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

June 28, 2018

THE UNITED STATES OF AMERICA, Complainant, v. TECHNICAL MARINE MAINTENANCE TEXAS, LLC, AND GULF COAST WORKFORCE, LLC, Respondents.	)	8 U.S.C. § 1324b Proceeding OCAHO Case No. 17B00089

ORDER GRANTING COMPLAINANT'S MOTIONS TO COMPEL AND IMPOSING SANCTIONS, GRANTING COMPLAINANT'S MOTION TO STAY EXPERT WITNESS REPORT DEADLINES, AND CONDITIONALLY GRANTING RESPONDENTS' COUNSEL'S MOTION TO WITHDRAW

I. INTRODUCTION

This case arises under the anti-discrimination provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b (2012). Pending are Complainant's Motion to Compel, Renewed Motion to Compel, Motion to Deem, and Motion to Stay a June 29, 2018 expert witness report deadline. Also pending is Respondents' counsel's Motion to Withdraw based on his clients' failure to cooperate and comply with directives from the undersigned.

For the reasons set forth herein, Complainant's Motions to Compel and Motion to Deem are **GRANTED. IT IS ORDERED** that liability be assessed and adverse inferences be drawn against Respondents under 8 U.S.C. § 1324b as sanctions for repeatedly failing to obey judicial directives in this matter. Respondents' counsel's Motion to Withdraw is **CONDITIONALLY GRANTED**.

II. PROCEDURAL AND FACTUAL HISTORY

A. Failure to Comply with Preliminary Investigatory Subpoenas

Prior to the present action, Technical Marine Maintenance Texas, LLC (TMM-TX) and Gulf Coast Workforce, LLC (GCW) (hereinafter jointly identified as Respondents) failed to comply with obligations during an investigation conducted by the Immigrant and Employee Rights Section of the Civil Rights Division of the U.S. Department of Justice (IER) pursuant to 8 U.S.C. § 1324b(a)(6). The administrative record indicates that IER was authorized by this administrative tribunal to seek enforcement of two subpoenas issued against TMM-TX and GCW. *See* OCAHO Case 17S00031 and 17S00040. In both cases, Respondents' failure to comply with the subpoenas resulted in orders authorizing enforcement in the United States District Court.

1. In re Investigation of Technical Marine Maintenance Texas, LLC, TMM-TX 17S00031

On December 19, 2016, Administrative Law Judge (ALJ) James McHenry, issued subpoena 17S00031 to TMM-TX. The Respondent filed a Petition to Revoke and argued that subpoena 17S00031 improperly sought information against GCW. Dec. 19, 2016 Response to Subpoena 17S00031. In its reply, IER argued that enforcement of the subpoena was necessary "to put an end to Respondent's efforts to frustrate [IER's] enforcement of the anti-discrimination provision of the Immigration and Nationality Act, 8 U.S.C § 1324b, by imposing unnecessary delays and refusing to comply with less formal information requests." Jan. 9, 2017 IER Response in Opposition to Petition to Revoke Investigatory Subpoena at 2. ALJ McHenry subsequently approved IER's motion to enforce the subpoena, finding that "TMM[-TX] has refused to comply with the subpoena, and IER's application to seek enforcement of the subpoena will be granted." Mar. 6, 2017 Order Granting IER's Application to Seek Enforcement of Subpoena 17S00031 at 2. The administrative record does not indicate whether IER filed a motion for enforcement of 17S00031 in the United States District Court.

2. Subpoena 17S00040, Gulf Coast Workforce, LLC (GCW)

On January 5, 2017, ALJ McHenry also approved administrative subpoena 17S00040, which directed GCW to provide the information sought by IER. GCW opposed the administrative subpoena arguing that it improperly sought to connect GCW to the activities of TMM-TX. Jan. 8, 2017 Response to Subpoena 17S00040.[1] On January 31, 2017, ALJ McHenry rejected GCW's arguments and found that the "information requested by IER is specific, definite, and based on documentary support, appears relevant to the investigation." Jan. 31, 2017 Order, 17S00040. On July 13, 2017, after ALJ McHenry left this office, the undersigned heard this matter and found that GCW's refusal to comply with the subpoena was unjustified. July 13, 2017 Order Granting IER's Application to Seek Enforcement of Subpoena 17S00040 at 2. The

[1] The caption for In re Investigation of Technical Marine Maintenance Texas is the same for both 17S00040 and 17S00031.

administrative record does not indicate whether IER filed a motion for enforcement of 17S00040 in the United States District Court.

B. Background, 17B00089

On July 26, 2017, Complainant IER filed a complaint against TMM-TX and GCW. The complaint alleges that the Respondents engaged in an unfair immigration-related employment practice. OCAHO Compl. at 2-3. The complaint also alleges that Respondents discriminated against job applicants and newly hired employees on the basis of citizenship by requesting more or different documents than were required to prove work eligibility in violation of 8 U.S.C. § 1324b(a)(6). *Id.* at 1, 3.

On July 28, 2017, the Office of the Chief Administrative Hearing Officer (OCAHO) served both Respondents individually with a notice of case assignment and the complaint by USPS Certified Mail, tracking number 7013-0600-0001-3782-1889 and 7013-0600-0001-3782-1872 in addition to service through counsel. On September 5, 2017, Respondents filed an answer denying liability.

On September 13, 2017, IER sought discovery pursuant to 28 C.F.R. §§ 68.19 and 20 and then conducted a discovery conference on September 25, 2017. Renewed Motion Ex.'s A, B, C, and D. On October 6, 2017, the undersigned issued an Order for Prehearing Statements providing, inter alia, that "[t]he parties are free to begin their discovery at any time." Order for Prehearing Statements (Prehearing Order) at 2. The order also indicated that the parties shall make initial disclosures. *Id.* The parties were further advised that proceedings in this matter are governed by the provisions of 28 C.F.R. pt. 68 (2017). The Respondents were directly served with the Prehearing Order on October 6, 2017, and were also served through counsel.

On November 7 and 27, 2017, respectively, Complainant IER and Respondents filed a prehearing statement.

C. Failure to Comply with Discovery Orders

On November 1, 2017, IER filed an initial Motion to Compel Discovery and asserted that Respondents failure to respond to interrogatories and requests for production of documents was unjustified pursuant to 28 C.F .R. §§ 68.19 and 20.

On January 4, 2018, the undersigned convened a telephonic conference with counsel to discuss scheduling issues and Complainant's Motion to Compel. On that call, Complainant again asserted that Respondents failed to respond to the Complainant's request for interrogatories and production of documents. The undersigned then went over and allowed Complainant to explain each of the discovery requests that Complainant sought. Respondents, through counsel Rusty Savoie, agreed to provide responses to Complainant's discovery requests by January 18, 2018, as

ordered by the undersigned. On January 8, 2018, counsel Savoie served Respondents, OCAHO, and IER with a Notice of Intent to Withdraw, as Respondents' counsel.

On January 10, 2018, the undersigned issued an order memorializing scheduling deadlines set forth in the telephonic conference call, and set a date for the parties to meet and confer over discovery. Jan. 10, 2018 Order and Memorandum of Telephonic Prehearing Conference (Telephonic Order). Respondents were reminded that continued failure to comply with discovery obligations may result in sanctions under 28 C.F.R. § 68.23(c). *See id*. at 1 (citing *Ulysses Inc*., 2 OCAHO no. 390, at 735-36) (discussion of various sanctions available on a motion to compel). The Telephonic Order was served on each Respondent in addition to service on counsel Savoie. On January 19, 2018, counsel Savoie filed a Motion to Withdraw, indicating that he "finds it necessary to withdraw as a result of Respondents' consistent refusal to accept advice and abide by the rules of this court and obligations to actively participate in the discovery needs of this case." Jan. 19, 2018 Motion to Withdraw at ¶4. Under OCAHO rule 28 C.F.R. § 68.33(g), the withdrawal of counsel is not effective until approved by order of the ALJ.

On January 25, 2018, Complainant filed a Renewed Motion and For Sanctions (Renewed Motion). The Renewed Motion confirms that the parties met and conferred about discovery on January 23, 2018, but that Respondent did not intend on complying with the discovery obligations and orders. IER now seeks a liability finding for Respondents' failure to comply. In the alternative, the Renewed Motion reasserts the request for adverse inferences as a sanction for the continued failure to respond. Respondents were directly served with Complainant's Renewed Motion in addition to service through counsel Savoie.

On January 29, 2018, IER filed a Response to opposing counsel's Motion to Withdraw and took no position on the motion, but did request that the undersigned authorize the United States to continue filing documents electronically. Jan. 29, 2018 Complainant's Response to Attorney Rusty Savoie's Motion to Withdraw at 2. Respondents were directly served with Complainant's Response in addition to service through counsel Savoie.

To date, Respondents have not provided discovery pursuant to 28 C.F.R. §§ 68.18, 19, and 20, have not responded to the January 18, 2018 deadline set by the undersigned, and have not responded to the Complainant's Motion to Compel or Renewed Motion.

On April 13, 2018, Complainant filed a Motion to Deem United States' Motion to Compel and For Sanctions Unopposed and for a Stay of the Scheduling Deadlines Set Forth in the Court's January 10, 2018 Order (Motion to Deem). The Motion to Deem requests a new scheduling order be issued which acknowledges that the United States has been unable to conduct discovery on account of Respondent's failure to comply. *Id*. Respondents were directly served with Complainant's Motion to Deem in addition to service through counsel. Both the Motion to Compel and the Motion to Deem remain unopposed. For the reasons set forth below, the Motion to Compel and the Motion to Deem are **GRANTED**.

III. DISCUSSION

A. Obligations To Comply With OCAHO Orders

After a full review of the administrative record, the undersigned finds that Respondents' failure to comply with OCAHO orders warrants a finding of liability as a sanction. Section 68.23(c) grants explicit authorization for an Administrative Law Judge to impose sanctions for a failure to comply with a discovery order to aid "disposition of the proceeding and to avoid unnecessary delay." 28 C.F.R. § 68.23(c). These sanctions range from drawing adverse inferences from the failure to respond to discovery requests, to striking a pleading, or entering an adverse ruling against the non-complying party. 28 C.F.R. §§ 68.23(c)(1), (2), and (5). OCAHO precedent guides implementation of these rules and states that "dereliction with respect to orders of the judge 'cannot be permitted to frustrate sound case management."' *United States v. M.C.S.M. Inc.*, 3 OCAHO no. 544, 1427, 1429 (1993) (citing *United States v. El Dorado Furniture Mfg. Inc*., 3 OCAHO no 417, 208, 210 (1992).

Section 68.23(c) is patterned after Rule 37(b) of the Federal Rules of Civil Procedure, which also enables a judge to impose sanctions for failure to comply with discovery orders. *Rodriguez v. Tyson Foods, Inc.*, 9 OCAHO 1109, 3 (2004).[2] Such sanctions may include the dismissal of the action or rendering a judgment by default against the disobedient party. Fed. R. Civ. P. (37)(b). These two penalties are expressly stated in subsections Section (b)(2)(A)(v) and (vi) respectively. *Id*. Section 68.23(c) provides a similar scope of judicial action but uses a different textual mechanism. It allows a judge to "[r]ule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both." 28 C.F.R. § 68.23(c)(5). This provision effectively incorporates 37(b)(2)(A)(v) & (vi) into one clause and grants the judge the power to dismiss an action or issue a default judgment. Therefore, the case law interpreting Rule 37(b) is relevant to the issuance of sanction under Section 68.23(c) in an OCAHO hearing. *Rodriguez*, 9 OCAHO 1109 at 3.

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

OCAHO precedent has consistently looked to the United States Courts of Appeals for guidance in its application of Section 68.23(c). *See Rodriguez*, 9 OCAHO 1109 at 3 (applying Tenth Circuit case law for Rule 37(b)(2)(A)(v) to dismiss a complainant's pro se complaint as a sanction); *Kalil v. Utica City School District*, 9 OCAHO 1101, 13 (2003) (applying Second Circuit case law for Rule 37(b)(2)(A)(v) to dismiss a party's pro se complaint). Since the alleged unfair immigration-related employment practices occurred in the State of Texas and Louisiana, the case law of the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) is authoritative. *See* 8 U.S.C. § 1324b(i)(1). Therefore, it is necessary to first examine the Fifth Circuit's position on Rule 37(b) sanctions.

The Fifth Circuit evaluates four factors to determine if dismissal is warranted under 37(b), including whether:

> (1) the refusal to comply results from willfulness or bad faith and is accompanied by a clear record of delay or contumacious conduct; (2) the violation [is] attributable to the client instead of the attorney; (3) the violating party's misconduct [] substantially prejudice[‘s] the opposing party's preparation for trial; and (4) a less drastic sanction would substantially achieve the desired deterrent effect.

Oprex Surgery (Baytown), L.P. v. Sonic Auto. Emp. Welfare Benefit Plan, 704 F.App'x 376, 378 (5th Cir. 2017) (quoting *FDIC v. Connor*, 20 F.3d 1376, 1380-81 (5th Cir. 1994)).

The Fifth Circuit, however, utilizes a different standard to evaluate whether a default judgment is the appropriate sanction. Recognizing that judgment by default is an "extreme sanction," a defendant must demonstrate "flagrant bad faith and callous disregard of its responsibilities" to warrant such a harsh penalty. *United States v. Dajj Ranch*, 988 F.2d 1211, 1993 WL 82260, *2 (5th Cir.1993) (quoting *McLoed, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir.1990)). Comparing these two standards illustrates that a higher threshold must be met to allow the imposition of default judgment. Although the court did not opine on the origin of this difference, practical application provides some guidance. The complainant is the originator of the suit, while respondent is often an unwilling party. The bifurcated standard intuitively derives from this distinction, with more accountability required from the initiator and greater deference given to the accused.

Since OCAHO has followed the relevant circuit's criteria for dismissal; it logically follows that this Court would also apply the appropriate criteria in the issuance of a default judgment. In finding liability against Respondent as a sanction, the undersigned recognizes that this penalty, though not a true default judgment as described in Rule 37(b), is more analogous to a

partial default judgment than a dismissal.[3] While a dismissal with prejudice bars a complainant from pursuing his case to the remedy stage, a partial default judgment forecloses litigation on an issue against the non-complying party but allows the suit to proceed. Here, Complainant has indicated that they will propose additional proceedings to address remedy after liability is assessed. Therefore, this Court deems it appropriate to weigh the finding of liability against the heightened "flagrant bad faith and callous disregard" standard used in *Dajj Ranch*.[4]

B. Sanctions

In this case, the record of Respondents' continued non-compliance with judicial orders justifies assessing liability against Respondents. The alternative sanction of adverse inferences against Respondents is also in order. Respondents initially were ordered to comply with investigatory subpoenas seeking relevant information. In 17S00031, ALJ McHenry authorized enforcement in the District Court and found that TMM-TX had, without justification, "refused to comply with the subpoena." Mar. 8, 2017 Order Granting Application to Seek Enforcement of Subpoena 17S00031 at 2. In 17S00040, GCW's request to modify/revoke was denied by ALJ McHenry because the subpoena was "specific, definite, and based on documentary support." Jan. 31, 2017 Order, 17S00040. The undersigned later authorized enforcement in District Court and found that "IER has demonstrated that Gulf Coast has refused to comply with the subpoena [17S00040]." Jul. 13, 2017 Order Granting IER's Application to Seek Enforcement of Subpoena 17S00040. GCW and TMM-TX's failure to comply is compounded by the fact that ALJ McHenry and the undersigned had already ordered that the subpoenas would not be revoked. The failure to comply with the subpoenas issued in 17S00031 and 17S00040 evidence the Respondents' initial efforts to frustrate the judicial process in this matter.

Respondents also have repeatedly refused to comply with discovery obligations in the above-captioned case. On September 13, 2017, IER served Respondents with interrogatories and a request for production of documents. Renewed Motion Ex.'s A, B, C, and D. On September 25, 2017, the parties conducted a discovery conference. *Id.* On October 6, 2017, the parties were directed to begin discovery. Prehearing Order at 2. Throughout October, IER contacted Respondent's counsel numerous times to resolve the discovery impasse, but Respondents' failed to provide a meaningful response. Renewed Motion. at 4. On November 1, 2017, IER filed its initial Motion to Compel because it had received no response to the written discovery requests. IER's Motion requested adverse inferences against the Respondents after "Respondents' counsel

[3] Section 68.23(c)(5) does not use the language of "default judgment," instead granting the ability to render a decision against the non-complying party.

[4] Because the finding of liability is warranted under the default judgment sanction standard, it is also satisfies the more lenient first factor in the *Connor* Test. The conduct in question also fulfills the remaining three *Connor* factors. *Connor,* 20 F.3d at 1380-81.

indicated that he had received Complainant's first Discovery Requests, but had not yet evaluated them, and that his clients would try to comply." Motion to Compel at 3.

During the January 4, 2018 telephonic conference call, after the undersigned went through the specific information that Complainant's were requesting, Respondents, through counsel, did not contest the allegations in Complainant's Motion to Compel and agreed to meet their discovery obligations by January 18, 2018. Telephonic Order at 1. Thereafter, on January 19, 2018, Respondents' counsel requested withdrawal from the case because "of Respondents' consistent refusal to accept his advice and abide by the rules of this Court and obligations to actively participate in the discovery needs of this case." Motion to Withdraw at ¶ 4.

The administrative record confirms that Respondents have been directly served with judicial process through the Notice of Case Assignment, the Prehearing Order, Complainant's Motion, Respondents' counsel's Notice of Intent to Withdraw, the Telephonic Order, the Renewed Motion and the Motion to Deem. Respondents cannot claim that they are unaware of their obligations, particularly in light of counsel's request to withdraw because of Respondents' continued refusal to meet their obligations. This record of service indicates that Respondents have been on notice of their obligations in the above-captioned case since at least July 28, 2017. *See* Notice of Case Assignment. In addition, by telephonic order dated January 10, 2018, Respondents were warned that a continued failure to comply with discovery obligations may result in sanctions under 28 C.F.R. § 68.23(c). *See* Telephonic Order at 1.
Based on the totality of circumstances, I find that Respondents' continued failure to respond to discovery, and Respondents complete failure to respond to Complainant's Motion to Compel and Renewed Motion, warrants the severe sanction of imposing liability against Respondents under 28 C.F.R. § 68.23(c)(5). I find that Respondents' repeated refusal to comply with discovery obligations, after representations that it would do so, is evidence of flagrant bad-faith and callous disregard of its responsibilities. *See Nat'l. Hockey League v. Metro. Hockey Club Inc.*, 427 U.S. 639, 640 (1976) (per curiam) ("where crucial interrogatories remained substantially unanswered despite numerous extensions . . . and . . . admonitions by the Court[,] . . . conduct of the plaintiffs demonstrates the callous disregard of responsibilities"); *Bonaventure v. Butler*, 593 F.2d 625, 626 (5th Cir. 1979) ("Deliberate, repeated refusals to comply with discovery orders have been held to justify the use of this ultimate sanction.")(citations omitted). In addition, as an officer of the Court, Respondents' counsel has represented that it is the Respondents who are responsible for the delay and contumacious non-compliance with discovery obligations, not their attorney. *See* Motion to Withdraw at ¶ 4 (Respondents' counsel Savoie asserts that he must withdraw because of "Respondents' consistent refusal to accept his advice and abide by the rules of this Court and obligations to actively participate in the discovery needs or this case"). I find merit in Complainant's assertion that Respondents delay and contumacious non-compliance with discovery obligations substantially prejudices IER's preparation because it prevents access to documents and witnesses necessary to prove the case. Renewed Motion at 7-8 (citing *Sig M. Glukstad, Inc. v. Lineas Aereas Nacional-Chile*, 656 F.2d 976, 978 (5th Cir. 1981). Finally, in my judgment, a lesser sanction alone would not be sufficient to deter Respondents continued and

egregious non-compliance, which has already substantially delayed this proceeding and prejudiced Complainant's ability to prosecute its case.

Respondents first delayed this case for more than six months by failing to comply with investigatory subpoenas in early 2017. *See* OCAHO Case 17S00031 and 17S00040. Respondents then failed to provide discovery, thereby forcing IER to file the November 1, 2017 Motion to Compel. On the January 10, 2018 Telephonic Conference, Respondent then agreed to provide the discovery by January 18, 2018. Telephonic Order at 1. Thereafter, on January 19, 2018, Respondents' counsel requested withdrawal from the case because "of Respondents' consistent refusal to accept his advice and abide by the rules of this Court and obligations to actively participate in the discovery needs of this case." Motion to Withdraw at ¶ 4. On January 25, 2018, after a year of delay, IER then filed a Renewed Motion which sought liability as a sanction for the delay.[5] Finally, on the date of this Order, Respondents have still have not complied with their discovery obligations and with Orders from this tribunal. Thus, in light of Respondents' continued willful and deliberate refusal to comply with its legal obligations, I conclude that a lesser sanction short of imposing liability against Respondents would prejudice the Complainant's timely prosecution of this matter and enable these recalcitrant Respondents to continue to "benefit from a failure to comply." Renewed Motion at 7 (quoting *Iron Workers Local 455 v. Lake Constr. & Dev. Corp*., 7 OCAHO no. 964, 674 (1997); *see also*, *Moore v. CITGO Ref. & Chemicals Co., L.P*., 735 F.3d 309, 317 (5th Cir. 2013) (the court is not required to "coax" compliance through lesser sanctions).

My finding of liability is "not [] used lightly." *Conner*, 20 F.3d at 1380 (quoting *E.E.O.C. v. General Dynamics Corp*., 999 F.2d 113, 119 (5th Cir.1993)). It is necessary to deter Respondents' bad-faith non-compliance, and to remedy the prejudice already sustained to Complainant's repeated efforts to timely prepare for trial. I note that Complainant only sought a liability sanction as a last resort after Respondents' continued failure to respond made prosecuting this case impracticable. Furthermore, as shown herein, the liability sanction is supported by the Fifth Circuit's standard governing default judgment for failure to comply with discovery. *See Dajj Ranch*, 988 F.2d 1211, 1993 WL 82260, at *2; s*ee also Rodriguez*, 9 OCAHO no. 1109 at 5 (Federal Rule 37(b)(2) is comparable to 28 C.F.R. § 68.23(c)).

[5] Complainant completed service of the Renewed Motion months before it was granted by this court. This service in turn satisfies the notice requirement of Rule 55(b)(2). *Dajj Ranch*, 988 F.2d 1211, 1993 WL 82260, at *2. Additionally, the Fifth Circuit has held that "[r]ule 55(b)(2) does not require a district court to hold either an evidentiary hearing or oral argument on a motion for default judgement." *Sec. Exchange Comm'n v. First Fin. Grp. of Tex.*, 659, F.2d 660, 669 (5th Cir. 1981). However, this decision is issued under the authority granted in 28 C.F.R. § 68.23(c)(5), as a decision rendered against a non-complying party, and not as Rule 37(b) default judgment sanction. So while the Rule 55(b)(2) requirements are met, they are not necessary.

In sum, as a result of Respondents' adamant and repeated refusal to comply with the judicial process and its discovery obligations, contrary to the apparent advice of counsel, Respondents are found liable for the violations alleged in the complaint pursuant to 28 C.F.R. § 68.23(c)(5).

I also find that pursuant to OCAHO rule § 68.23(c)(1), the answers to Complainant's interrogatories and requests for production of documents (see Renewed Motion Ex.'s A, B, C, and D) would have been adverse to Respondents. *Ulysses Inc*., 2 OCAHO No. 390, at 735-36. Accordingly, the matters in Complainant's Motion to Compel and Renewed Motion are "taken as established adversely" against Respondents. 28 C.F.R. § 68.23(c)(2). This lesser sanction does not substitute for the liability sanction. IER first sought the lesser sanction of adverse inferences, and only sought the harsher sanction of liability after months of Respondents' continued non-compliance. This additional sanction of adverse inferences is granted to establish a factual record to be used during the remedy phase of this case because Respondents' obstinate non-compliance is uncontested and prejudicial to Complainant. Accordingly, the following findings in the Renewed Motion and the proposed stipulations in Complainant's Prehearing Statement are adopted as findings of fact.

(a) TMM-TX is a person or entity covered under 8 U.S.C. § 1324b that employed more than three individuals at all times since January 1, 2014.

(b) GCW is a person or entity covered under 8 U.S.C. § 1324b that employed more than three individuals at all times since January 1, 2014.

(c) TMM-TX entered into a Memorandum of Understanding (MOU) with the Department of Homeland Security's E-Verify program in March 2012.

(d) TMM-TX has used the E-Verify system to verify individuals' work authorization from March 2012 through at least November 6, 2017.

(e) TMM-TX job applicants have completed Section 1 of the Form I-9 as part of TMM-TX's employment application at all times since January 1, 2014.

(f) Refugia "Cookie" Gunn, Maria Perez, and Jesus "Chuy" Rivera are the only individuals since January 1, 2014, who have asked TMM-TX job applicants to provide documents to satisfy Section 2 of the Form1 I-9.

(g) From January 1, 2014 to July 21, 2017, TMM-TX obtained List A documents for purposes of verifying employment eligibility from at least 279 of 281 (99.29 percent) of the non-U.S. citizens it hired.

(h) From January 1, 2014 to July 21, 2017, TMM-TX obtained List B and C documents for purposes of verifying employment eligibility from at least 675 of 678 (99.56 percent) of the U.S. citizens it hired.

(i) From January 1, 2014 to at least July 21, 2017, it was TMM-TX's standard practice in the employment eligibility verification ("EEV") process to request List A documentation from all individuals identified as non-U.S. citizens.

(j) From January 1, 2014 to at least July 21, 2017, it was TMM-TX's standard practice in the EEV process to request Lists B and C documentation from all individuals identified as U.S. citizens.

(k) Cornel J. Martin is the owner and Chief Executive Officer of both TMM-TX and GCW.

(l) Both TMM-TX and GCW have a corporate headquarters at 5437 West Park Avenue, Houma, Louisiana, 70364.

(m) Lincoln Martin, Jr. is the Chief Operating Officer of TMM-TX and GCW.

(n) Lincoln Martin, Jr. signed several TMM-TX Forms I-9 where he identified himself as the Chief Operating Officer of GCW in Section 2.

IV. CONCLUSION

This Order finds liability against the Respondents for their failure to comply with judicial directives and repeated failure to comply with discovery obligations pursuant to 28 C.F.R. § 68.23(c)(5). A liability finding is warranted under the "flagrant bad faith and callous disregard of responsibility" standard articulated by the Fifth Circuit in *McLeod*. *Dajj Ranch*, 988 F.2d 1211, 1993 WL 82260, at *2 (citing *McLeod*, 894 F.2d at 1486). Additionally, adverse inferences are justified against the Respondents to establish a factual record to be used during the remedy phase of this case as an additional sanction for Respondents' failure to comply with discovery obligations pursuant to 28 C.F.R. §§ 68.23(c)(1) and (2) and *Ulysses Inc*., 2 OCAHO no. 390, at 735-36. In sum, liability is conclusively determined against Respondents.

ORDER

Complainant's Motion to Compel, Renewed Motion to Compel, Motion to Deem, and Motion to Stay the June 29, 2018 expert witness report deadline for 45 days are **GRANTED**. Liability against Respondents is **ORDERED.** In addition, adverse inferences are **ORDERED** against Respondent, as outlined above, to establish a factual record to be used during the remedy phase of this case.

IT IS ORDERED that Respondents are found to have engaged in a pattern or practice of document abuse based on citizenship status in violation of 8 U.S.C. § 1324b(a)(6)

by requesting more or different documents from non-U.S. citizens than are required to prove identity and work eligibility.

For good cause shown, Rusty Savoie's Motion to Withdraw as counsel for Respondents pursuant to 28 C.F.R. § 68.33(g) is **CONDITIONALLY GRANTED,** provided that Mr. Savoie provides this office with a valid email address for each of the Respondents to be used for continued e-filing in this case, within five days of this order. IER shall continue to serve each Respondent at its address indicated in the enclosed certificate of service as a courtesy copy, in addition to the electronic service copy provided to OCAHO and the Respondents.

The undersigned retains jurisdiction of this case to affix appropriate remedies for the violations of 8 U.S.C. § 1324b(a)(6). If the parties provide evidence that liability has been imposed for non-protected individuals under *Verdesi v. Ark Rustic Inn*, 13 OCAHO no. 1311 (2018), the undersigned will limit any sanction and remedy to protected individuals.

The June 29, 2018 expert witness report deadline is **STAYED** for 45 days. Within 30 days of this Order, the Complainant and Respondents shall brief the issue of proposed remedies and shall identify if there is evidence that any of the violations involve non-protected individuals. The onus to demonstrate that certain individuals should be excluded from the remedy is on the Respondents. Should the Respondents fail to respond within the time allotted, the issue of whether the violations involve non-protected individuals will be conceded and a fine will be assessed according to the available evidence.

SO ORDERED.

Dated and entered on June 28, 2018.

_____

Thomas P. McCarthy
Administrative Law Judge