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

October 2, 2026

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2026A00054
SUMMIT INDUSTRIAL CONSTRUCTION, LLC, Respondent.	)	

Appearances: Conor F. McNulty, Esq., for Complainant
Stephanie C. Generotti, Esq., for Respondent
Leigh Ganchan Esq., for Respondent

ORDER GRANTING MOTION FOR A MORE DEFINITE STATEMENT & ORDER SUMMARIZING PREHEARING CONFERENCE

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a.

The Court received Respondent's Answer and a Motion for More Definite Statement (Count I). For the reasons outlined below, the Motion is GRANTED, and Complainant is ORDERED to file a more definite statement (as further explained in this Order). Based on the issues outlined in the Motion and Response, and because the Court received an Answer, it deemed it prudent to set an Initial Prehearing Conference, which is also summarized in this Order.

I. PROCEDURAL HISTORY

On July 9, 2026, Complainant filed its Complaint against Summit Industrial Construction. Count I alleges some portion of the Form I-9 was not properly completed for 637 named employees. Compl. 3-15. Specifically, the Complaint alleges that Respondent had a "non-compliant audit trail." *Id.* Count II alleges no Form I-9 was prepared and/or presented for five named employees.

Compl 17. Count III alleges Respondent "knowingly continued to employ" two named individuals with a "Section 3 violation." Compl. 18.

On August 7, 2026, Respondent's "Statutory Agent" received the Notice of Case Assignment and a copy of the Complaint.

On September 3, 2026, Respondent timely filed its Answer (as to Count II and Count III). *See* 28 C.F.R. §§ 68.3(b), 68.9(a).[1]

On September 3, 2026, Respondent filed a "Motion for a More Definite Statement as to Count I." Respondent argues for "a more definite statement as to the allegations in Count I in order to prepare a meaningful [Answer to the Count]." Motion 2.

On September 14, 2026, Complainant filed its Response to the Motion.

On September 24, 2026, at the direction of the undersigned, the Court staff contacted the parties via email to inform them: "The Judge would like to set an initial prehearing conference, with an anticipated discussion of the Motion for a More Definite Statement. The Judge would like to know whether parties have any periods of unavailability on September 30, October 1, and 2. Please respond by COB if possible. Failure to timely respond to this email may mean she does not take your availability into account when she issues the Order setting the conference."

Respondent provided availability. Complainant did not respond to the correspondence. After waiting for Complainant's response and receiving none, the Court set the initial prehearing conference around Respondent counsel's stated availability – for October 1, 2026 at 1:00pm ET.

On September 28, 2026, Court staff, at the direction of the undersigned, contacted the parties via email to inform them "The Initial Prehearing Conference in this matter is scheduled for Thursday, October 1, 2026, at 1:00pm ET."

On September 30, 2026, the Court memorialized the initial prehearing conference date and time via an Order,[2] which was served on the parties via the OCAHO Portal. Note that OCAHO's Portal system sends an automatic email to the parties when an Order is uploaded. While no response was

[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024).

[2] The substance of the Order was as follows:

> This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. On July 9, 2026, Complainant filed its Complaint against Summit Industrial Construction, LLC. On August 7, 2026, a "Statutory Agent" received the Notice of Case Assignment and copy of the Complaint. On September 3, 2026, Respondent timely filed its Answer (as to Count II and Count III). The Court will hold an Initial Prehearing Conference on October 1, 2026. Dial-in information shall be provided in separate correspondence from the Court.

Order Setting Initial Prehearing Conference, September 30, 2026.

requested or required based on the content of the Order, it is worth noting Complainant did not contact the Court regarding attendance or availability.

On October 1, 2026, the Court held the Initial Prehearing Conference. Complainant did not attend the Conference.

II. COUNT I OF THE COMPLAINT

Count I of the Complaint alleges Respondent "failed to ensure that employee properly completed Section 1 and/or failed to properly complete Section 2 or 3 of the… Form I-9…" Compl. 3.

The Count then goes on to state: "Respondent hired the following individuals for employment in the United States… [and then provides a numbered list of 637 employees (full name) with "non-compliant audit trail" written next to each name.]." Compl. 3-15.

The Complaint then "charge[s]… Respondent [with a] violation of §274A(a)(1)(B)…. which renders it unlawful… for… an entity… to hire… an individual without complying with the requirements of §274A(b) of the INA." Compl. 16.

Complainant recommends each alleged violation be assessed at $2,553.60 for each violation, for a total civil penalty (for this Count) of $1,626,643,20. *Id.*

III. RESPONDENT'S POSITION

Respondent argues that, while the Complaint may meet OCAHO's pleading standard, the contents of the Complaint (specifically, Count I) are too vague and ambiguous in their present form.[3]

> OCAHO proceedings are conducted under 28 C.F.R. Part 68, which closely parallels the Federal Rules of Civil Procedure. Where its own rules do not address a procedural question, OCAHO looks to the Federal Rules as a "general guideline." 28 C.F.R. § 68.1; *United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475g, 21 (2024). Under that principle, FRCP 12(e) authorizes a party to "move for a more definite statement of a pleading to which a responsive pleading is allowed

[3] Respondent lodges an argument noting an "internal contradiction" between Count I label and its contents:

> These are substantive I-9 completion charges, that is, they are allegations that individual employees' Forms I-9 were improperly completed. Both the heading and the statutory citation point to paperwork violations in the content of individual employees' forms. Yet, the sole factual description for all 637 individuals is "Non-compliant audit trail" a term that, under the regulations, denotes system-level electronic metadata. *See* 8 C.F.R. § 274a.2(e)(8)(i); *KLJ Leasing*, 16 OCAHO no. 1446c at 4, 23. The Complaint's legal theory and its factual description are irreconcilably at odds.

Motion 5.

> but which is so vague or ambiguous that the party cannot reasonably prepare a response." *Id.* (*quoting* Fed. R. Civ. P. 12(e)).
>
> Such motions are available in OCAHO proceedings: "nothing in OCAHO's rules appears to . . . preclude[] [a respondent] from seeking a more definite statement." *Id.* at 21, 22. And where a complaint is vague yet meets the threshold pleading standard, "the appropriate remedy is typically a more definite statement rather than dismissal." *Id.* at 22 (*citing* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (4th ed.)); *see also Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002) ("[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 . . . ."); *Harman v. Valley Nat'l Bank of Ariz.,* 339 F.2d 564, 567 (9th Cir. 1964) ("'[M]ere 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.'" (citation omitted)).

Motion 2-3.

With this standard in mind, Respondent argues merely describing instances of a "non-compliant audit trail," without further description, is impermissibly vague. Respondent references OCAHO precedential decisions in noting audit trails are a "system-level obligation directed at the electronic storage platform." Motion 4 (*citing United States v. KLJ Leasing, LLC,* 16 OCAHO no. 1446c, 4 (2025) (Audit trail records are "effectively metadata for the Forms I-9s, creating a log of when they were created, who accessed them, when they did so, what modifications were made, and by whom.")

Respondent also notes:

> An audit trail "serves to verify the 'authenticity and integrity' of the Forms I-9, in particular the Sections 1 and 2 signatures, by verifying who accessed the computer system when these signatures are completed." [*KLJ Leasing, LLC*] at 23. Failure to timely present audit trails is a *separate category* of substantive violation, distinct from failures to complete individual I-9 sections. *See id.* at 23-24. ("[A]n untimely-presented audit trail is a violation of 8 C.F.R. §§ 274a.2(b)(2)(ii), (e)(8), (f), and 8 U.S.C. §§ 1324a(a)(1)(B), (b)(3) in the same way as an untimely-presented paper Form I-9.").

Motion 4.

Respondent characterizes Complainant's regulations at 8 C.F.R. § 274a.2 as "impos[ing] dozens of discrete employer obligations, any of which could produce what Complainant labels a 'non-compliant audit trail.'" Motion 5. "Complaint's blanket characterization of 637 individuals as having a 'non-compliant audit trail' could refer to any of the following distinct categories of deficiency (among others) [Respondent then lists 19 different possible deficiencies]." Motion 6.

Respondent then posits that, absent a more definite statement, it would be in an unacceptably disparate position in discovery, and the Court here should hold Complainant to the same standards to which it was in the *Walmart* case:

> Requiring parties to "undertake extensive and burdensome discovery in order to narrow legal issues which could more easily be handled through a more definite statement appears self-evidently injudicious." *Walmart*, 17 OCAHO no. 1475g at 21 (*citing Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1126–28 (11th Cir. 2014)). "'[C]ivil pleadings are supposed to mark the boundaries for discovery; discovery is not supposed to substitute for definite pleading.'" *Id.* (quoting *Paylor*, 748 F.3d at 1126–28).

Motion 7.

IV. COMPLAINANT'S POSITION

Complainant argues it "provides sufficient notice of the charges, and the 'audit trail' provided by Respondent is demonstrably non-compliant with the governing regulations." Response 2. According to Complainant, "Respondent's argument that 'non-compliant audit trail' is not a recognized term of art ignores the plain language of 8 C.F.R. § 274a.2(e)(8)(i). An audit trail must be a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time." Response 2.

Complainant then specifies:

> The data provided by Respondent is a static Excel spreadsheet—a mere snapshot of field values, not an audit trail. The produced records lack:
>
> 1. **Access logs**: records identifying who accessed the record.
> 2. **Action logs**: records of what actions were performed, such as when a record was created, modified, altered, or corrected.
> 3. **Lifecycle metadata**: the "secure and permanent record" of the date and identity of each individual who modified or updated the record, as mandated by 8 C.F.R. § 274a.2(g)(1)(iv).
> 4. **Attestation integrity**: a method to acknowledge that the attestation to be signed has been read by the signatory. *See* 8 C.F.R. § 274a.2(h)(1).

Response 2.

Complainant argues: "Respondent possesses its own electronic system and is in the best position to know how its system creates, stores, and logs these records." Response 3. Complainant concludes: "Should this Court determine that the Complaint requires further clarification, Complainant respectfully requests the opportunity to file an amended complaint or to provide a more definite statement." Response 4.

V. LAW & ANALYSIS

A. Law – Pleading Standards & Responsive Pleadings

The issue raised in the Motion is, at its core, one of pleadings sufficiency. It is then, only prudent, to begin the analysis with what is minimally required in the forum.

OCAHO's Rules require that a complaint contain (1) "A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated"; (2) "The alleged violations of law, with a ***clear*** and concise statement of facts ***for each*** violation alleged to have occurred"; and (3) "A short statement containing the remedies and/or sanctions sought to be imposed against the respondent." 28 C.F.R. § 68.7(b)(1)–(4) (emphasis added).

As the Court recently explained:

> OCAHO precedential case law provides further context as to what a "clear and concise statement of facts" means[4] in cases arising under § 1324a. *See United States v. Walmart Inc. (Bethlehem),* 17 OCAHO no. 1475g (2024). The Chief Administrative Hearing Officer (CAHO) concluded "the bulk of the [complaint met] OCAHO's pleading standard [in that case]." *Id.* at 15. There, Complainant put forth "clear and concise statement of facts" when it included a "table which lists, for each count, the 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…. [along with the violated] statutory provision." The CAHO thus concluded "[a]lthough 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 [Complaint]—at this stage of the proceeding." *Id*. at 16.

United States v. Talis Construction Corp., 22 OCAHO no. 1681, 3 (2025).

When a Complaint meets the pleading standard, the regulations require the Respondent to file an answer (or face default). 28 C.F.R. § 68.9(a)-(b). In filing an answer, the Respondent must include:

> A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of lack of information shall have the effect of a denial (any allegation not expressly denied

[4] As the Chief Administrative Hearing Officer explained in his Order, the "sole dispute [before him] was whether the [complaint] contained '[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred.'" *United States v. Walmart Inc. (Bethlehem),* 17 OCAHO no. 1475g 14 (2024).

> shall be deemed to be admitted); and… a statement of the facts supporting each affirmative defense.[5]

28 C.F.R. § 68.9(c)(1)-(2).

B. Law – More Definite Statement

When evaluating pleadings-related issues, the Court may look to the Federal Rules as a "general guideline." 28 C.F.R. § 68.1. The Federal Rule at issue here is Rule 12(e) "Motion For a More Definite Statement:" [6]

> 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. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If

[5] While there may be other affirmative defenses available, the Court notes, at a minimum, a Respondent may seek to lodge a "good faith" affirmative defense, which is expressly made available in the statute. *See* 8 U.S.C. § 1324a(b)(6).

As the Court held previously:

> A narrow but complete affirmative defense may be available for certain technical or procedural paperwork violations where an employer made a good faith attempt to comply with a particular recordkeeping requirement. 8 U.S.C. § 1324a(b)(6). Congress added this "good faith" defense, colloquially known as the "Bono Amendment," in 1996. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 411, 110 Stat. 3009 (Sept. 30, 1996). The provision says with respect to certain technical or procedural violations, that an employer must be given a period of not less than ten days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A), (B).

United States v. International Packaging, Inc., 12 OCAHO no. 1275 (2016).

[6] The difference between Rule 12(e) and Rule 12(b)(6) can seem subtle in certain circumstances, but it is meaningful. When a pleading is not drafted with clarity and precision, either (or both) Rules may be triggered. As is the case here, the Complaint is, at a minimum, vague and ambiguous, all but inviting this kind of motion practice. *See e.g. United States v. Talis Construction Corp.*, 22 OCAHO no. 1681, 3, note 4 (2025).

Respondent presumably opted to utilize Rule 12(e) (and not Rule 12(b)(6)) because it may have concluded Complainant had stated a claim upon which relief can be granted, but the manner in which it was pled left Respondent in a position where it could not mount an answer. Because the moving party has not requested an analysis of Count I under Rule 12(b)(6), the Court will decline to provide one, other than to note that insufficiently pled complaints may result in amendment to resolve the issue, whereas here, resolution comes in the form of a required filing by Complainant providing a more definite statement (i.e. additional information). *See United States v. RS&L Inc., D/B/A Total Employment And Management (TEAM)*, 13 OCAHO no. 1333 (2019); *see also United States v. KLJ Leasing, LLC*, 16 OCAHO no. 1446 (2022); *see also United States v. Walmart Inc. (Bethlehem)*, 17 OCAHO no. 1475a (2023).

> the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

Fed. R. Civ. P. 12(e) (emphasis added).

As Respondent notes, "if a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement. . . ." Motion 3; *citing Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

"Courts have 'much discretion[7] to grant or deny motions for more definite statements as may be appropriate in the particular case.'" *Hernandez v. Bank of Am., N.A.*, No. 1:25-cv-00710-KES-HBK, 2026 U.S. Dist. LEXIS 106845, at *5 (E.D. Cal. May 14, 2026) (quoting *Renfrow v. BDP Innovative Chemicals Co.*, No. CV-14-01183-PHX-GMS, 2015 U.S. Dist. LEXIS 188456, at *2-3 (D. Ariz. May 20, 2015) (internal citation omitted)).

"The proper test in evaluating a motion under Rule 12(e) is whether the complaint provides the defendant with a sufficient basis to frame his responsive pleadings." *Fed. Sav. & Loan Ins. Corp. v. Musacchio*, 695 F. Supp. 1053, 1060 (N.D. Cal. 1988).

C. Law – Audit Trail

To consider whether this Respondent could frame a responsive pleading, it is first helpful to understand what an "audit trail"[8] violation is (in the context of an alleged 8 U.S.C. § 1324a(b)(3) violation (which provides that an employer "must retain a paper, microfiche, microfilm, or electronic version of the [Form I-9] and make it available for inspection…").)

As the Court previously explained:

> Opting to store Form I-9 data electronically carries with it obligations to maintain the data in a manner that permits one to see when changes were made to the forms, and by whom. See, e.g., 8 C.F.R. § 274a.2(f)(1) ("A person or entity who chooses to complete and/or retain Forms I 9 electronically must maintain and make available to an agency of the United States upon request documentation of the business processes that . . . [e]stablish the authenticity and integrity of the Forms I-9, such as audit trails.")….

[7] Indeed, declining to resolve issues of vagueness or ambiguity simply because the parties have access to discovery later all but invites the prospect of a more protracted and likely litigious discovery phase. "Although Defendant may eventually obtain this information through discovery, forcing the parties to proceed… would undercut Rule 12(e)'s purpose and conflict with Rule 1's mandate 'to secure the just, speedy, and inexpensive determination of every action.'" *Hernandez*, 2026 U.S. Dist. LEXIS 106845, at *9 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)).

[8] "Generally, an audit trail is a record showing who has accessed a computer system and the actions performed within or on the computer system during a given period of time…" 8 C.F.R. § 274a.2(e)(8).

> The data retention obligations come from 8 C.F.R. § 274a.2(f)(1)–(2), which directs that if an employer elects to complete or retain copies of Forms I-9 electronically, they must retain and make available to DHS the process they used to: 1) create the retained Form I-9, 2) modify or maintain the form, and 3) establish the authenticity and integrity of the form. The regulation directs that failure to maintain documentation showing its process for validating the data is a violation of the statute.

United States v. KLJ Leasing, LLC, 16 OCAHO no. 1446c, 22 (2025).

D. Analysis & Order – Count I Label

Complainant is ORDERED to provide a more definite statement as it relates to the Count label.

Complainant must explain how the "non-compliant audit trail" relates to the label (e.g. is it that the insufficiency pertains to completion of one of the sections of the Form I-9 (and if so, which one), or is it that the insufficiency of the audit trail is more systemic in nature). Complainant is encouraged to consider the language of its own regulations it identified in its Response.

Note that, if the Complainant revises or changes the Count label, this would be an amendment.

E. Analysis & Order – Count I Content

Next, Complainant is ORDERED to provide a more definite statement explaining why the audit trail is "non-compliant" for each named employee.

Respondent asserts the "non-compliant audit trail" descriptor places it in a position where it is unable to describe, with requisite factual specificity, whether it achieved technical compliance with the statute. There is undoubtedly some variane in how any given company (or electronic tool) creates, maintains, or produces for inspection, its electronic "audit trail." Additionally, the relative complexity of the regulations surrounding "audit trail" allegations,[9] can make it more difficult to divine which portion is at issue. For these reasons, the Court concludes Respondent's position is a reasonable one. Respondent is entitled to this additional information so it can assess whether it can lodge an affirmative defense.

VI. SUMMARY OF PREHEARING CONFERENCE

The Court delayed the start of the conference for ten minutes as a courtesy to Complainant's counsel; however, after ten minutes the Court began the conference without counsel for Complainant.

[9] By this, the Court bears in mind the simplicity of completing the standardized two-page Form I-9 in hard copy and in person (and as outlined in the Form instructions) against the landscape of choices surrounding electronic systems to complete, store, and produce the Forms.

The Court first discussed the Motion for a More Definite Statement and the Response. The Court explained it had already determined the Motion was to be granted,[10] but desired an opportunity to hear from the parties on logistical issues surrounding the more definite statement. To that end, the Court next referenced Federal Rule of Civil Procedure 12(e), which states: "If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order."

Because the Court uses the Federal Rules as a guideline, it informed the parties the timeline identified in the Rule would operate as a default. The Court then invited any party who attended the conference to opine on this issue. Respondent, who did attend, relayed it had no issue with the 14-day timeframe provided in the Rule. Complainant, who did not attend the conference, appears to have waived his opportunity[11] to be heard.

Continuing to reference Rule 12(e), the Court also explained that a consequence outlined in the Rule for failure to obey an order for a more definite statement is "striking" the pleading, which, in this case and forum, could mean dismissing with or without prejudice Count I. The Court highlighted this portion of the Rule to ensure all parties were on notice of this possibility (and thus, underscored the importance of timely complying with an Order for a More Definite Statement). Respondent desired an opportunity to be heard at the conference on this point. Specifically, Respondent explained that, should this scenario arise, the Court should consider dismissal with prejudice. The Court indicated it would take Respondent's position under advisement should the case find itself in such a posture. Complainant, who did not attend the conference, appears to have waived his opportunity[12] to be heard.

The Court next explained that, while Complainant would be ordered to file a More Definite Statement, it could satisfy the Court's order by filing an amended complaint to resolve the issues identified in the Order. The Court noted both Rule 15 and OCAHO precedent require the Court favor granting leave to amend in such circumstances, as it can be an appropriate remedy for deficiencies in a complaint. In providing this additional guidance surrounding amendment as an alternative, the Court considered the Response filing provided by Complainant which identified amendment as an alternative as well.

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[10] The Court also explained the full rationale for that decision would be memorialized in this Order.

[11] Absent additional information surrounding Complainant counsel's absence, he has waived his opportunity to be heard. Complainant is not precluded from submitting a filing explaining his lack of attendance. If Complainant can demonstrate good cause for his failure to appear, he may be heard on this matter. Such a filing must be submitted within two days of the date this Order is issued to be considered timely.

[12] Absent additional information surrounding Complainant counsel's absence, he has waived his opportunity to be heard. Complainant is not precluded from submitting a filing explaining his lack of attendance. If Complainant can demonstrate good cause for his failure to appear, he may be heard on this matter. Such a filing must be submitted within two days of the date this Order is issued to be considered timely.

Staying on amendment versus more definite statement, the Court clarified that a more definite statement would provide additional information but not change the underlying legal theory of an allegation. By contrast, an amended complaint may both provide additional information and change the underlying legal theory of an allegation. The Court then explained that either could resolve the deficiency in the pleadings, but each option presents different deadlines and options in response.

The Court set the following deadlines:

> Complainant is ORDERED to file a satisfactory "More Definite Statement Pursuant to Rule 12(e)" within 14 days of the date of this Order. Failure to do so may result in Count I being struck from the pleading (with or without prejudice).
>
> Complainant may satisfy this order by alternatively filing an amended complaint within 14 days of the date of this Order.
>
> If a "More Definite Statement Pursuant to Rule 12(e)" is filed, Respondent shall have 10 days to submit a filing addressing the "More Definite Statement Pursuant to Rule 12(e)." After the Court resolves any issues pertaining to the "More Definite Statement Pursuant to Rule 12(e)" it will provide a deadline to file an answer to Count I.
>
> If an amended complaint is filed, Respondent shall have 30 days to provide an amended answer, or file any motions it deems appropriate.

Finally, the Court informed the parties it was considering a requirement of Initial Disclosures in this case because of the potential discovery complexity surrounding an "audit trail" allegation.

In an effort to assist the parties in preparing for that prospect, the Court indicated it would preview its Initial Disclosures instructions (should they be ordered at a later date.)

Those instructions (presented in italics to highlight they are merely a preview and not required at this juncture) are as follows:

The Initial Disclosures required are modeled on (but are not identical to) Federal Rule of Civil Procedure 26(a)(1)[13] *and Federal Rule of Civil Procedure 26(a)(2).*[14] *The text of each Rule is provided in a footnote below for the parties' convenience.*

Parties shall provide:

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[13] The Federal Rules of Civil Procedure (including the referenced rule here) are available at: https://www.uscourts.gov/file/78323/download. The text of the Rule 26(a)(1) is provided below (note that, as explained in this Order, disclosure of 26(a)(1)(A)(iv) information is not to be required):

> (1) Initial Disclosure.
> (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ***ordered by the court***, a party must, without awaiting a discovery request, provide to the other parties:
> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
> (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
> (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based…; and
> (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Fed. R. Civ. P. 26(a)(1)(A) (emphasis added).

[14] The text of Rule 26(a)(2) is provided below:

> (2) Disclosure of Expert Testimony.
> (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
> (B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ***ordered by the court***, this disclosure must be accompanied by a written report—prepared and signed by the witness…
> (C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ***ordered by the court***, if the witness is not required to provide a written report, this disclosure must state: (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.

Fed. R. Civ. P. 26(a)(1)(B) (emphasis added).

1. *The name, address, and telephone number of each individual who may have discoverable information, along with the subject of that information. This includes any individual and subject that would or could support (for Complainant) his claim or (for Respondent) its "defense."*[15]
2. *A copy of each document, or the description and location of each document (which includes electronically stored information or tangible things), that the disclosing party has in its possession, custody or control that would or could support (for Complainant) his claim or (for Respondent) its "defense."*[16]
3. *A computation of damages claimed by the disclosing party. (Stated a different way, if the Complainant is seeking monetary damages, he must disclose how he calculated his proposed monetary damages.) That party must make available any document or evidentiary material,*[17] *on which the computation is based, available for inspection.*
4. *The identity of an individual who may testify as a witness at hearing (or provide an affidavit in summary decision) when that individual has "expertise"*[18] *in a certain topic or area (whether that witness is providing factual information or an opinion) and just a summary of the topic areas of expertise (no written reports by or about this individual and/or the topic is/ are required).*

Parties may stipulate to the modification of this guidance.[19] *Such an agreement must be memorialized in writing and signed by both parties. It need not be provided to the Court.*

Parties must provide disclosures in writing and must sign the disclosures. The signature constitutes a certification that the disclosure is complete and accurate. See Fed. R. Civ. P. 26(g)(1).

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[15] Unless either side determines the identity and information are for impeachment purposes.

[16] Unless either side determines the identity and information are for impeachment purposes.

[17] Provided it is not privileged or otherwise protected.

[18] Expertise, in this context, is defined as someone whose "scientific, technical, or other specialized knowledge will help [the judge] understand [other evidence presented in the case]." Fed. R. Evid. 702(a).

Additionally, some witnesses with expertise may be able to provide an opinion based on their expertise under certain conditions – the identity of such an individual should also be disclosed. *See* Fed. R. Evid. 703.

Some individuals with expertise who testify at a hearing may provide both facts surrounding the underlying claim at issue (i.e. in a non-selection case, facts pertaining to the hiring process and the position at issue), and they may also have helpful expertise about a technical topic. Even in such an instance, Federal Rule of Evidence 702 is likely triggered and disclosure is required. *See generally Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011).

[19] More germane to the likely issues here, the guidance could apply to an interviewer, hiring manager, or candidate for a technical position. Again, parties should carefully consider the Court's guidance when they make their initial disclosures.

While not expressly contained in the Court's regulations at 28 C.F.R. part 68, the Court places the parties on notice it shall treat these disclosures as part and parcel of the discovery process in this case. The regulations at 28 C.F.R. § 68.18(d)(3) vest in the Administrative Law Judge the authority to impose by order a duty to supplement responses. To that end, the Court imposes through this order a duty to supplement these disclosures.

Should questions or disputes arise regarding initial disclosures, the parties should meet and confer in an attempt to resolve them, with such efforts concluding before the prehearing conference.

Finally, parties should consider themselves on notice that, if it is shown later they failed to disclose information, they may be precluded from using that information at a later stage of the proceedings (or other consequences as appropriate). See generally Fed. R. Civ. P. 37(c).

Parties shall not commence formal discovery (i.e. propounding discovery on the opposing side) at this time, although they are free to informally confer about the case.

SO ORDERED.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge