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

October 1, 2020

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| ROBERT HEATH,<br>Complainant,<br><br>v.<br><br>OPTNATION AND AN ANONYMOUS EMPLOYER,<br>Respondent. | ) | 8 U.S.C. § 1324b Proceeding<br>OCAHO Case No. 2020B00062 |

ORDER DISMISSING COMPLAINT

## I. BACKGROUND

On March 26, 2020, Complainant Robert Heath filed a complaint against Optnation (Respondent), and its "client employers." The complaint alleges that Respondent discriminated against him based on his national origin and citizenship status in violation of 8 U.S.C. § 1324b. Respondent filed an answer on May 6, 2020. The parties filed prehearing statements. On July 7, 2020, Respondent filed a motion to dismiss. Complainant has not responded to the motion to dismiss.

Respondent argues in the motion that it does not employ anyone, and therefore the Office of the Chief Administrative Hearing Officer (OCAHO) does not have subject matter jurisdiction both because OCAHO does not have jurisdiction over claims of national origin and citizenship discrimination if the employer employs less than three people, and because Optnation is not an employer, but is merely a website owned by RAGNS Inc. RAGNS Inc. likewise has no employees. Respondent submitted four exhibits, consisting of a declaration from the corporate representative of Optnation and RAGNS Inc., a Corporate Resolution and Certificate of Good Standing for RAGNS Inc., and a letter from RAGNS Inc.'s Certified Public Accounting firm. Mot. Exs D-G. Respondent states that the motion is both a facial and factual challenge, that Complainant did not allege that Optnation employed more than three employees and Complainant did not, and factually cannot, allege that Optnation was an employer.

## II. LEGAL STANDARDS

"OCAHO's rules permit dismissal of a complaint for failure to state a claim upon which relief may be granted[.]" *United States v. Spectrum Tech. Staffing Servs., Inc.*, 12 OCAHO no. 1291, 8 (2016) (citations omitted)[1] (citing 28 C.F.R. § 68.10). Section 68.10 is modeled after Federal Rule of Civil Procedure 12(b)(6). *Id.*; *see* 28 C.F.R. § 68.1 ("The Federal Rules of Civil Procedure may be used as a general guideline" in OCAHO proceedings.). When considering a motion to dismiss, the Court must "liberally construe the complaint and view 'it in the light most favorable to the [complainant].'" *Spectrum Tech.*, 12 OCAHO no. 1291 at 8 (quoting *Zarazinski v. Anglo Fabrics Co.*, 4 OCAHO no. 638, 428, 436 (1994)). OCAHO's rules of practice and procedure merely require the complaint to contain "[t]he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. § 68.7(b)(3).

Generally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). "When matters outside the pleadings are considered, a motion to dismiss may be converted to one for summary decision." *Barone v. Superior Wash & Gasket Corp.*, 10 OCAHO no. 1176, 2 (2013). If the Court converts a motion to dismiss to a motion for summary decision, "the parties must be given appropriate notice so that they have a reasonable opportunity to present relevant materials." *Id.*

## III. DISCUSSION

### A. Lack of Subject Matter Jurisdiction

Complainant asserts that Optnation discriminated against him based on his national origin and citizenship status. Respondent argues that it is owned by a single individual and has no employees. From the face of the complaint, it is not clear how many employees Optnation employs. In the complaint, Complainant did not state how many employees Optnation employs

[1] 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 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.

and, in the Immigrant and Employee Rights Section of the Civil Rights Division of the Department of Justice (IER) charge form attached to the complaint, Complainant stated that the number of employees was unknown or he was unable to estimate. In its Letter of Determination, IER dismissed his charge for lack of subject matter jurisdiction because it "was unable to determine that this website is operated by a legitimate employer."

Similar to lower federal courts, OCAHO is a forum of limited jurisdiction "with only the jurisdiction which Congress has prescribed." *Wilson v. Harrisburg School Dist.*, 6 OCAHO no. 919, 1167, 1173 (1997). OCAHO does not have jurisdiction to hear national origin or citizenship status discrimination claims if the employer employs three or less individuals. § 1324b(a)(2)(A). Further, OCAHO only has jurisdiction to hear national origin discrimination claims against employers with between four and fourteen employees. *Sivasankar v. Strategic Staffing Solutions*, 13 OCAHO no. 1343, 3 (2020); § 1324b(a)(2). Since Complainant has not alleged sufficient facts to determine whether OCAHO has jurisdiction to hear claims against Optnation, Complainant has not stated a claim upon which relief can be granted. Because the complaint is deficient on its face, this Court will not consider the evidence proffered by Respondent. Respondent's motion is GRANTED and the Complaint as to Optnation is DISMISSED.

B. Unknown Employer

Complainant also brings claims against Optnation's "client employers." In an attachment to his Complaint, Complainant alleges that Optnation is a clearinghouse for employers and appears to allege that the unknown employers also discriminated against him based on his citizenship status and national origin. In the attachment, Complainant provides a number of names of companies, but concludes that all employers are involved in the discrimination. Complainant did not identify any particular employer in relation to this complaint.

In *Heath v. F18 Consulting and an Anonymous Employer*, 14 OCAHO no. 1284 (2020), this Court addressed the use of fictitiously-named parties, noting that the practice is disfavored. *Id.* at 3 (citing *Stafford v. Hernandez*, 05CV1703-JAH(POR), 2008 WL 4836523, at *1 (S.D. Cal. Aug. 4, 2008) (adopted by *Stafford v. Hernandez*, 2009 WL 3334821, at *2–3 (C.D. Cal. Feb, 17, 2009)). "However, a complainant may use a fictitiously-named respondent 'if the complaint alleges why the [respondent's] real name was not [ ] known or ascertainable.'" *Id.* at 4. If the complainant later discovers the identity of the fictitiously-named respondent, then the complainant should amend his complaint to name the respondent. *Id.*; *see also Johnson v. Udall*, 292 F.Supp. 738, 751 (C.D. Cal. 1968) (on a judicial review of an administrative agency action the court found "there is no prohibition in judicial or administrative practice to openly and frankly use a fictitious [name] until the true one is made known so long as due process is accomplished."). This Court adopted precedent from the United States Court of Appeals for the Ninth Circuit that set limitations on the length of time a complainant may use a fictitious name for a respondent. *Id.* Specifically, the *Stafford* court found that authorities clearly support the

proposition that fictitiously-named defendants "must be identified and served within 120 days of the commencement of the action against them." *Stafford*, 2008 WL 4836523, at *2 (quotation marks omitted) (citing *Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (1995); FED. R. CIV. P. 4(m) & 15(c)(1); Propriety of Use of Fictitious Name of Defendant in Federal District Court, 139 A.L.R. Fed. 553, 3b (1998)). Nonetheless, "if the [complainant] shows good cause for the failure [to identify and serve fictitiously-named respondents within 120 days], the court must extend the time for service for an appropriate period." FED. R. CIV. P. 4(m).

Here, Complainant named Optnation as a respondent and also named "client employers." Complainant alleges that Optnation is a clearinghouse, and acts as a proxy for technology companies, banks, telecommunications companies and all other employers. He indicated that he had applied for a number of positions through Optnation, but did not specify the names of the companies in the complaint, and has not subsequently sought to amend the complaint to name the companies. As the unknown employers have not been identified, OCAHO cannot serve the unknown employer with the complaint. Further, Complainant filed the complaint on March 26, 2020, and July 24, 2020, is 120 days from that date. "OCAHO case law demonstrates that in instances when a complaint cannot be effectively served, it is dismissed without prejudice so that a complainant can refile the complaint if the Respondent is located and service can be accomplished." *United States v. Iniguez-Casillas*, 6 OCAHO no. 870, 510, 512 (1996); *United States v. Baches-Corado*, 3 OCAHO no. 571 (1993) (8 U.S.C. § 1324c document fraud complaint dismissed without prejudice when neither OCAHO nor the Immigration and Naturalization Service could serve the complaint and notice of hearing upon the respondent). As the claim against Optnation must be dismissed, and Complainant has not identified the relevant companies in the six months since the complaint was filed, the Complaint as to the unknown employers is DISMISSED without prejudice.

Accordingly, the Complaint against Optnation is DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction. The Complaint against the unknown employers is DISMISSED WITHOUT PREJUDICE as service cannot be effectuated.

SO ORDERED.

Dated and entered on, October 1, 2020.

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Jean C. King
Chief Administrative Law Judge

## Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.