its request for interlocutory review, but it would also require OCAHO to determine that 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. §§ 68.53, 68.54 are unconstitutional. Even if OCAHO could take such a step—a point that is decidedly unclear, *see supra* note 10—prudence dictates extreme caution and very careful deliberation before doing so.

To that end, the final—but perhaps most important—point cautioning against deciding Respondent's constitutional claims at the present time is that like most courts and other adjudicatory bodies, even if OCAHO can decide constitutional issues, it should avoid doing so if there is another basis on which to resolve a case. *See, e.g., Bond v. United States*, 572 U.S. 844, 855 (2014) (noting that "it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case" (cleaned up)). In other words, OCAHO

[14] For similar reasons, the Deputy Chief Administrative Hearing Officer, who performs the duties of the CAHO when the CAHO is absent or when the position is vacant, would also be an inferior officer subject to for-cause removal enforced by the MSPB, *see* 5 U.S.C. §§ 7511, 7513(a).

would not need to decide Respondents constitutional claim if, for example, the relief it seeks based on that claim is not available because Respondent cannot demonstrate harm. *See, e.g.*, *K & R Contractors*, 86 F.4th at 148-49 (declining to decide the constitutionality of an ALJ's removal restrictions because the petitioner had not alleged any harm and, thus, could not obtain relief regardless of whether the restrictions were unconstitutional).

In sum—and to be clear—the undersigned makes *no* decision regarding the substance of Respondent's constitutional claim or its claim for relief, including whether it has alleged any harm from the asserted constitutional violation. The Chief ALJ's constructive denial of those claims was proper, particularly in light of her resolution of Respondent's Motion to the Dismiss the FAC on other grounds, and Respondent has not argued otherwise or challenged it in the instant interlocutory review. Nevertheless, both OCAHO adjudicators and parties appearing in OCAHO proceedings should be cognizant of this issue—and any relevant, applicable caselaw—as it is likely to continue to loom over all administrative proceedings, including those at OCAHO, for the foreseeable future.

V. DISCUSSION

Turning to Respondent's arguments on review, as an initial point, Respondent concedes that it has admitted some allegations in the FAC and does not seek dismissal of those counts. Respondent's Br. in Support of Interlocutory Review at 1, n.1, 3. Consequently, the counts admitted by Respondent are not considered within this interlocutory review, and—because the undersigned has not considered Respondent's constitutional arguments, *see supra* Part IV—there is no basis to dismiss the FAC in its entirety. Regarding the remaining allegations and counts, although the undersigned is not unsympathetic to Respondent's concerns about how they have been presented by Complainant—or to Respondent's concerns about OCAHO's pleading standard in general[15]—they do sufficiently conform to OCAHO's pleading standard to survive a motion to dismiss at the present juncture. Accordingly, the undersigned declines to modify or vacate the Chief ALJ's Order on Motion to Dismiss for the reasons outlined below.

A. OCAHO's Pleading Standard

Respondent's main argument in its Motion to Dismiss the FAC and its Motion for Interlocutory Review and associated briefing is that the FAC failed to meet OCAHO's pleading standard. OCAHO's rules of practice and procedure provide that a complaint under 8 U.S.C. § 1324a must contain the following information:

> (1) A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated;

[15] Respondent previously suggested that OCAHO should consider, "in an appropriate case," raising and conforming its pleading standard to the well-established standard used in civil litigation in federal court as articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Respondent's Mot. for Interlocutory Review at 4 n.2. Respondent's point merits serious consideration. However, it is not clear that OCAHO could adopt such a standard through adjudication rather than rulemaking given the differences in wording between its pleading standard in 28 C.F.R. § 68.7 and the one in Fed. R. Civ. P 8 from which the *Iqbal/Twombly* standard flows. Moreover, Respondent did not further press its argument on this point in the instant interlocutory review, and the present posture of the case provides no basis to reconsider or deviate from OCAHO's prior rejection of the *Iqbal/Twombly* standard in 2012, *see United States v. Mar-Jac Poultry, Inc*, 10 OCAHO no. 1148, 8-10 (2012).

> (2) The names and addresses of the respondents, agents, and/or their representatives who have been alleged to have committed the violation;
> (3) The alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred; and
> (4) A short statement containing the remedies and/or sanctions sought to be imposed against the respondent.

28 C.F.R. § 68.7(b). This paragraph constitutes the OCAHO "pleading standard" to which the parties refer. *See, e.g.*, *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450, 2 (2022) ("To meet pleading standards, a complaint must contain '[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred.'" (quoting 28 C.F.R. § 68.7(b)(3)).

The parties do not seem to dispute that the FAC contains numbered items (1), (2), and (4) from 28 C.F.R. § 68.7(b); their sole dispute—at least in the context of this administrative review—is whether the instant FAC contained "[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), and whether the Chief ALJ correctly analyzed that question in her Order on Motion to Dismiss. Accordingly, it is appropriate to turn first to the language of the FAC which informs that analysis.

Each count of the FAC consists of five paragraphs: three lettered paragraphs (A, B, and C), a "wherefore" paragraph, and a paragraph identifying the total civil money penalty sought for that count. In Count I,[16] paragraph A alleges that "[t]he Respondent hired the following individuals listed 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 for," and then provides a table listing 1,677 employees. First Am. Compl. at 4, 4-47. Paragraph B then alleges that "[t]he Respondent hired the individuals listed in paragraph A after November 6, 1986." *Id.* at 47. Paragraph C somewhat repetitively alleges that "[t]he Respondent failed to prepare and/or present or, in the alternative, failed to properly complete or ensure the proper completion of the Forms I-9 for the one thousand six hundred seventy-seven (1,677) individuals listed in paragraph A." *Id.* These three lettered paragraphs are followed by a paragraph which reads,

> WHEREFORE, it is charged that the Respondent is in violation of Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(b) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(b).

Id. Finally, Count I concludes with a paragraph identifying the amount of the civil penalty sought to be imposed, as follows: "The civil monetary penalty assessed for Count I is three million nine hundred thirty-one thousand four hundred eighty-one dollars and ninety cents ($3,931,481.90)."[17] *Id.*

[16] Because the two counts are substantially similar in structure, a discussion of the specifics of Count I in sufficient to inform the overall analysis.

[17] As noted *supra* note 16, the language in Count II is substantially similar to that in Count I. Paragraphs A and C of Count II allege that the Respondent hired 280 individuals for employment in the United States and "failed to properly

The FAC also includes (as "Tab A") a table which lists, for each count, the relevant employee's name, the employee's hire date, and a more specific description of the alleged deficiency or violation for that employee's Form I-9. For example, in Count I, Employee 1, the FAC alleges that:

> The audit trail shows that only the employer signed into the electronic software system used to complete the Form I-9 and appears to have attested and signed as the employee in Section 1 (a Preparer/Translator section was not completed). The audit trail shows that the employee did not sign into the software system used to complete the Form I-9 system and did not attest or sign in Section 1, as required. Not prepared or, in the alternative, not properly completed because the employer failed to ensure the proper completion of Section 1.

First Am. Compl. at Tab A (Count I, Employee 1). In Count I, Employee 2, the FAC alleges more briefly "No Form I-9. Employer failed to prepare and/or present I-9." *Id.* (Count I, Employee 2).[18]

In the Order on Motion to Dismiss, the ALJ ultimately concluded that:

> 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 for the violation at issue. 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.

Order on Motion to Dismiss at 11 (citation omitted).

Upon review, I agree with the Chief ALJ that the bulk of the FAC meets OCAHO's pleading standard.[19] In both Counts I and II, the FAC includes a paragraph charging that

> the Respondent is in violation of Section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(a)(1)(B), which renders it unlawful, after

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complete the Forms I-9" for those individuals. *See* First Am. Compl. at 48, 55. The final paragraph of Count II seeks to impose a civil penalty of $656,454.55 for the Count II violations. *See id.* Paragraph B and the "wherefore" paragraph of Count II are identical to the equivalent paragraphs in Count I of the FAC. *Compare* First Am. Compl. at 47, *with* First Am. Compl. at 55.

[18] Most of the violations alleged in Count I match either the allegation for Employee 1 or Employee 2.

[19] In the Order on Motion to Dismiss, the Chief ALJ granted the Respondent's motion to dismiss certain allegations in Count II of the FAC for failure to meet OCAHO's pleading standard. *See* Order on Motion to Dismiss at 13. As those alleged violations were resolved in Respondent's favor, the undersigned presumes that Respondent does not contest the Chief ALJ's analysis or conclusion as to those allegations, and the Complainant similarly did not timely challenge that conclusion in the context of this interlocutory review. Accordingly, there is no basis to disturb the Chief ALJ's conclusions as to those specific Count II violations. As the Chief ALJ also noted, the more specific description of some of the alleged Count II violations in Tab A of the FAC does not match the description of those same violations in the body of the FAC. *See id.* at 12. Thus, it would be fair to say that the statement of facts for those particular Count II violations is not sufficiently "clear" to meet OCAHO's pleading standard at 28 C.F.R. § 68.7(b)(3). Moreover, for those same allegations in Count II, the Chief ALJ found that "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)." *Id.* at 15. Accordingly, the undersigned also finds no grounds to disturb that conclusion by the Chief ALJ.

> November 6, 1986, for a person or entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(b) of the Immigration and Nationality Act, 8 U.S.C. Section 1324a(b).

First Am. Compl. at 47, 55. This constitutes identification of "[t]he alleged violations of law" as required by 28 C.F.R. § 68.7(b)(3). Furthermore, the tables in Tab A, which contain specific descriptions of the alleged deficiencies or violations for each Form I-9, are sufficient to constitute "a clear and concise statement of facts for each violation alleged to have occurred." *See* 28 C.F.R. § 68.7(b)(3). This is enough to satisfy OCAHO's pleading standard and survive a motion to dismiss.

In its Motion to Dismiss the FAC, Respondent repeatedly argues that the FAC provides "no indication" of the alleged violation of law. *See* Mot. to Dismiss First Am. Compl. at 18 ("These counts do not meet OCAHO's Pleading Standard because they provide no indication as to what provisions of the I-9 Statute or regulations Respondent supposedly violated."), 19 ("Complainant provides no indication of the legal provisions allegedly violated, either in the body of the FAC or Tab A.").[20] But this is plainly untrue—both Count I and Count II of the FAC allege that the Respondent violated 8 U.S.C. § 1324a(a)(1)(B) by hiring listed individuals for employment in the United States without complying with the requirements of 8 U.S.C. § 1324a(b). *See* First Am. Compl. at 47, 55. Although this alleged violation of law is an admittedly general one, it does track the relevant statutory language and is sufficient—when coupled with the more detailed factual allegations in Tab A of the FAC—at this stage of the proceeding.

Respondent points to *United States v. Mester Manufacturing Co.*, 1 OCAHO no. 18, 53 (1988), to argue that "complainants have a 'duty' to cite the specific statutory provision and any corresponding regulation it intends to use to support its allegations[.]" Mot. for Interlocutory Review at 7; *see also* Respondent's Br. in Support of Interlocutory Review at 9, 12. Relatedly, Respondent appears to argue that the FAC's citation to 8 U.S.C. §§ 1324a(a)(1)(B) and 1324a(b) is insufficiently "precise," and that the Complainant was required to provide more specific information regarding what provisions of the statute or regulations Respondent allegedly violated. Respondent's Br. in Support of Interlocutory Review at 10. However, Complainant's reliance on *Mester Manufacturing* is misplaced.

As an initial point, *Mester Manufacturing* specifically declined to address the scenario at issue here, stating that "[i]t remains for other cases whether or not [DHS] may effectively charge a violation of 8 U.S.C. 1324a(a)(1)(B) or 8 U.S.C. 1324a(b), without more." *United States v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 95 (1988). The parties did not identify—and, after diligent research, the undersigned has been unable to locate—subsequent OCAHO cases analyzing that precise question in depth. However, OCAHO case law is replete with examples of complaints that allege a violation of 8 U.S.C. § 1324a(a)(1)(B) generally that were deemed—either implicitly or

[20] Respondent narrows this assertion somewhat in its Brief in Support of Interlocutory Review, arguing instead that "Complainant never provided a statement of the 'alleged violations of law' because the FAC does not cite or reference a specific statutory or regulatory provision that could give rise to the alleged violations. Instead, it simply points to the general I-9 Statute." Respondent's Br. in Support of Interlocutory Review at 2. However, Respondent does not acknowledge or distinguish this case from the ample OCAHO case law in which a similar reference in the complaint to 8 U.S.C. § 1324a(a)(1)(B) generally was sufficient to survive a motion to dismiss, *e.g.*, *United States v. Zarco Hotels Inc.*, 18 OCAHO no. 1518b (2024), or allow for full adjudication of the alleged violations, *e.g.*, *United States v. HDB Network Tech., Inc.*, 18 OCAHO no. 1483 (2024).

explicitly—to be sufficient pleadings under OCAHO's rules. *See, e.g.*, *United States v. Zarco Hotels Inc.*, 18 OCAHO no. 1518b, 3, 6-7 (2024) (denying the respondent's motion to dismiss for failure to state a claim where the complaint alleged that the respondent was in violation of 8 U.S.C. § 1324a(a)(1)(B), specifically finding that "[t]hese are well plead[ed] violations of § 1324a"); *see also United States v. HDB Network Tech., Inc.*, 18 OCAHO no. 1483a, 1, 9-10 (2024) (finding the respondent liable for violations where the complaint alleged that the respondent "failed to prepare and/or present a Form I-9 for one worker, and failed to ensure proper completion of Forms I-9 for an additional 48 workers, in violation of [8 U.S.C.] § 1324a(a)(1)(B)."); *United States v. ABCO Solar, Inc.*, 17 OCAHO no. 1465a (2023) (finding the respondent liable for violations of 8 U.S.C. § 1324a where the complaint charged respondent with violations of 8 U.S.C. § 1324a(a)(1)(B)); *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451 (2022) (finding that the complainant established that the respondent was liable for numerous violations of the employment eligibility verification provisions where the complaint charged the respondent with, *inter alia*, three counts of violating 8 U.S.C. § 1324a(a)(1)(B)).

Indeed, the main issue with the complaint in *Mester Manufacturing* was not a failure to cite a more specific statutory or regulatory provision, as Respondent asserts is the defect with the complaint in the instant matter. Rather, the complaint in that case *did* cite specific statutory and regulatory provisions. However, in doing so, the complaint specified "a different statutory violation than the one reasonably embraced by the factual allegations" and "the regulation specified to have been violated [was] nonexistent[.]" *Mester Mfg. Co.*, 1 OCAHO no. 18, at 95 (noting also that "among the three elements, the factual allegation, the statutory specification and the regulatory specification, no two are consistent as charged."). Accordingly, even after full briefing and an evidentiary hearing on the record, the ALJ found that it was "unclear, as the result of the ambiguous statutory citation, considered in light of the nonexistent regulatory citation, what was intended to be alleged and tried." *Id.* It was in that context, when the ALJ sought to ultimately determine liability for the alleged violations, that the ALJ in *Mester Manufacturing* observed that "[i]t is not for the trial judge to speculate as to which among the statutory imperatives is at issue" and therefore dismissed the relevant counts of that complaint. *Id.* at 95-96. Given the entirely different factual and procedural context present in *Mester Manufacturing*, that case provides little help to the Respondent in the instant matter. *See* Order on Motion to Dismiss at 11 ("Unlike in *Mester Manufacturing Company*, there is no inconsistency between the factual allegations and the cited statutory provision.").

Respondent points to no previous OCAHO case law dismissing a complaint under 8 U.S.C. § 1324a where that complaint cites only to 8 U.S.C. § 1324a(a)(1)(B) and/or 8 U.S.C. § 1324(b) as the required "alleged violations of law," and the undersigned is not aware of any such case law. To the contrary, as noted above, there are abundant examples of OCAHO cases in which that very same statutory citation in the complaint was deemed sufficient to survive a motion to dismiss, and even to proceed to final adjudication. *E.g.*, *Zarco Hotels Inc.*, 18 OCAHO no. 1518b; *HDB Network Tech., Inc.*, 18 OCAHO no. 1483a. In short, Respondent has not provided sufficient justification to depart from this consistent line of OCAHO case law. Accordingly, the undersigned declines to modify the Chief ALJ's order on this basis.

To be sure, Complainant may ultimately need to be more specific in identifying precisely how the Respondent's actions with respect to each employee's Form I-9 violated the relevant statute and/or regulations in order to meet its ultimate burden of establishing liability for the

alleged violations. *See, e.g.*, *United States v. Agri-Sys.*, 12 OCAHO no. 1301, 8 (2017) ("In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements."); *see also infra*, Part V.C. However, under OCAHO case law, that additional specificity is not required at the pleading stage. *See, e.g.*, *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1148, 10 (2012) ("[T]he task here is not to assess evidence and predict at the outset what [the complainant] will be able to prove. The only question to be addressed in considering a motion to dismiss for failure to state a claim is whether the complaint is facially sufficient to permit the case to proceed further.").

B. Consideration of Materials Outside the "Four Corners" of the Complaint

"In considering a motion to dismiss, the court must limit its analysis to the four corners of the complaint. The court may, however, consider documents incorporated into the complaint by reference and materials subject to judicial notice." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113-14 (1997) (citations omitted). Respondent argues that the ALJ improperly considered matters outside the pleading in resolving the motion to dismiss. *See, e.g.,* Respondent's Mot. for Interlocutory Review at 5 (asserting that the Chief ALJ's order was "contrary to OCAHO regulations and case law because the ALJ strayed beyond the four corners of the FAC in an attempt to supplement and clarify Complainant's vague, confusing, and ambiguous allegations."); Respondent's Br. in Support of Interlocutory Review at 13-19. Respondent specifically asserts that:

> The Chief ALJ's errors as to the "four corners" rule took two primary forms. First, the Chief ALJ supplied legal theories that the Complainant itself never proffered. Second, the Chief ALJ relief on material from outside the four corners of the Complaint that Complainant offered only in response to Respondent's Motion to Dismiss the FAC.

Respondent's Br. in Support of Interlocutory Review at 16. Complainant counters by arguing that the Chief ALJ in fact found that the court "was limited in its review to the allegations in the FAC and the chart," Complainant's Br. on Interlocutory Review at 14, and that therefore "the Respondent's allegations regarding the ALJ relying on facts and legal citations outside the four corners of the FAC are unfounded," *id.*

Upon review, the undersigned finds that the Chief ALJ did not improperly consider materials outside the four corners of the complaint in evaluating the Respondent's motion to dismiss. To the extent that the Chief ALJ considered factual materials not expressly attached to the complaint, such as screenshots of certain Forms I-9, those documents were incorporated by reference into the complaint, *see* First Am. Compl. at 4 n.1, 48 n.2, and thus were appropriate materials to consider in evaluating the motion to dismiss, *see Jarvis*, 7 OCAHO no. 930, at 113-14.[21]

[21] Respondent argues that "[t]he Chief ALJ also erred by accepting Complainant's erroneous premise that the I-9s and their audit trails are incorporated into the FAC so long as their contents are referenced somewhere in a complaint." Respondent's Br. in Support of Interlocutory Review at 18. But the Forms I-9 and their audit trails were not merely "referenced" in the FAC; rather, they were explicitly incorporated by reference. *See* First Am. Compl. at 4 n.1, 48 n.2.

Respondent also argues that the Chief ALJ relied on the electronic Form I-9 regulations even though those regulations were not mentioned in or cited in the FAC, *see* Respondent's Br. in Support of Interlocutory Review at 16, and "outlined potential legal theories for Complainant that it has never articulated (certainly not in the FAC)—based on legal authority introduced in Complainant's brief[,]" *id.* at 16-17. Respondent appears to be arguing that, in resolving a motion to dismiss, it is impermissible for an ALJ to consider legal sources or authorities that are not expressly included or referenced in the complaint. However, Respondent does not identify any previous OCAHO case law—or other controlling or persuasive authority—supporting that broad proposition.

Indeed, OCAHO case law on what is properly considered within the "four corners" of the complaint has primarily focused on consideration of *factual* allegations and materials that were not included in the pleadings. *See, e.g.*, *Brown v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379, 2 (2020) ("In Complainant's Opposition, Complainants cite to thirty-two 'Proposed Additional/Amended Facts (PAFs).' Since the Court is limited to the four corners of the complaint when considering a motion to dismiss, these *facts* cannot be considered." (emphasis added)); *United States v. R2M2 Rebar & Stressing, Inc.*, 14 OCAHO no. 1357, 2 (2020) (converting respondent's partial motion to dismiss to one for summary decision where both parties submitted factual materials not included in the pleadings); *United States v. Lazy Days S., Inc.*, 13 OCAHO no. 1322a, 3 (2019) (finding that an argument by the respondent could not be resolved in a motion to dismiss because it involved "a *factual statement* not contained in the complaint" (emphasis added)); *Flores v. Logan Foods Co.*, 6 OCAHO no. 874, 545, 549 (1996) (converting a motion to dismiss to a motion for summary decision where the parties submitted factual materials—including affidavits and payroll records—that were outside of the pleadings); *see also Heath v. I-Services, Inc.*, 15 OCAHO no. 1413c, 2-3 (2022) ("While the ALJ's review [of a motion to dismiss] is limited to the *facts* alleged in the complaint, the complaint includes any written attachments or exhibits, and any statements or documents incorporated therein by reference." (emphasis added)); *Sinha v. Infosys Ltd.*, 14 OCAHO no. 1373d, 11 (2024) ("[T]he Court finds that Complainant pleaded sufficient minimal factual allegations within the four corners of his complaint giving rise to an inference of citizenship discrimination under 8 U.S.C. § 1324b.").

Moreover, the Chief ALJ, like all OCAHO adjudicators, is bound to apply properly-promulgated federal regulations, and DHS's regulations at 8 C.F.R. Part 274a "have the force of law not only as regards the regulated public, but also as to other agencies of government." *United States v. Diversified Tech. & Servs.. of Va., Inc*., 9 OCAHO no. 1095, 4 (2003). Respondent has not offered any authority to support its proposition that the Chief ALJ should disregard binding federal regulations if they are relevant to the case. *Cf. FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("An agency may not . . . simply disregard rules that are still on the books."); FED. R. EVID. 201 advisory committee's note to 1972 proposed rules ("In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion." (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944))).

In short, absent more persuasive argument or authority, I decline to hold that the Chief ALJ's consideration of 8 U.S.C. § 1324a's implementing regulations at 8 C.F.R. Part 274a strayed beyond the "four corners" of the complaint as that term is used in OCAHO cases. Accordingly, I decline to modify the Chief ALJ's order on this ground.

C. Propriety of an Order for a More Definite Statement

Although I find no legal error in the Chief ALJ's Order on Motion to Dismiss, I am nevertheless sympathetic to Respondent's general argument that the FAC is not a paragon of drafting. For example, Respondent takes issue with the general organization of the FAC, asserting that it "makes it difficult—if not impossible—for Respondent to sort through the categories of violations that *might* be alleged and challenge the underlying legal theories." Mot. for Interlocutory Review at 1 (emphasis in original). Further, as Respondent points out in Appendix A accompanying its Motion for Interlocutory Review and Brief on Interlocutory Review, Count I of the complaint contains at least three different types of allegations, while Count II of the complaint contains as many as seventeen different types of allegations. Moreover, within the two counts, the alleged violations in the FAC are listed in alphabetical order by employee last name rather than being grouped with similar violations. Certainly, this organizational method places an additional burden on the Court and the Respondent to sort through those violations and prepare analyses and challenges, respectively. *Compare* Order on Motion to Dismiss at 8 n.7, Allegations List (attempting to organize "each different type of allegation involving electronic Forms I-9" into categories), *with* Respondent's Mot. for Interlocutory Review at Appendix A (identifying the number of allegations containing identical language within each count of the FAC). Indeed, both the volume of claims and their somewhat convoluted presentation apparently led the Chief ALJ to order the parties to determine which claims have been dismissed rather than determining them herself. *See* Order on Motion to Dismiss at 26 (ordering the parties to confer and provide the Chief ALJ with a list of claims subject to dismissal based on her findings and conclusions).

Although nothing in OCAHO's rules appears to mandate a specific method of organizing allegations in a complaint, the efficient adjudication of this matter—as well as the nineteen other, similar complaints filed against other Walmart locations—would likely benefit from more precise information from the Complainant as to which specific provisions of 8 U.S.C. § 1324a(b) and/or 8 C.F.R. Part 274a are relevant to each of the alleged violations, especially given the "novelty" and "complexity" of many of the allegations at issue. *See* Respondent's Br. in Support of Interlocutory Review at 1. To that end, in its Brief in Support of Interlocutory Review, Respondent suggests that the CAHO could "*sua sponte* order Complainant to file a more definite statement of the allegations."[22] *Id.* at 7.

As I noted previously, "although Respondent raised the prospect of the Chief ALJ ordering Complainant to file a more definite statement regarding the original complaint, *see* Respondent's Motion to Dismiss, 18 n.4, that issue became moot when the Chief ALJ granted Complainant's request to amend its original complaint." Order at 2 n.1 (citing *United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475a, 2 (2023)). Further, the record is unclear whether Respondent sought a more definite statement once the FAC was filed. *Id*. However, no applicable law appears

[22] Respondent did not exactly move *per se* the undersigned to *sua sponte* order a more definite statement, and in any event, a motion for an adjudicator to take action *sua sponte* is an "oxymoron." *See Malukas v. Barr*, 940 F.3d 968, 969 (7th Cir. 2019) ("[Taking action] in response to a motion is not *sua sponte*; it is a response to the motion . . . ."); *accord Calderon v. Thompson*, 523 U.S. 538, 554 (1998) (noting that a *sua sponte* order is one necessarily independent of any party's motion or request). Nevertheless, the tenor of Respondent's suggestion was clear, and the undersigned has fully considered it.

to preclude Respondent from seeking a more definite statement regarding the FAC or the undersigned from considering that option *sua sponte*. [23]

Although OCAHO has no specific rule regarding a motion for a more definite statement, it may look to the Federal Rules of Civil Procedure ("FRCP") as a "general guideline" for situations not covered by its own rules or any other applicable source of law. 28 C.F.R. § 68.1. Pursuant to FRCP 12(e), "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." As Respondent has repeatedly described the FAC as "vague" and ambiguous," *e.g.*, Mot. for Interlocutory Review, 1, 5, 8; Respondent's Br. in Support of Interlocutory Review at 1, 11, 19, 20—and as Respondent suggested, in the alternative, that the undersigned could *sua sponte* order Complainant to file a more definite statement, Respondent's Br. in Support of Interlocutory Review at 7—it appears that consideration of that option is warranted.

To be sure, OCAHO jurisprudence generally disfavors motions for a more definite statement. *See*, *e.g.*, *United States v. Harris Ranch Beef Co.*, 2 OCAHO no. 331, 278, 280-81 (1991); *United States v. Aguas-Avalos*, 4 OCAHO no. 642, 4 (1994). Part of that disfavor stems from a concern that a motion for a more definite statement should not be used as a means of discovery, which is the preferred method of focusing issues in a case. *Harris Ranch Beef Co.*, 2 OCAHO no. 331, at 280-81; *Aguas-Avalos*, 4 OCAHO no. 642, at 5. However, that concern is lessened in the instant case where Respondent principally seeks more definitive *legal* information—*i.e.*, more specificity regarding the statutory or regulatory basis for the charged violations—rather than *factual* information obtainable through discovery. Moreover, as Respondent's case involves nearly 2,000 alleged violations, requiring the parties to undertake extensive and burdensome discovery in order to narrow legal issues which could more easily be handled though a more definite statement appears self-evidently injudicious. *Cf. Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1126-28 (11th Cir. 2014) (discussing the perils of proceeding to discovery without clear pleadings and noting that "[c]ivil pleadings are supposed to mark the boundaries for discovery; discovery is not supposed to substitute for definite pleading").

Furthermore, although a motion for a more definite statement is "disfavored" in OCAHO proceedings, so, too, is a motion to dismiss for failure to state a claim. *See Split Rail Fence Co.*, 10 OCAHO no. 1181 at 6. Moreover, when a complaint may be vague or ambiguous but still sufficiently clear to meet the threshold pleading standard—as the FAC is—the appropriate remedy

[23] Although under the Federal Rules of Civil Procedure ("FRCP"), a motion for a more definite statement is required to be filed *before* filing a responsive pleading, FED. R. CIV. P. 12(e), the fact that Respondent has already filed an answer to the FAC does not necessarily preclude it from seeking a more definite statement now. OCAHO's rules differ significantly from the FRCP regarding the timing of filing an answer when a motion to dismiss is pending, *see*, *e.g., Ferrero v. Databricks*, 18 OCAHO no. 1505, 5-6 (2023), and the overall thrust of OCAHO's regulations strongly suggests that only an ALJ—and not the filing of a motion—can extend the deadline for filing an answer, *see*, *e.g.*, 28 C.F.R. §§ 68.9(a) (noting that an answer "shall" be filed within thirty days after service of the complaint), 68.9(b) (noting that failure to timely file an answer may constitute a waiver of the right to contest a complaint and may lead to an adverse default judgment), 68.10(a) (noting that "[t]he filing of a motion to dismiss does not affect the time period for filing an answer"). Thus, just as Respondent's filing of an answer to the FAC did not preclude it from filing a motion to dismiss, it is not clear that its filing of an answer precludes it from subsequently seeking a more definite statement of the FAC. However, because the undersigned is not ordering a more definite statement at the present time, *see infra*, resolution of that issue, if necessary, is left to the Chief ALJ in the first instance.

is typically a more definite statement rather than dismissal. *See, e.g.*, 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (4th ed.) ("If the complaint is ambiguous or does not contain sufficient information to allow a responsive pleading to be framed, a [motion to dismiss for failure to state a claim] is not appropriate; the proper remedy is a motion for a more definite statement . . . ."); *see also Harman v. Valley Nat'l Bank of Ariz.*, 339 F.2d 564, 567 (9th Cir. 1964) (noting that "'mere vagueness or lack of detail is not ground for a motion to dismiss, but should be attacked by a motion for a more definite statement'" (quoting 2 Moore's Federal Practice par. 12.08, pp. 2245-46)); *cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002) (noting that under the pleading standard then-operable in federal court,[24] "'[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations'" and positing that "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement . . . ." (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Finally, the Chief ALJ's Order on Motion to Dismiss itself is, arguably, already tantamount to an order for a more definite statement. Indeed, the fact that the Chief ALJ could not conclusively identify all allegations in the complaint subject to dismissal without the aid of the parties strongly suggests that more clarity in the FAC is warranted. *See* Order on Motion to Dismiss at 26 (ordering the parties to confer and provide the Chief ALJ with a list of claims subject to dismissal based on her findings and conclusions).

In short, multiple factors firmly pull in the direction of ordering Complainant to file a more definite statement regarding the FAC. *Cf. Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 367 (11th Cir. 1996) ("Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice."). However, although the undersigned likely has *sua sponte* authority to order such a filing, *see Paylor*, 748 F.3d at 1127, I am nevertheless reluctant to take such a step without allowing Complainant to weigh in on the issue. Accordingly, although Respondent's suggestion is well-taken—and nothing in this order should be construed to preclude Respondent from seeking a more definite statement before the Chief ALJ and before discovery commences—I will leave the issue of the propriety of a more definite statement to the presiding Chief ALJ in the first instance.

VI. CONCLUSION

Respondent's Motion for Interlocutory Review and accompanying brief fail to provide sufficient grounds for modifying or vacating the Chief ALJ's Order on Motion to Dismiss in this case, and, thus, I decline to do so. Under OCAHO's rules, if the CAHO does not modify, vacate, or remand an interlocutory order within thirty days of the date that order is entered, the ALJ's interlocutory order is deemed adopted. 28 C.F.R. § 68.53(c). Accordingly, the Chief ALJ's Order on Motion to Dismiss is deemed adopted.

In the March 5, 2024 Order initially granting Respondent's Motion for Interlocutory Review, the undersigned issued a stay of the underlying proceedings, and provided that the stay

[24] Although *Swierkiewicz* was decided before the federal pleading standard was reinterpreted to the current *Iqbal/Twombly* standard in 2009, it retains relevance to OCAHO because OCAHO continues to adhere to a pleading standard similar, if not identical, to the federal pre-*Iqbal/Twombly* standard.

would "dissolve automatically at the conclusion of the administrative review, and upon conclusion of the review, the Chief ALJ shall reset all stayed deadlines, if appropriate." Order at 4. Accordingly, that stay is now dissolved, and the Chief ALJ should reset any stayed deadlines from the Order on Motion to Dismiss, if appropriate. Further, the Chief ALJ may also consider—either as an initial matter or in concert with resetting any stayed deadlines—whether to resolve the propriety of ordering Complainant to file a more definite statement. *See supra* Part V.C.

It is SO ORDERED, dated and entered this 22nd day of March, 2024.

_____
James McHenry
Chief Administrative Hearing Officer