

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

|                            |   |                             |
|----------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA,  | ) |                             |
| Complainant,               | ) |                             |
|                            | ) | 8 U.S.C. § 1324a Proceeding |
| v.                         | ) |                             |
|                            | ) | OCAHO Case No. 2021A00021   |
| LA PARISIENNE BAKERY, LLC, | ) |                             |
| Respondent.                | ) |                             |
|                            | ) |                             |

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ORDER OF DISMISSAL

I. PROCEDURAL HISTORY

On February 24, 2021, Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement (“the Government”), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, La Parisienne Bakery, LLC, alleging that Respondent violated 8 U.S.C. § 1324a(a)(1)(B) (2021). The complaint alleges that Respondent failed to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9) for two individuals, and that Respondent failed to prepare and/or present Forms I-9 for twenty-six individuals. The Government sought a total of \$47,908.55 in civil monetary penalties for the two counts of violations under § 1324a(a)(1)(B).

On April 30, 2021, Complainant filed a Notice of Tentative Settlement and Dismissal informing the Court that it has reached a tentative agreement to settle and dismiss the complaint in this case. Complainant stated that a “Motion to Dismiss the Complaint will be filed with the Court within thirty (30) days.” Complainant requested the Court to accept the Notice of Settlement and allow 30 days to file a Motion to Dismiss.

On May 14, 2021, the Court issued an Order addressing Complainant’s Notice of Tentative Settlement and Dismissal. The Court took notice of the parties’ tentative agreement to settle and dismiss the complaint in this case. The Court ordered that the parties may file a motion to dismiss the case pursuant to a settlement agreement by 30 days from the issuance of the order and directed the parties to include a copy of their settlement agreement in their submission. The Court further ordered that all proceedings in this matter are stayed for 30 days from the issuance of the order.

On June 8, 2021, Complainant filed a Motion to Extend Time to File Motion to Dismiss. Complainant sought an additional 30 days to file a Motion to Dismiss. Complainant stated that it had reached an agreement to settle and dismiss the complaint in this case, but needed additional

time to obtain signatures on the Motion to Dismiss. The Court granted this motion for an extension on June 17, 2021, and ordered that the parties may file their motion to dismiss and accompanying settlement agreement by no later than July 14, 2021.

## II. PENDING MOTION

On July 12, 2021, Complainant filed a Motion for Voluntary Dismissal in the above-captioned matter. The Government seeks to dismiss the complaint without prejudice and states that it is exercising prosecutorial discretion in not pursuing this matter further. In its motion, the Government notes that this case is in the initial pleadings stage and that Respondent has not filed an answer and the parties have not yet submitted prehearing statements. The Government asserts that Respondent will not suffer legal prejudice if the Court grants the motion and that Respondent is aware that this motion is being filed and has no objection. Respondent did not respond to the motion.

## III. ANALYSIS

OCAHO regulations identify three vehicles for a dismissal: 1) a settlement agreement, 28 C.F.R. § 68.14(a)(2); 2) abandonment of the action, 28 C.F.R. § 68.37(b); and 3) default, 28 C.F.R. § 68.37(c). LeEdwards v. Kumagai Int'l USA Corp., 4 OCAHO no. 609, 197, 200 (1994). However, OCAHO jurisprudence, which borrows from the Federal Rules of Civil Procedure in instances where there are gaps in the regulations, provides for dismissal in other instances as well. United States v. Johnny & Leona Entm't, LLC, 13 OCAHO no. 1325, 1-2 (2019); *see also* 28 C.F.R. § 68.1 (“[t]he Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.”).

Federal Rule of Civil Procedure 41(a)(2) provides that the Court may dismiss an action through an order, on terms that the court considers proper. Fed. R. Civ. P. 41(a)(2). Rule 41(a)(1) provides that a plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves an answer or a motion for summary judgment; or by filing a stipulation of dismissal. Fed. R. Civ. P. 41(a)(1).

Complainant’s submission appears to straddle 41(a)(1) and 41(a)(2) — the motion was served on the Court before Respondent’s answer, and the Complainant’s justification for the motion is its exercise of prosecutorial discretion — all common practices a party might invoke for the 41(a)(1) notice of voluntary dismissal. However, Complainant seeks leave of the Court, which is quintessential 41(a)(2) conduct. On balance, the Court determines that the Complainant’s intention (as expressed in its motion) for the Court to review and determine the

sufficiency of the dismissal should govern, and accordingly it evaluates the pleading in the context of Rule 41(a)(2).

The Court has broad discretionary power over whether to grant a motion for voluntary dismissal, with or without prejudice, pursuant to Rule 41(a)(2). Arias v. Cameron, 776 F.3d 1262, 1268 (11th Cir. 2015) (*citing* Fisher v. Puerto Rico Marine Mgmt., Inc., 940 F.2d 1502, 1502-03 (11th Cir. 1991) (per curiam); *see also* Charles A. Wright & Arthur R. Miller (“Wright & Miller”), 9 Fed. Prac. & Proc. Civ. 4d § 2364).

It has been consistently recognized that the Court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless the opposing party will suffer some plain legal prejudice as a result. *See, e.g.*, Zajradhara, 14 OCAHO no. 1356, at 1 (citing Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001)); Hughes v. Fiat Chrysler Automotive, 13 OCAHO no. 1336, 1 (2019) (quotation omitted); Shamrock Creek LLC v. Borough of Paramus, 683 F.Appx. 142, 144 (3d Cir. 2017); Huesca v. Rojas Bakery, 4 OCAHO no. 654, 550, 556 (1994). Arias, 776 F.3d at 1268 (“Generally speaking, a motion for voluntary dismissal should be granted unless the defendant will suffer *clear* legal prejudice other than the mere prospect of a second lawsuit.”) (emphasis added). “Legal prejudice” is prejudice to some legal interest, some legal claim, or some legal argument. Zajradhara, 14 OCAHO no. 1356, at 1 (internal quotation omitted).

The court has further explained that the purpose of 41(a)(2) is to “prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions.” McCants v. Ford Motor Co., Inc., 781 F. 2d 855, 856 (11th Cir. 1986).

The Court finds that it is unlikely that Respondent will suffer “plain legal prejudice” or a dismissal which “unfairly affects the other side,” and thus, dismissal without prejudice is appropriate in this matter. As the Government noted, this case is in an early stage and Respondent has not filed an answer. Furthermore, since the motion for voluntary dismissal was filed over three weeks ago, Respondent has not filed a response opposing the Government’s motion. Although a dismissal without prejudice could potentially result in a second lawsuit against Respondent, OCAHO case law has recognized that the threat of future litigation does not constitute plain legal prejudice. *See* Zajradhara, 14 OCAHO no. 1356, at 1 (citing Westlands Water Dist. v. United States, 100 F.3d 94, 97 (9th Cir. 1996); Johnny & Leona Entm’t, LLC, 13 OCAHO no. 1325, at 1-2). Ultimately, there does not appear to be any prejudice to Respondent in the dismissal, accordingly the Court will grant Complainant’s motion for dismissal.

IV. CONCLUSION AND ORDER

The Court orders that this case is DISMISSED WITHOUT PREJUDICE.

SO ORDERED.

Dated and entered on August 26, 2021.

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John A. Henderson  
Administrative Law Judge