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

April 10, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00059
SPLIT RAIL FENCE COMPANY, INC., Respondent.	)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS COUNT II

I. PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint in two counts against Split Rail Fence Company, Inc. (Split Rail, SRF, or the company), alleging that the company engaged in ten violations of the statute. After some preliminary motion practice, ICE filed an amended complaint alleging in Count I that the company hired Jaime Lopez Ramirez and failed to update and reverify his employment authorization on Form I-9 after his authorization document expired, and in Count II that the company continued to employ nine individuals knowing them to be unauthorized for employment in the United States. Split Rail filed an answer to the amended complaint and prehearing procedures were undertaken.

The parties submitted prehearing statements and participated in telephonic case management conferences. Discovery has been completed. Currently pending is Split Rail's motion to dismiss Count II of the complaint based on res judicata and collateral estoppel, two affirmative defenses not pleaded in the company's answer. Ordinarily a party's failure to plead an affirmative defense in its answer results in the waiver of that defense and its exclusion from the

case. *See generally,* 5 Wright & Miller, Federal Practice and Procedure, Civil § 1278 (3d ed. 2004). Here, however, the government's response made no objection to consideration of the defense, and the motion has been fully briefed by both parties. The motion is accordingly ready for resolution.[1]

II. BACKGROUND INFORMATION

Split Rail is a fencing company located in Littleton, Colorado. ICE served its first Notice of Inspection (NOI) on Split Rail on or about July 20, 2009. In the course of the investigation ICE issued the company a Notice of Suspect Documents (NSD) on September 11, 2009 advising the company that eighty-three of its current and former employees appeared to be unauthorized to work in the United States. The NSD instructed that unless the employees presented valid documents other than those previously produced they would be considered unauthorized, and that if the company continued to employ them without valid documents, liability for civil penalties might result. The notice advised that if the company or the employees believed the determination of unauthorized status was not correct, forensic auditor Mellissa Shanahan should be contacted immediately so that ICE could re-verify the information. No such contact was initiated.

This inspection culminated with the service of a Notice of Intent to Fine (NIF) on October 5, 2009, and an amended NIF on February 8, 2010. Count I of the amended NIF alleged that the company failed to prepare or present I-9 forms for sixteen named individuals, and Count II alleged that the company failed to ensure that I-9 forms were properly completed for fifty-five named individuals. No allegations were made in the NIF about the employees identified in the NSD. The parties reached a settlement with respect to the amended NIF and executed a Settlement Agreement on or about June 17, 2010.

Almost a year later, on June 15, 2011, ICE served the company with a second NOI, followed by a second NSD on August 30, 2011 containing the names of nine current employees and one former employee. Nine of the employees named on the second NSD, Isidro Ameca Aguilera, Aaron Apodaca, Ivan Dominguez, Fernando Morales Arroyo, Jesus Nunez, Juan Perez, Angel Quinones, Esteban Rodgriguez Campos, and Juan Sanchez, were individuals whose names also appeared on the previous NSD issued on September 11, 2009. The government subsequently served SRF with another NIF on September 26, 2011 alleging the same violations as charged in Counts I and II of the instant complaint. Split Rail filed a timely request for hearing and all conditions precedent to the institution of this proceeding have been satisfied.

[1] Also pending is the government's motion for summary decision, which will be addressed in a separate order.

III. THE INSTANT MOTION

The company moves to dismiss Count II of the complaint on the grounds that the doctrines of collateral estoppel and res judicata preclude consideration of the allegations in that count. While captioned as a motion to dismiss, the motion does not address the facial sufficiency of the complaint, but rather seeks judgment on the merits and refers to and relies upon matters outside the pleadings, notably its exhibits A, B, and C, which accompanied the filing.[2] When matters outside the pleadings are to be considered, a motion to dismiss may appropriately be converted to one for summary decision. *Barone v. Superior Washer & Gasket Corp.*, 10 OCAHO no. 1176, 2 (2013).[3] Generally, when a motion to dismiss is treated as a motion for summary decision, notice must be given to the nonmoving party in order to provide that party an opportunity to present relevant materials. *Id*. Here, because ICE's response in opposition to the motion also refers to materials not included in the pleadings, there is no need to issue a notice of the conversion or to provide additional time for presenting contravening evidence.

The company's motion asserts that upon its receipt of the first NSD it gave each employee written notice of ICE's determination and offered an opportunity for the employee to contest it. SRF asserts further that it all nine instances pertinent to this case the employees confirmed that they were authorized to work in the United States. Split Rail says its decision to continue their employment was known to ICE at the time and the government "never produced any definitive concrete evidence to meet its burden to prove that these nine individuals were unauthorized to work." The company says further that the parties executed a settlement agreement regarding the underlying inspection, and that the agreement constituted a final binding order on the merits of the charges and recites that payment was made in "full satisfaction of the Final Order and all claims set forth in the Notice."

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[2] Exhibit A) is a settlement agreement finalized June 17, 2010 , B) is ICE Form I-764 dated June 17, 2010, and C) is the NSD dated September 11, 2009.

[3] 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, 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 "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

SRF contends that the allegations in Count II are identical to those previously raised, that the evidence is the same, and that the two are based on a common nucleus of operative facts. The company argues that because no allegations were made in the 2010 amended NIF with respect to these nine employees, there were no violations found with respect to them. Had violations been found, they would have been included in the 2010 amended NIF.

In response, the government says first that Split Rail provided no legal support for its argument and identified no instance in which the doctrines of res judicata and collateral estoppel were applied to a settlement agreement. Second, ICE points to the requirements of Tenth Circuit jurisprudence that there must have been, inter alia, a prior suit in which the issues were actually litigated, and points out that the violations in Count II were never litigated or decided, nor were they even presented in the prior NIF or the settlement agreement. In addition, the government contends that there was no opportunity to litigate the instant allegations because they were discovered after the execution of the agreement and have continued every day thereafter. ICE says it had no reason to believe that SRF would simply ignore the instructions contained in the 2009 NSD with respect to these employees, and there is nothing in the settlement agreement that excuses the company's new and subsequent conduct. The agreement expressly states that the company is not relieved of "liability or penalties for any future violations of § 274a of the Act."

III. LEGAL STANDARD

Summary decision is appropriate where the pleadings and other materials show that there is no genuine issue as to any material fact, and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Federal Rule of Civil Procedure 56(c), which provides for summary judgment in federal cases. *See United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 2 (2010). A party seeking summary decision bears the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 2 (2010), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The doctrine of collateral estoppel (issue preclusion) bars a complainant from litigating an issue that has already been decided in a former proceeding. *Diarrassouba v. Medallion Fin. Corp.*, 9 OCAHO no. 1076, 9 (2001). For issue preclusion to apply, the parties must be identical, the issue in the current and former proceedings must be identical, and the party opposing collateral estoppel must have had a "full and fair opportunity to litigate the issue at the prior proceeding." *Id*. (citing *United States v. Power Operating Co., Inc.*, 3 OCAHO no. 580, 1781, 1809-11 (1993). The similar doctrine of res judicata (claim preclusion) bars a second attempt by a complainant to re-litigate the same the same cause of action between the same parties. *United States v. Alvarez-Suarez*, 4 OCAHO no. 655, 565, 572. (1993).

For collateral estoppel to foreclose an issue in an OCAHO case, the following elements must be present: 1) the issue decided in the prior adjudication is identical with the one presented in the later action; 2) there was a final judgment on the merits in the prior action; 3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior action. *Mackentire v. Ricoh Corp.*, 5 OCAHO no. 746, 191, 196 (1995). For the doctrine of res judicata to apply and bar the cause of action there must be 1) a final judgment on the merits in an earlier action; 2) identity of parties or privies in the two suits; and, 3) identity of the cause of action in both suits. *Wilkes v. Wyo. Dep't of Emp't Div. of Labor Standards*, 314 F.3d 501, 504 (10th Cir. 2002).

IV. DISCUSSION AND ANALYSIS

Split Rail cites to no case in which res judicata and collateral estoppel consequences were ever held to result from a settlement agreement. By the doctrines' own terms, the application of either or both is limited to final judgments resulting from adjudication. Notwithstanding the caption appearing on ICE's Form I-764 identifying the document as a "Final Order to Cease Violations and Pay Fines," that label does not convert the underlying ICE inspection to an adjudicative proceeding. There never was an adjudication on the merits of the allegations in the 2010 amended NIF.

It is undisputed that the parties in this action are the same parties involved in the 2010 NIF and the agreement to settle, but the remaining elements of either defense are unsatisfied. To begin with, a comparison of the 2010 NIF and the 2011 NIF reflects that there is no overlap between them, the issues presented are entirely different, and this case involves a wholly different cause of action. The settlement agreement resolved the allegations made in the 2010 NIF, which included only paperwork violations and no allegations about the knowing employment of unauthorized aliens. While the settlement agreement was dispositive of the violations alleged in the 2010 NIF, the violations alleged in the 2011 NIF at issue here are not the same. Second, the settlement agreement in no way constitutes an adjudication. Any attempt to relitigate the paperwork violations involved in that NIF might be barred by a defense of accord and satisfaction or release, but not by res judicata or collateral estoppel. The instant matter presents the question of whether the company violated 8 U.S.C. 274A(a)(2) by continuing to employ unauthorized aliens with knowledge of their unauthorized status. This not the same cause of action as was resolved by the settlement agreement, the issues are not identical, and the matter has not been previously litigated.

Finally, the settlement agreement expressly states that it does not relieve the company of liability or penalty for future violations. The allegations in Count II of the complaint in this matter are of

continuing violations occurring subsequent to the settlement agreement, and nothing in the agreement purports to license SRF to continue to violate the Act in perpetuity. The continued employment of the individuals named in Count II are "future" violations as contemplated by paragraph 12 of the settlement agreement because the continued employment of persons known to be unauthorized to work is a continuing violation for as long as the individual remains employed. *See United States v. Curran Eng'g Co., Inc.*, 7 OCAHO no. 975, 874, 894 (1997).

In short, because no knowing hire violations were included in the 2010 NIF or resolved in the settlement agreement, nor has there been any judgment on the merits with respect to them, collateral estoppel and res judicata do not preclude resolution of the allegations contained in Count II.

ORDER

Split Rail's respondent's motion to dismiss Count II of the complaint is denied.

SO ORDERED.

Dated and entered this 10th day of April, 2014.

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Ellen K. Thomas
Administrative Law Judge

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

April 24, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00059
SPLIT RAIL FENCE COMPANY, INC., Respondent.	)	

ERRATA

In the Order Denying Respondent's Motion to Dismiss Count II of the Complaint, issued on April 10, 2014:

1. On page 4, the section titled "Legal Standard" is numbered as section III. It will be changed to reflect that it is section IV.

2. On page 5, the section titled "Discussion and Analysis" is numbered as section IV. It will be changed to reflect that it is section V.

3. The second sentence of the fourth paragraph on page 4, reading: "For issue preclusion to apply, the parties must be identical, the issue in the current and former proceedings must be identical, and the party opposing collateral estoppel must have had a "full and fair opportunity to litigate the issue at the prior proceeding." *Id*. (citing United States v. Power Operating Co., Inc., 3 OCAHO no. 580, 1781, 1809-11 (1993)" is stricken.

   The following is inserted in its place: "For issue preclusion to apply, the parties must be identical, the issue in the current and former proceedings must be identical, and the party opposing collateral estoppel must have had a "full and fair opportunity to litigate the issue at the prior proceeding." *Id*. (citing United States v. Power Operating Co., Inc., 3 OCAHO no. 580, 1781, 1809-11 (1993))."

4. The last sentence of the fourth paragraph on page 4, reading: "The similar doctrine of res judicata (claim preclusion) bars a second attempt by a complainant to re-litigate the same the same cause of action between the same parties," is stricken.

The following is inserted in its place: "The similar doctrine of res judicata (claim preclusion) bars a second attempt by a complainant to re-litigate the same cause of action between the same parties," is stricken.

5. The final citation of the fourth paragraph on page 4, reading: "*United States v. Alvarez-Suarez*, 4 OCAHO no. 655, 565, 572. (1993)," is stricken.

   The following is inserted in its place: "*United States v. Alvarez-Suarez*, 4 OCAHO no. 655, 565, 572 (1993)."

SO ORDERED.

Dated and entered this 24th day of April, 2014.

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Ellen K. Thomas
Administrative Law Judge