

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

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| ROBERT HEATH, |) | |
| Complainant, |) | |
| |) | |
| v. |) | 8 U.S.C. § 1324b Proceeding |
| |) | OCAHO Case No. 2020B00072 |
| |) | |
| ASTA CRS, INC., |) | |
| Respondent. |) | |
| |) | |

ORDER ON COMPLAINANT’S MOTION TO COMPEL DISCOVERY RESPONSES

I. PROCEDURAL HISTORY

On June 25, 2021, Complainant filed a Motion to Compel Respondent to Fulfill Discovery. In his motion, Complainant sought answers to his second set of nine interrogatories, and his first set of four requests for production of documents. Mot. Compel 4–12.¹ Complainant’s submission included what appeared to be only his discovery requests, and not Respondent’s discovery responses. *Id.* On July 6, 2021, Respondent filed its Opposition to Complainant’s Motion to Compel Respondent to Fulfill Discovery (Opposition). Among its other objections, Respondent noted that Complainant had not included a copy of Respondent’s answers to its discovery. Opp’n 2. The same day that Respondent filed its opposition, Complainant filed a Motion to Supplement Motion to Compel (Reply) in which it included Respondent’s responses to the contested discovery requests.

II. ORDER GRANTING COMPLAINANT’S MOTION TO SUPPLEMENT

Generally, replies are not permitted “[u]nless the Administrative Law Judge provides otherwise[.]” 28 C.F.R. § 68.11(b). The Court has discretion in accepting replies. *Diaz v. Pac. Mar. Ass’n*, 9 OCAHO no. 1108, 3 (2004);² *see* § 68.11(b). In light of Complainant’s pro se

¹ Cites to Complainant’s filings refer to the internal pagination of the respective PDF document because the filings are not consistently paginated.

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 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

status, and the fact that the information in the Reply is essential to determining the exact nature of the dispute between the parties, the Court will GRANT the motion to supplement Complainant's motion to compel. However, the Court reminds the parties that as a matter of course, motions to compel which fail to include a verbatim copy of the relevant discovery responses will not be considered. See A.S. v. Amazon Web Servs., Inc., 14 OCAHO no. 1381, 2–3 (2020).

III. ANALYSIS OF COMPLAINANT'S MOTION TO COMPEL

A. Procedural Requirements for a Motion to Compel

An OCAHO Administrative Law Judge has the authority to “compel the production of documents” and to compel responses to discovery requests, pursuant to 28 C.F.R. § 68.23 and § 68.28. United States v. Rose Acre Farms, Inc., 12 OCAHO no. 1285, 2 (2016). The OCAHO rules permit parties to file motions to compel responses to discovery if the responding party fails to adequately respond or objects to the request. 28 C.F.R. § 68.23(a). However, pursuant to 28 C.F.R. § 68.23(b), a motion to compel must set forth and include:

- (1) The nature of the questions or request;
- (2) The response or objections of the party upon whom the request was served;
- (3) Arguments in support of the motion; and
- (4) A certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure information or material without action by the Administrative Law Judge.

B. Complainant Fails to Present Evidence Indicating that His Discovery Requests Are Timely

Per the Court's prior order, the deadline for the close of all discovery in this matter was June 28, 2021. Order Granting Second Ext. Disc. 2. The order also stated that all discovery must be served at least 30 days prior to the close of discovery. *Id.* at 3. Both in Complainant's original motion and in his supplemental motion, Complainant fails to identify when he served discovery on Respondent. Complainant also fails to provide a certificate of service attesting to the date of service and the means of service. Respondent objects that the discovery requests are untimely; Complainant as the moving party has the burden of demonstrating that its discovery

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>.

was sent in a timely manner. Both Complainant's initial and supplement submissions fail to do so; accordingly Complainant's motion must be DENIED on these grounds alone.

C. Merits of Complainant's Motion

Assuming *arguendo* that Complainant's discovery was timely, the Court will briefly address the discovery requests within.

In response to Respondent's objection that Complainant failed to specify which discovery he sought responses to, Complainant specified in his reply that he sought answers to all of his requests. Reply 2. This is confusing in that Respondent has asserted in places that there is no responsive data (e.g. Interrogatory 1 and 2, Request for Production of Documents 1 and 2), and Complainant's responses appear to demand production of responses or answers without offering a proffer that Respondent's answers are incorrect or the parameters for its consideration of the discovery are unnecessarily cramped.

Complainant also fails to describe the particular grounds for overcoming Respondent's objections. For instance, Respondent has stated in response to Interrogatory No. 5, which sought for Respondent to identify all jobs for which ASTA submitted resumes on behalf of Robert Heath, that "Asta did not submit Robert Heath's resume or application to any clients." Reply 9. Respondent has asserted in its opposition that "Asta rejected [Complainant's] application for an entry level position because his 40 years of experience rendered him overqualified for consideration." Opp'n 2. Based on this response, it is unclear what information Complainant seeks to compel Respondent to provide.

More generally, Respondent has objected that Complainant's discovery requests are not relevant to any of the claims and defenses in this matter. Opp'n 2. Much of Complainant's discovery is aimed at identifying the third parties with whom Complainant alleges Respondent contracted to provide IT personnel. *See* Mot. Compel 6–12. Respondent's argument appears to be that its third party contracts are irrelevant because Complainant never advanced far enough in ASTA's internal hiring process to be considered by any of them. *See* Reply 8–17. Respondent's argument may or may not be ultimately persuasive, however Complainant's conclusory assertion that "the [sought after] information is totally relevant to these proceedings," Mot. Compel 2, with nothing more, does not enlighten the Court about the legal basis for the conclusion that the information "bears on, or that could reasonably lead to other matter that could bear on, an issue that is or may be in the case." United States v. Autobuses Ejecutivos, LLC, 11 OCAHO no. 1220, 3 (2014) (quoting United States v. Select Temps., Inc., 9 OCAHO no. 1078, 2 (2002)). Complainant, as the proponent of the motion, has the burden of explaining to the Court why the motion should be granted. This obligation maintains for each discovery request. Complainant's submission fails meet its burden.

Finally, the Court notes that Respondent's objections to the discovery requests occasionally suffer from a formulaic recitation of "proportionality" which, without more, is unhelpful to its defense. Reply 8–10, 16–17. As the courts have made clear on several occasions, generalized, conclusory, or boilerplate objections are no objection at all, and they should not be considered. United States v. Allen Holdings, Inc., 9 OCAHO no. 1059, 5 (2000) (citing McLeod, Alexander, Powel & Apffel, P.C. v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990)). The Court understands Respondent's objection of proportionality to generally mean instances where "the marginal returns on discovery do not outweigh the concomitant burden, expense, and bother," and the court must find the right balance." United States v. Durable, Inc., 11 OCAHO no. 1221, 3 (2014) (quoting Goodman v. Burlington Coat Factory Warehouse Corp., 292 F.R.D. 230, 233 (D.N.J. 2013)). Evaluations of proportionality in civil litigation have sprung up from many places, but perhaps the most significant wellspring is Rule 26(b)(1) of the Federal Rules of Civil Procedure, which limits discovery in this manner:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).³ As the rule makes clear, proportionality involves a balancing of several factors, among them the parties "relative access to the information," the "importance of the discovery in resolving the issues" and "the amount in controversy." Id. The comments to the 2015 amendment reiterate their caution against boilerplate objections, asserting that the change is not "intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional." Fed. R. Civ. P. 26 Advisory Committee's Notes to 2015 Amendment. Further, the committee notes that financial considerations are one of many factors to be considered in determining whether the discovery requests are proportional to the needs of the case; the 2015 Advisory Committee's Notes assert that "many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Id.; *e.g.*, Fed. R. Civ. P. 26 Advisory Committee's Notes to 1983 Amendment. Respondent's objection fails to articulate how Complainant's discovery requests are not proportional to the needs of the case, and to the extent Respondent relies on financial considerations in judging the discovery to be disproportionate, to what extent the special solicitude which the commentators have provided for employment discrimination cases should bear on this analysis.

³ 28 C.F.R. § 68.1 permits the use of the Federal Rules of Civil Procedure as a general guideline.

These considerations are not dispositive with regard to the ultimate issue presently before the Court; as stated previously, the pleading deficiencies in Complainant's motion alone prevent the motion from being granted. Nonetheless, the parties are encouraged to avoid boilerplate objections and to describe with particularity the basis for their argument that an objection is improper and that an order compelling discovery is warranted.

IV. CONCLUSION

Complainant's Motion to Supplement Motion to Compel is GRANTED.

Complainant's Motion to Compel is DENIED.

IT IS SO ORDERED.

Dated and entered on September 17, 2021.

Honorable John A. Henderson
Administrative Law Judge