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

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Complainant, | ) | 8 U.S.C. § 1324b Proceeding |
| v. | ) | OCAHO Case No. 20B00106 |
| TROPICANA CASINO & RESORT,<br>Respondent | ) | Judge Robert L. Barton, Jr. |

## ERRATUM

(*January 17, 2001*)

A typographical error appears in this court's January 10, 2001, Prehearing Conference Report and Order Denying Complainant's Motion to Strike Affirmative Defenses. Specifically, the second sentence of the second full paragraph on page 6 of that order reads as follows: "[w]hile in rare circumstances the absence of a statement of facts may be permissible, see United States v. WSC Plumbing, 9 OCAHO 1061, at 19 (2000), Rule 68.(c)(2) employs mandatory language, and thus a respondent must provide a statement of facts supporting its affirmative defenses."

I hereby correct the typographical error so that the sentence now reads as follows: "[w]hile in rare circumstances the absence of a statement of facts may be permissible, see United States v. WSC Plumbing, 9 OCAHO 1061, at 19 (2000), Rule 68.9(c)(2) employs mandatory language, and thus a respondent must provide a statement of facts supporting its affirmative defenses." For the convenience of the parties, a copy of the corrected page is attached to this Erratum.

**ROBERT L. BARTON, JR.**
**ADMINISTRATIVE LAW JUDGE**

of Respondent's affirmative defenses. The United States Court of Appeals for the Third Circuit, in whose territorial jurisdiction this proceeding arises, adheres to the common rule that,

> [a] court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent.' The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where ... the factual background for a case is largely undeveloped.

See Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986) (internal citations omitted). Moreover, even if the proceedings had advanced to the stage where substantive adjudication of the defenses were possible, I would be disinclined to address them, as a prudential matter, until they became the subject of a motion to dismiss. Many courts hold that motions to strike affirmative defenses should be granted only if (1) the movant shows that the defense lacks any conceivable relation to the controversy, and (2) the continued presence of the defense in the pleading will be unfairly prejudicial to the movant. See, e.g., American Buying Ins. Servs. v. S. Kornreich & Sons, Inc., 944 F. Supp. 240, 250 (S.D.N.Y. 1996); Bush v. Barnett Bank of Pinellas County, 916 F. Supp. 1244, 1249 (M.D. Fla. 1996). On the basis of the record before me, I simply cannot conclude with any confidence that Respondent's affirmative defenses lack any conceivable relation to the controversy. Further, Complainant has not shown that the continued presence of the defenses in Respondent's Answer will be unfairly prejudicial to Complainant. Thus, because the issues raised in Respondent's affirmative defenses have not yet become ripe for adjudication, Complainant's Motion to Strike is DENIED. However, this denial is without prejudice, and Complainant may renew its motion to strike at a later date (e.g. after completion of discovery).

It does appear, however, that Respondent has not fully satisfied its obligation to provide a statement of facts in support of each affirmative defense. See 28 C.F.R. § 68.9(c)(2). While in rare circumstances the absence of a statement of facts may be permissible, see United States v. WSC Plumbing, 9 OCAHO 1061, at 19 (2000), Rule 68.9(c)(2) employs mandatory language, and thus a respondent must provide a statement of facts supporting its affirmative defenses. Thus, by not later than January 23, 2001, Respondent must serve on Complainant and file with the court an Amended Answer, in which it provides a discussion of the facts supporting each affirmative defense, to the extent it can do so, or explain why, given the nature of the defense, the inclusion of such a fact statement is impracticable. However, Respondent need not provide legal arguments in support of its defenses. With respect to the Second Affirmative Defense, Respondent must at least specify what it believes to be the cut-off date under INA § 274B(d)(3)–i.e., the date prior to which Respondent believes all claims against it are barred. With respect to the Third Affirmative Defense, Respondent must identify specific incidents, statements, or other alleged facts that support its assertion that Complainant is engaging in vindictive or retaliatory prosecution against it. The fact that Complainant filed a Complaint afterRespondent rejected its settlement demand is simply not sufficient to show vindictive prosecution.

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

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br>Complainant, | ) | 8 U.S.C. § 1324b Proceeding |
| v. | ) | OCAHO Case No. 20B00106 |
| TROPICANA CASINO & RESORT,<br>Respondent | ) | Judge Robert L. Barton, Jr. |

# PREHEARING CONFERENCE REPORT AND ORDER DENYING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

(*January 10, 2001*)

## I. BACKGROUND

In response to my First Prehearing Order of November 28, 2000, the parties to this proceeding, the United States of America (Complainant) and Tropicana Casino & Resort (Respondent), submitted a joint proposed procedural schedule (JPPS) to the court. Among other things, the JPPS contained a number of proposed dates and times for the holding of a Prehearing Conference to discuss the procedural schedule, as well as any contested legal issues and matters pertaining to discovery. One of the proposed conference dates and times submitted by the parties was January 8, 2001, at 2:00 p.m. Accordingly, on December 18, 2000, I issued a Notice of Prehearing Conference in which I directed counsel for the parties to participate in a telephonic Prehearing Conference on January 8, 2001, at 2:00 p.m. Eastern Time.

On the morning of January 8, 2001, the court received a telephone call from the office of Respondent's counsel, Russell L. Lichtenstein, Esq., informing the court that he had been summoned, at the last minute, to appear at a state-court matter in Atlantic County, New Jersey, and would be unavailable to participate in the Prehearing Conference scheduled for that afternoon. Accordingly, Mr. Lichtenstein sought to reschedule the conference. Despite the fact that the Prehearing Conference had been scheduled three weeks previously, based on the parties' (including Respondent's) own proposed date and time, counsel for Complainant was willing and able to accommodate Mr. Lichtenstein's request to reschedule, and therefore the Conference was rescheduled for January 9, 2001, at 3:00 p.m. Eastern Time. When Mr. Lichtenstein's office called the court, at approximately 11:30 a.m. on January 8, 2001, to confirm the new date and time for the

Conference, it was communicated to the court that Mr. Lichtenstein would himself be present at the Conference.

On January 9, 2001, at 3:00 p.m., the rescheduled Prehearing Conference was initiated by telephone calls from the court to the parties' counsel. Complainant was represented at the Conference by Ginette Milanes, Esq. Also in attendance on behalf of Complainant was Lilia Irizarry, an Equal Employment Opportunity Specialist with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). However, at the outset of the conference I was informed that Mr. Lichtenstein was, at that moment, on an airplane returning from a deposition in another matter. Therefore, Respondent was represented at the Prehearing Conference by Eileen Muskett, Esq. and Jerry Quinn, Esq., neither of whom had previously entered an appearance on behalf of Respondent as required by 28 C.F.R. § 68.33(f). I would note that a copy of the OCAHO Rules of Practice and Procedure, 28 C.F.R. Part 68, was attached to the Notice of Hearing in this proceeding, and was served on Respondent's counsel on October 4, 2000. However, because counsel for Complainant had no apparent objection to Ms. Muskett's appearance at the Conference, and because Ms. Muskett assured the court that her participation in this proceeding would likely be confined to the present conference, I expressed my willingness to proceed with the Conference despite the absence of a formal entry of appearance.

I wish to put the parties and their representatives on notice that I expect them to adhere scrupulously to the OCAHO Rules of Practice and to the procedural schedule agreed to in this proceeding. When a party proposes dates and times for conferences, depositions, filing deadlines, hearings or any other matters, I expect that party to conform its schedule to those commitments. Thus, once a party has committed itself to a deadline, a party must take whatever steps are necessary to avoid scheduling conflicts. If unanticipated intervening business arises (such as trials and depositions in other unrelated matters) that prevents counsel from participating personally in a proceeding, it is counsel's *obligation* to obtain the assistance of an associate who can participate meaningfully in his absence on the scheduled date; it is not the court's or the opposing party's obligation to bend over backward to indulge the convenience of counsel. Moreover, to participate, an associate must enter an appearance, as required by the OCAHO Rules of Practice. In the future, the court will look with disfavor upon eleventh-hour requests to deviate from the procedural schedule. I turn now to a discussion of the substantive matters discussed during the January 9, 2001, Prehearing Conference.

## II. DISCUSSION

### A. Complainant's Motion to Strike Respondent's Affirmative Defenses

The first matter discussed at the Conference was Complainant's pending Motion to Strike Respondent's Affirmative Defenses. On September 29, 2000, Complainant filed a Complaint with the OCAHO in which it alleges that Respondent violated both section 274B(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b(a)(1)(B), which prohibits citizenship-status discrimination with respect to hiring, recruitment, and referral for a fee, and INA § 274B(a)(6),

which prohibits discriminatory documentary practices occurring in connection with the employment eligibility verification process (I-9 process).

On November 2, 2000, Respondent served an Answer to the Complaint upon this court. For various reasons outside Respondent's control, the Answer was misdirected and did not arrive at OCAHO until November 27, 2000, at which time it was accepted for filing. In addition to denying each of the substantive allegations set forth in the Complaint, Respondent's Answer contains three affirmative defenses. The first affirmative defense asserts that the Complaint, or a portion of it, fails to state a claim upon which relief can be granted. The second affirmative defense asserts that some or all of the allegations contained in the Complaint are barred by the "limitation period contained in 8 U.S.C. § 1324b(b)(3)." The third affirmative defense asserts that "the penalties sought by complainant are grossly excessive and fashioned in retaliation for respondent's refusal to accede to the government's unreasonable and factually unsupportable 'settlement' demand and represent an abuse of prosecutorial discretion...."

On November 22, 2000, Complainant filed a Motion to Strike Respondent's Affirmative Defenses. As a threshold matter, Complainant explains that each of Respondent's defenses lacks a supporting statement of facts, as required by 28 C.F.R. § 68.9(c)(2). According to Complainant, this deficiency shows that Respondent's defenses are both procedurally and substantively defective. Complainant also attacks Respondent's affirmative defenses on the merits. Specifically, Complainant asserts that the First Affirmative Defense is legally insufficient and should be struck because Complainant has, in fact, stated a valid legal claim against Respondent. Complainant opposes the Second Affirmative Defense, relating to the applicability of the 180-day limitations period codified at INA § 274B(d)(3), on the ground that, as a factual matter, Complainant has asserted the existence of pattern or practice violations occurring within, or continuing to occur within, the relevant time period. Complainant opposes the Third Affirmative Defense, relating to vindictive or retaliatory prosecution, on the ground that Respondent cannot satisfy the applicable legal standard governing such claims.

After receiving an unopposed extension of time to respond to Complainant's motion, on December 11, 2000, Respondent filed a Memorandum in Opposition to Complainant's Motion to Strike. In its Memorandum, Respondent argues that its First Affirmative Defense does not contain a statement of facts because it is not based on any asserted facts, but rather upon what it views as the purely *legal* deficiencies of the Complaint. Respondent argues that its Second and Third Affirmative Defenses contain adequate statements of facts, and therefore satisfy the requirements of 28 C.F.R. § 68.9(c)(2). With respect to substance, Respondent argues that its affirmative defenses should not be stricken simply because Complainant believes they lack legal merit. As a threshold matter, Respondent asserts that its affirmative defenses are, in fact, meritorious. In addition, Respondent asserts that it is premature–in light of the fact that no meaningful discovery has yet been conducted in this proceeding–to submit the legal merits of its defenses to full-fledged adjudication.

On December 12, 2000, Complainant filed a Motion to Reply to Complainant's Opposition. I granted the Motion, over Respondent's objection, and gave Complainant until January 5, 2001,

to file its Reply. In its Reply, Complainant essentially reiterates its arguments that the Complaint does in fact state a valid legal claim and that Respondent cannot prove the necessary elements of vindictive or retaliatory prosecution. Complainant's Reply does not further address the Second Affirmative Defense, relating to the statute of limitations. Moreover, Complainant argues that Respondent's claims of compliance with the requirements of Rule 8(c) of the Federal Rules of Civil Procedure (FRCP)–dealing with affirmative defenses–is misplaced because 28 C.F.R. § 68.9(c)(2), and not FRCP 8(c), governs OCAHO proceedings.

1. Relevance of FRCP 8(c) in OCAHO Proceedings

As stated above, Complainant objects to Respondent's effort to seek shelter behind the liberal requirements of FRCP 8(c). According to OSC, FRCP 8(c) is not relevant in this proceeding because the OCAHO Rule appearing at 28 C.F.R. § 68.9(c)(2) "specifically covers affirmative defenses." According to OSC, reference to the FRCP as a "general guideline" is permissible in OCAHO proceedings only to the extent that no binding OCAHO authority already exists with respect to the particular issue at hand. Because 28 C.F.R. § 68.9(c)(2) sets forth an OCAHO requirement with respect to affirmative defenses, OSC argues that the OCAHO Rule is controlling, and that FRCP 8(c) is simply inapposite.

OSC's argument, while not meritless, is greatly overstated. First and foremost, 28 C.F.R. § 68.9(c)(2) merely states that all affirmative defenses asserted in an answer must be supported by a statement of facts; it provides absolutely no insight into whether and under what circumstances defenses may be deemed waived if they are not pleaded affirmatively. Given the dearth of practical guidance supplied by the OCAHO Rule, numerous OCAHO cases have held that FRCP 8(c) may be used to supplement 28 C.F.R. § 68.9(c)(2) under appropriate circumstances. See United States v. Davila, 7 OCAHO no. 936, 253, 270-71 & n.19 (1997) (ruling, by reference to FRCP 8(c), that a respondent who had failed to timely raise the statute of limitations defense had waived it); United States v. Harran Transp. Co., Inc., 6 OCAHO no. 857, 342, 347-48 (1996) (holding, in the summary decision context, that "28 C.F.R. § 68.9(c)(2) is analogous to [FRCP] 8(c) ... which requires that an affirmative defense be pleaded with specificity...."); United States v. Northern Michigan Fruit Co., 4 OCAHO no. 667, 680, 688-89 (1994) (adopting FRCP 8(c) and the federal judicial standards governing it in adjudicating a motion to strike affirmative defenses); United States v. Jenkins, 4 OCAHO no. 649, 511, 521-22 (1994) (same); United States v. Valencia & Sons, Inc., 2 OCAHO no. 387, 724, 725 (1991) (same).

At the same time, a respondent in an OCAHO proceeding may not seek to excuse its failure to provide a statement of facts in support of its affirmative defenses by relying upon its compliance with FRCP 8(c), which contains no such requirement. Of course, to the extent that FRCP 8(c) and 28 C.F.R. § 68.9(c)(2) differ, the OCAHO Rule must be followed. In a recent unpublished order rejecting an OSC motion to strike, this court stated as follows:

> The OCAHO Rules indicate that a Respondent's Answer "shall include ... a statement of the facts supporting each affirmative defense." See 28 C.F.R. § 68.9(c)(2). By requiring respondents to provide a statement of facts in support of each affirmative defense,

> the OCAHO rule deviates from the more liberal pleading requirement of FRCP 8(c), which permits affirmative defenses to be pleaded with only a minimal degree of specificity. Therefore, if a responding party in an OCAHO proceeding fails to include a statement of facts in support of an affirmative defense, an OCAHO ALJ may, on motion, strike that defense from the Answer. United States v. A & A Maintenance Enter., Inc., 6 OCAHO no. 852, 265, at 267 (1996), 1996 WL 382262, at *2. In the alternative, an ALJ may, either on motion or *sua sponte*, require a defending party to supplement its affirmative defenses with the required statements of facts. Cf. United States v. Mark Carter d/b/a Dixie Indus. Serv. Co., 6 OCAHO no. 865, 458, at 467 (1996), 1996 WL 455009, at *7.

United States v. Swift and Co., OCAHO Case No. 20B00102, Order Granting Respondent's Motion to Amend Answer and Denying Complainant's Motion to Strike Affirmative Defenses, at 6 (December 12, 2000). Thus, OSC is correct that FRCP 8(c) is inapposite in an OCAHO proceeding where the sole disputed issue is the respondent's compliance with the statement-of-facts requirement of 28 C.F.R. § 68.9(c)(2). However, by implying that the existence of 28 C.F.R. § 68.9(c)(2) makes FRCP 8(c) irrelevant generally in OCAHO proceedings, OSC carries its argument too far. Clearly, FRCP 8(c) and 28 C.F.R. § 68.9(c)(2) are not strictly coextensive, i.e., some questions that may be answered by reference to FRCP 8(c) cannot be answered by reference to 28 C.F.R. § 68.9(c)(2); therefore, to the extent that the former provision may address situations "not provided for or controlled by [the latter]," OCAHO Administrative Law Judges may consider it as a "general guideline." See 28 C.F.R. § 68.1.

In any event, I fail to see the basis for Complainant's claim that Respondent seeks, in its Opposition to the Motion to Strike, "to excuse its failure to comply with the OCAHO Rules by turning to [FRCP] 8(c)." Respondent mentions FRCP 8(c) in connection with its assertion that it raised the contested defenses because it was concerned that its failure to do so would have been construed as a waiver by this court. My prior ruling in Davila, 7 OCAHO no. 936, at 270-71, shows that Respondent's concern in this regard is justified. However, I have found nothing in Respondent's Opposition to suggest that Respondent believes it was excused from OCAHO's statement-of-fact requirement simply because FRCP 8(c) contains no such requirement. Instead, as previously stated, Respondent asserts that it did, in fact, comply with 28 C.F.R. § 68.9(c)(2) or, in the alternative, that it could not provide a factual statement in support of a purely legal defense.

2. Complainant's Motion to Strike is Denied, But Respondent Must Supplement Its Answer to Provide the Required Statements of Facts

As I made clear during the Conference, I am inclined to agree with Respondent that it is too early in this proceeding for the court to entertain substantive arguments with respect to the merits

of Respondent's affirmative defenses. The United States Court of Appeals for the Third Circuit, in whose territorial jurisdiction this proceeding arises, adheres to the common rule that,

> [a] court should not grant a motion to strike a defense unless the insufficiency of the defense is 'clearly apparent.' The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where ... the factual background for a case is largely undeveloped.

See Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3d Cir. 1986) (internal citations omitted). Moreover, even if the proceedings had advanced to the stage where substantive adjudication of the defenses were possible, I would be disinclined to address them, as a prudential matter, until they became the subject of a motion to dismiss. Many courts hold that motions to strike affirmative defenses should be granted only if (1) the movant shows that the defense lacks any conceivable relation to the controversy, and (2) the continued presence of the defense in the pleading will be unfairly prejudicial to the movant. See, e.g., American Buying Ins. Servs. v. S. Kornreich & Sons, Inc., 944 F. Supp. 240, 250 (S.D.N.Y. 1996); Bush v. Barnett Bank of Pinellas County, 916 F. Supp. 1244, 1249 (M.D. Fla. 1996). On the basis of the record before me, I simply cannot conclude with any confidence that Respondent's affirmative defenses lack any conceivable relation to the controversy. Further, Complainant has not shown that the continued presence of the defenses in Respondent's Answer will be unfairly prejudicial to Complainant. Thus, because the issues raised in Respondent's affirmative defenses have not yet become ripe for adjudication, Complainant's Motion to Strike is DENIED. However, this denial is without prejudice, and Complainant may renew its motion to strike at a later date (e.g. after completion of discovery).

It does appear, however, that Respondent has not fully satisfied its obligation to provide a statement of facts in support of each affirmative defense. See 28 C.F.R. § 68.9(c)(2). While in rare circumstances the absence of a statement of facts may be permissible, see United States v. WSC Plumbing, 9 OCAHO 1061, at 19 (2000), Rule 68.(c)(2) employs mandatory language, and thus a respondent must provide a statement of facts supporting its affirmative defenses. Thus, by not later than January 23, 2001, Respondent must serve on Complainant and file with the court an Amended Answer, in which it provides a discussion of the facts supporting each affirmative defense, to the extent it can do so, or explain why, given the nature of the defense, the inclusion of such a fact statement is impracticable. However, Respondent need not provide legal arguments in support of its defenses. With respect to the Second Affirmative Defense, Respondent must at least specify what it believes to be the cut-off date under INA § 274B(d)(3)–i.e., the date prior to which Respondent believes all claims against it are barred. With respect to the Third Affirmative Defense, Respondent must identify specific incidents, statements, or other alleged facts that support its assertion that Complainant is engaging in vindictive or retaliatory prosecution against it. The fact that Complainant filed a Complaint after Respondent rejected its settlement demand is simply not sufficient to show vindictive prosecution.

### B. Other Matters Discussed at the Prehearing Conference

After concluding the discussion of Complainant's Motion to Strike and issuing my oral rulings, I proceeded to discuss with the parties the possibility of settlement. At the outset, counsel for Complainant indicated that no settlement discussions were currently being conducted, and that its last settlement inquiry, sent to Respondent on August 28, 2000, had not yet elicited a response. Counsel for Respondent indicated, in response to my question, that Respondent would likely be interested in exploring the possibility of settlement at some time in the future. Moreover, counsel for Respondent inquired as to whether the court would personally intervene to promote settlement of the proceeding. I responded that I would be willing, upon the request of any or all parties, to order a settlement conference.

Next, I turned to a discussion of the potential scope of discovery. Counsel for both parties expressed confidence that the parties would be able to complete discovery by May 31, 2001. Counsel for Respondent indicated that it had served interrogatories upon Complainant, and was currently engaged in discussions with Complainant regarding what it perceives to be the inadequacy of Complainant's responses. However, I note that no motion to compel has yet been filed with the court. Complainant indicated that it has not yet propounded any discovery requests, but that it will likely serve requests for admissions, interrogatories, requests for production of documents and requests for oral depositions in the near future.

The parties appeared to agree that the area in and around Atlantic City, New Jersey, would be a reasonable situs for the hearing in this proceeding. Counsel for Respondent noted that the nearest U.S. District Court building was located in Camden, New Jersey, about forty-five minutes from Atlantic City, but that the New Jersey Superior Court building in Atlantic City would likely be available for use as well.

## III. CONCLUSION

In conclusion, Complainant's Motion to Strike Respondent's Affirmative Defenses is DENIED without prejudice. However, Respondent must file, by not later than January 23, 2001, an Amended Answer in which it provides a statement of facts in support of each affirmative defense. It is so ordered.

**ROBERT L. BARTON, JR.**
**ADMINISTRATIVE LAW JUDGE**