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

September 28, 2023

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2023A00015
WALMART INC. (BETHLEHEM), Respondent.	)	

Appearances: Sirin Ozen Hallberg, Esq., for Complainant
Dan Brown, Esq. and K. Edward Raleigh, Esq., for Respondent

ORDER ON RESPONDENT'S MOTION TO STRIKE AND ORDER FOR SUPPLEMENTAL BRIEFING

I. BACKGROUND

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on December 13, 2022, alleging Respondent, Walmart Inc. (Bethlehem), violated 8 U.S.C. § 1324a(a)(1)(B). On February 17, 2023, Respondent filed an answer and a motion to dismiss.

On April 11, 2023, Complainant filed a First Amended Complaint Regarding Unlawful Employment Practices (FAC). On June 9, 2023, Respondent filed an Answer to the FAC and a Motion to Dismiss the FAC. On July 24, 2023, Complainant filed a Response to Respondent's Motion to Dismiss the FAC.

Presently before the Court is Respondent's July 28, 2023, Motion to Strike Complainant's Response to Respondent's Motion to Dismiss the FAC. Complainant filed a response to the Motion to Strike on August 4, 2023. On August 10, 2023, Respondent filed a Motion for Leave to Reply to Complainant's response.

II. LEAVE TO REPLY TO MOTION TO STRIKE

Respondent seeks leave to file a reply to Complainant's response to its Motion to Strike, and attaches the proposed Reply. Respondent seeks to reply to Complainant's argument in its response that motions to strike only apply to pleadings, not oppositions to motions to dismiss. *See* R's Mot. Leave to Reply 2. Respondent asserts that its Reply "inform[s] the ALJ of the applicable law," which serves as good cause, and that Complainant will not be prejudiced by the Reply. *Id.* at 1–2.

OCAHO Administrative Law Judges have discretion to allow replies. 28 C.F.R. § 68.11(b); *A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381e, 2 n.3 (2021) (citing 28 C.F.R. § 68.11(a)) ("Generally, replies and sur-replies are prohibited, unless the Court provides otherwise."). The Court considers whether the party requesting leave to file a reply has shown "good cause" for such a filing. *See Sharma v. NVIDIA Corp.*, 17 OCAHO 1450d, 2 (2023) (citing, inter alia, *Brown v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379b, 1 (2022)).

Here, the Court finds that Complainant has shown good cause for filing a reply, specifically, to respond to new arguments raised by Respondent in its response briefing regarding whether motions to strike may apply to motions to dismiss. *See, e.g.*, *Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450j, 4 (2023) (granting leave to file sur-reply "[i]n the interest of developing the record" when the respondent raised new issues in its reply that the complainant did not have an opportunity to address previously); *Heath v. ASTA CRS, Inc.*, 14 OCAHO no. 1385b, 2 (2021) (granting leave to file reply when the "information in the Reply is essential to determining the exact nature of the dispute between the parties").

Therefore, the Court will consider Respondent's Reply in resolving its Motion to Strike.

III. MOTION TO STRIKE

A. Parties' positions

Respondent moves to strike Complainant's response to the Motion to Dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(f). Generally, Respondent asserts that: 1) Complainant has added new allegations, and has attempted to "clarify and recharacterize its allegations," in its response; and 2) Complainant has included evidence in its response which was not included in the FAC, including allegations and evidence related to settlement discussions, which are procedurally improper or inadmissible. *See generally* R's Mot. Strike.

Complainant responds that Respondent's motion to strike is procedurally improper and substantively inapplicable to the instant case. C's Resp. 2–5. Complainant asserts that Federal

Rule of Civil Procedure 12(f) is only applicable to pleadings, not responses to a motion to dismiss. *Id.* at 2–3. Moreover, Complainant asserts that motions to strike are a "drastic" measure only appropriate in "very limited circumstances, none of which are applicable to this case," and are "strongly disfavored." *Id.* at 4–5.

In its Reply, Respondent argues that while a motion is not a pleading under the Federal Rules of Civil Procedure, it is a pleading under OCAHO regulations. Reply 1–3 (citing 28 C.F.R. § 68.2). Moreover, Respondent argues that federal courts routinely entertain motions to strike documents other than pleadings, even though not specifically authorized under Rule 12(f), and that the Rule is not exclusive given courts' inherent power to strike impermissible filings. *Id.* at 3–4 (collecting cases).

B. Analysis

OCAHO's Rules of Practice and Procedure[1] do not contain provisions governing motions to strike. *See United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 2 (2009).[2] Therefore, it is appropriate for the Court to consider Federal Rule of Civil Procedure 12(f), as well as case law from the relevant Federal Circuit Court of Appeals. *See* 28 C.F.R. §§ 68.1, 68.57.

Rule 12(f) provides that courts "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter" either on its own or upon motion by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading. "A motion to strike is a drastic remedy and therefore is not favored," and "is often not granted in the absence of a showing of prejudice to the moving party." *United States v. Mark Carter*, 6 OCAHO no. 865, 458, 466 (1996) (citation omitted).

As the parties note, Rule 12(f) refers to "a pleading," not to an opposition to a motion. OCAHO's regulations define a pleading broadly to refer to "the complaint, the answer thereto, any motions, any supplements or amendments to any motions or amendments, and any reply that may be

[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

[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 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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

permitted to any answer, supplement, or amendment submitted to the Administrative Law Judge . . . " 28 C.F.R. § 68.2. Although this regulation offers a broad definition of a pleading, it also does not explicitly include *opposition briefs* to motions, but rather, motions, supplements or amendments to motions, and permitted replies to supplements or amendments. OCAHO case law does not appear to have addressed whether oppositions fall into this definition of a pleading. Respondent argues that "[l]ogically, if a motion is a pleading, so is its opposition," Reply 2, but the regulation specifically does not include oppositions in the enumerated list defining "pleading."

Respondent argues that Rule 12(f) "is not exclusive," and collects cases for the proposition that federal courts "routinely entertain" motions to strike documents other than pleadings. Reply 3 (citing, inter alia, *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc.*, No. 11 C 8332, 2013 WL 566805, at *11, 2013 U.S. Dist. LEXIS 19156, at *33 (N.D. Ill. Feb. 13, 2013)). But the courts in the cases cited by Respondent largely acted pursuant to an "inherent authority to strike impermissible filings" filed in derogation of local rules, not Rule 12(f).[3] *See id.* (addressing the merits of a motion to strike a motion to dismiss "[r]egardless of whether the authority for Plaintiff's Motion is Rule 12(f) or the Court's inherent power"). In general under Rule 12(f), "[o]nly material included in a 'pleading' may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly." 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.37 (3d ed. 2023). Given that the Federal Rules treat the matter narrowly, the enumerated list defining pleadings in OCAHO's regulations which does not include opposition briefs to motions, and the general disfavor related to motions to strike, this Court is reluctant to stretch the reach of Rule 12(f) in this forum.

[3] *Lazarescu v. Ariz. State Univ.*, 230 F.R.D. 596 (D. Ariz. 2005) (striking reply to response to motion to dismiss under a local rule limiting replies); *Lopez v. Deutche Bank Nat'l Trust Co.*, No. 10-664, 2011 WL 13229418, at *1–2 (D. Ariz. Jan. 13, 2011) (striking response to motion to dismiss which was untimely and exceeded page limit in local rules); *Hurth v. Bradman Lake Grp. Ltd.*, No. 3:08 CV 370, 2009 WL 2497993, at *2, 2009 U.S. Dist. LEXIS 72126, at *4–5 (W.D.N.C. Aug. 14, 2009) (granting motion to strike motion to dismiss response which did not meet length/font requirements); *Martinez v. Toyota Motor Mfg.*, No. SA-08-CA-733, 2009 WL 10669505, at *1, *3 (W.D. Tex. Aug. 3, 2009) (granting motion to strike responses as untimely); *Farley v. Bank of Am., N.A.*, No. 14-cv-568, 2014 WL 11516295, at *2 (E.D. Va. Oct. 28, 2014) (striking response to motion to dismiss as exceeding page limit in local rules); *Jones v. Garland*, 21-cv-02087, 2021 WL 6752272, at *1, 2021 U.S. Dist. LEXIS 252763, at *2 (W.D. Tenn. May 27, 2021) (striking opposition to motion to dismiss which exceeded page limit in local rules); *but see Wilson v. United States*, No. 07-cv-01267, 2008 WL 11516545, at *3 (D. Colo. June 3, 2008) (striking amended response to motion to dismiss both as an impermissible surreply in derogation of local rules and as redundant and immaterial under Rule 12(f)).

Moreover, even if the Court were to apply Rule 12(f) to Complainant's opposition brief, or act pursuant to an inherent power to strike impermissible filings,[4] the Court does not find that it warrants striking.

Respondent argues that several arguments, allegations, and evidence in Complainant's opposition should not be considered by the Court in resolving the motion to dismiss, should have been included in the complaint, or are premature. These include allegations of "fraud" and "misrepresentation" due to Respondent's employees allegedly completing Section 1 of the Form I-9, which "recharacterize" the allegations in the FAC; new allegations and evidence in the form of screenshots of Forms I-9s and corresponding audit trails; arguments that Respondent failed to produce evidence or meet its burden for dismissal; and references to settlement discussions.

However, the Court does not find that Respondent has demonstrated that these arguments, allegations, or evidence are redundant, immaterial, impertinent, scandalous, or prejudicial. Rather, Respondent largely takes issue with the merit of Complainant's arguments, the admissibility of evidence, and what the Court may consider in resolving the Motion to Dismiss. These arguments are better suited for a reply brief. *See, e.g.*, *Ottaviance v. AVS Properties, LLC*, No. CV 18-16429, 2019 WL 3183642, at *2 n.3, 2019 U.S. Dist. LEXIS 117746, at *6 n.3 (D.N.J. July 15, 2019) ("An opposition brief to a motion, however, is not a 'pleading [for purposes of Rule 12(f)].' By far the better course, and the one I follow here, is to simply consider the validity, or not, of the arguments in the brief."); *CEI Grp., LLC v. CEI Composite Materials, LLC*, No. 19-11611, 2021 WL 357018, at *6, 2021 U.S. Dist. LEXIS 19425, at *19 (E.D. Mich. Feb. 2, 2021) (where pleadings "contain evidence that would otherwise be inadmissible, a court should disregard the inadmissible evidence, rather than striking it from the record") (citation omitted).

For instance, Respondent argues that the Complainant has added new allegations and has attempted to "clarify and recharacterize its allegations" in its response, by arguing that Respondent failed to ensure proper completion of Section 1 of the Forms I-9, and specifically, that audit trails reflect that employees did not electronically sign Section 1, as opposed to allegations in the FAC that the Guardian/LawLogix audit trails were deficient. Mot. Strike. 6–10. Respondent asserts that these are new allegations of fraud and were required to have been pled in the FAC, and moreover, are subject to heightened pleading standards under Federal Rule of Civil Procedure 9(b). *Id.* at 8. Complainant responds it "does not allege that the Guardian/LawLogix audit trails are per se deficient" and does not agree that it is alleging fraud. C's Resp. 6–7. Complainant argues that this is "inherent in, and germane to, the violations consistently alleged in this matter and communicated to the Respondent on multiple occasions and throughout this litigation." *Id.* at 7.

[4] *See, e.g.*, *United States v. Sal's Lounge*, 15 OCAHO no. 1394 (2021) (striking amended complaint filed without leave of the court from the record).

Discussion of this argument necessarily requires discussion of the merits of the motion to dismiss and the FAC as a whole. Further, this argument is not redundant, immaterial, impertinent, scandalous or prejudicial; rather, it relates to the nature and merit of the allegations in Complainant's FAC, and responds to the arguments made in the motion to dismiss.

Respondent also argues that Complainant's discussion of the parties' settlement history in the opposition should be stricken as inadmissible, and because it should have been alleged in the FAC. Respondent argues that courts typically strike the pleading or motion when litigants introduce the substance of settlement negotiations, and that the Federal Rules of Evidence prohibit such disclosures. Mot. Strike 13 (citing, inter alia, Fed. R. Evid. 408). Complainant's attempt to use settlement discussions to argue that Respondent should know what Complainant's allegations are is "improper, because it relates to the central issues of Respondent's liability, credibility, and the viability of Complainant's claims." *Id.* at 13–14. Even if these settlement discussions were proper, Complainant was obligated to include these allegations in its pleading. *Id.* at 15.

Complainant responds that the email submitted by Respondent clearly shows that the start of settlement negotiations did not begin on January 7, 2022, but at a later time. C's Resp. 19. There was, instead, an interim period in which Respondent received clarification about the allegations against it, which is the period referenced by Complainant. *Id.* at 20–21. Even if the communications were regarded as settlement discussions, the information provided in the Response would not be covered by Rule 408 as the communications were about process, i.e. factual information about violations, corrections to employee lists and Form I-9 records, etc., and not about liability, credibility, or viability of the claims. *Id.* at 22–24.

Because discussions of settlement could arguably be considered prejudicial, the Court will consider this argument. In the fact section of Complainant's Opposition to the Motion to Dismiss, Complainant states that before any settlement conversations began, the parties discussed the Forms I-9 in the original Notice of Intent to Fine (NIF) which were outside the retention period, noting that Complainant redid the audits and dismissed numerous violations, at which point the settlement period began. Opp. MTD 3–4. Subsequent references include Complainant's responses to questions about representative examples of recurring violations, *id.* at 20; and information Complainant provided to Respondent about the audit trails at issue and the Guardian/LawLogix and Lookout Services systems, *id.* at 29 n.10, 41 n.13. When the settlement period began is disputed, and it is unclear when some of the information was gleaned, but the specific reference in Respondent's brief is to an email from 2020, before the date Respondent indicates settlement conversations began, on January 7, 2022. *Id.* at 29 n.10. This reference, then, is well outside the settlement period. The reference on page 41 appears to be the same.

Moreover, the references in the fact section are not "specific statements about an offer of settlement or its terms," *see Ogunrinu v. Law Resources*, 13 OCAHO no. 1332b, 2–3 (2019). These discussions appear to be offered to explain the amended NIF rather than to establish the underlying validity of the claims. *See Ogunrinu*, 13 OCAHO no. 1332b, at 3 (denying motion to strike

affidavit containing settlement discussions because they were not offered to establish the validity of discrimination claims, but rather, to show that the respondent was on notice of an Immigrant and Employee Rights Section charge).

To the extent that Respondent argues that the information should have been alleged in the FAC, this argument is more appropriately raised in a reply.

In sum, the Court concludes that Respondent's arguments regarding the content of Complainant's opposition to its motion to dismiss are more appropriately raised in a reply, and declines to strike Complainant's opposition from the record. Respondent's motion to strike is therefore DENIED.

C. Motion for Leave to Reply to Response to Motion to Dismiss

Respondent moves, in the alternative, to file a Reply to Complainant's opposition to its Motion to Dismiss. Mot. Strike 17. As discussed above, OCAHO Administrative Law Judges have discretion to allow replies. 28 C.F.R. § 68.11(b); *A.S.*, 14 OCAHO no. 1381e, at 2 n.3 (citing 28 C.F.R. § 68.11(a)). The Court considers whether the party requesting leave to file a reply has shown "good cause" for such a filing. *See Sharma*, 17 OCAHO 1450d, at 2 (citing, inter alia, *Brown*, 14 OCAHO no. 1379b, at 1.

Here, the Court finds that Respondent has shown good cause for filing a reply, specifically, to respond to new allegations, evidence, and arguments raised by Complainant in its response briefing, and to discuss which portions of the response the Court should consider in resolving the Motion to Dismiss. *See, e.g.*, *Sharma*, 17 OCAHO no. 1450j, at 4; *Heath*, 14 OCAHO no. 1385b, at 2 (2021). Respondent may file a Reply by October 19, 2023. As Respondent may raise issues raised in the motion to strike and addressed by Complainant in its Reply, Complainant may file a sur-reply by November 2, 2023.

IV. ORDER FOR SUPPLEMENTAL BRIEFING

On December 13, 2022, Complainant filed 20 separate cases before OCAHO against different Walmart, Inc. locations (OCAHO Case Nos. 2023a00015–2023a00034). During a status conference held on January 18, 2023, the Court inquired as to whether Respondent would seek consolidation of all the related complaints. *See* Order Summarizing Status Conf. 2 (citing 28 C.F.R. § 68.16). Respondent stated "that it had not and did not anticipate filing a motion to consolidate the cases, although it would be comfortable if the Court managed the cases procedurally together." *Id.*

28 C.F.R. § 68.16 allows for consolidation where "the same or substantially similar evidence is relevant and material to the matters at issue in each such hearing," and Federal Rule of Civil Procedure 42(a) provides that courts may order consolidation, or issue "any other orders to avoid

unnecessary cost or delay," where actions involve "a common question of law or fact." "There is ample OCAHO case precedent for consolidating cases involving common parties, issues, and/or witnesses." *Guzman v. Yakima Fruit & Cold Storage*, 9 OCAHO no. 1063, 3 (2000) (collecting cases). When considering whether to consolidate cases, courts often consider factors such as the interest of justice, expeditious results, conservation of resources, and avoiding inconsistent results, and conversely, whether consolidation would risk confusion, delay, or prejudice. *See generally* 8 MOORE'S FEDERAL PRACTICE § 42.13.

Here, it appears that the FAC in each of the pending cases contain substantially similar types of charges and factual allegations. Although the matters involve different Walmart locations, it is not clear from the record whether this creates a meaningful difference in fact or evidence between the cases, given that each location is affiliated with Walmart, Inc. Moreover, issuing separate decisions for each of the pending motions to dismiss would appear to pose a risk of delay, waste of resources, and inconsistent results. Conversely, consolidation at this juncture may also result in delay due to the pendency of motions to dismiss in each matter.

Therefore, the Court ORDERS the parties to provide their position on whether the pending matters should be consolidated into one matter at this juncture (or at a later time), or to propose alternative means for promoting efficiency in resolving these proceedings. The parties are directed to provide briefing on this question by November 2, 2023.

SO ORDERED.

Dated and entered on September 28, 2023.

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Honorable Jean C. King
Chief Administrative Law Judge