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

March 12, 2015

UNITED STATES OF AMERICA, Complainant, v. LOUISIANA CRANE COMPANY, LLC D/B/A LOUISIANA CRANE AND CONSTRUCTION, Respondent.	)))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 14B00102

ORDER DENYING RESPONDENT'S MOTION TO INTERPLEAD USCIS THROUGH COUNTER-COMPLAINT AND REPRIMANDING COUNSEL

I. RELEVANT PROCEDURAL HISTORY

Complainant United States, through attorney Liza Zamd in the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the United States Department of Justice's Civil Rights Division ("OSC" or complainant), filed a complaint against respondent Louisiana Crane Company, LLC ("LCC" or respondent) on August 29, 2014. The complaint at pages one and six alleges that LCC "engaged in a pattern or practice of discrimination against work-authorized, non-U.S. citizens when it required them to provide specific documents to establish their employment eligibility because of their citizenship status, in violation of 8 U.S.C. § 1324b(a)(6)."

Respondent, through counsel Kevin Lashus and Margaret Murphy, filed "Respondent's Original Answer to Complainant's Original Complaint and Respondent's Counter Complaint" on September 29, 2014. Respondent argues at page three of its answer and counter-complaint that the Department of Homeland Security's ("DHS") United States Citizenship and Immigration Services ("USCIS") has engaged in a "malicious use of process," and that USCIS should be interpleaded as a relevant party to this litigation.

Complainant filed its motion to dismiss the counter-complaint on October 28, 2014, arguing that respondent lacks standing to file a "complaint" before the Office of the Chief Administrative Hearing Officer ("OCAHO") and arguing that OCAHO lacks jurisdiction to consider a "malicious use of process" claim against USCIS. *See* "United States Combined Motion To

Strike Affirmative Defenses And Motion To Dissmiss [sic] Respondent's Counter Complaint" at 3-4.

In response, respondent filed "Respondent's Response To Complainant's Motion To Strike, Response to Counter Respondent's Motion To Dismiss, And Respondent's Motion To Dismiss" on November 13, 2014. On page three of this filing, respondent set forth its belief that

> under a Memorandum of Understanding, USCIS recommended Complainant investigate apparent patterns of immigration-related employment discrimination from the telemetry of information it receives from participating employers during the on-boarding process. It is Respondent's belief that this case arises from that speculative practice. No individual filed a complaint for immigration-related employment discrimination. Therefore, this Honorable Court is empowered to inter-plead relevant parties to this litigation.

Moreover, respondent argued that it has been the "victim of improper referral for investigation."

The parties filed a joint discovery plan on November 18, 2014. This case was reassigned to the undersigned on December 4, 2014. On January 14, 2015, the parties filed a joint motion for protective order.

On January 20, 2015, the parties and the undersigned held a prehearing conference, during which respondent was represented by Mr. Lashus. At the conclusion of the pre-hearing conference, respondent's counsel Mr. Lashus asked to file a "position statement" to support respondent's arguments that USCIS should be interpleaded as a party. I granted Mr. Lashus' request to file a "position statement," and I granted complainant's request to file a response.

On January 27, 2015, respondent filed a "position statement" in support of its contention that the E-Verify Monitoring and Compliance Branch of USCIS should be interpleaded through a counter-complaint as a counter-respondent. *See* "Louisiana Crane & Construction, LCC's Position Statement Regarding The Investigation Of The Charge And the Hearing Flowing There From [sic]" ("Position Statement"). I note that Mr. Lashus signed this pleading and listed Margaret Murphy as co-counsel. Respondent's Position Statement is discussed in great detail below. Additionally on February 3, 2015, respondent filed its untimely prehearing statement, which should have been filed with OCAHO by December 1, 2014.

Counsel for complainant OSC filed a response to respondent's Position Statement on February 3, 2015. *See* "United States' Response To LCC's 'Position Statement Regarding The Investigation Of The Charge And The Hearing Flowing There From [sic]'" ("OSC's Response"). In OSC's Response, OSC alleges that respondent failed to provide "a basis" for its position that USCIS should be interpleaded as a "counter respondent," and OSC claims that no authority exists to

support respondent's position. *See* OSC's Response at 2-3. Moreover, OSC cautions respondent by stating that

> discovery aimed at challenging the basis or adequacy of an OSC investigation has no place in this proceeding. *See United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO 1157 at 5 (2012) (explaining that an OCAHO complaint initiates a de novo proceeding, and the complaint does not provide respondents with 'an occasion to litigate the adequacy of [a] charge or of OSC's investigation of that charge.").

OSC's Response at 2. Primarily, this order resolves the issue of whether USCIS should be interpleaded. For the reasons set forth below, respondent's motion is denied, and USCIS will not be interpleaded as a counter respondent in this case.

II. SERIOUS PROBLEMS WITH RESPONDENT'S POSITION STATEMENT

Respondent's Position Statement contains serious problems and deficiencies, which warrant denial of respondent's motion and issuance of a written reprimand to respondent's counsel. In reaching these conclusions, it is essential to rely on pertinent standards of conduct, ethics obligations, rules of practice and procedure, and relevant case law.

A. Ethical Obligations of Attorneys

Lawyers are officers of the court and have an ethical duty to be candid with the court. OCAHO's rules at 28 C.F.R. § 68.35 set forth the "Standards of Conduct" expected of persons appearing before OCAHO. "All persons appearing in proceedings before an Administrative Law Judge are expected to act with integrity, and in an ethical manner" 28 C.F.R. § 68.35(a). Moreover, 28 C.F.R. § 68.35(b) establishes that the

> Administrative Law Judge may exclude from proceedings parties, witnesses, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against *ex parte* communications. The Administrative Law Judge shall state in the record the cause for barring an attorney or other individual from participation in a particular proceeding. The Administrative Law Judge may suspend the proceeding for a reasonable time for the purpose of enabling a party to obtain another attorney or representative.

OCAHO case law instructs that reliance on the ethics rules of a relevant state bar is appropriate to determine whether an ethical violation has occurred. *See Santiglia v. Sun Microsystems, Inc.*,

9 OCAHO no. 1104, 5 (2004) (citing *Avila v. Select Temporaries, Inc.*, 9 OCAHO no. 1079, 8 (2002)).[1] In addition, the United States Court of Appeals for the Fifth Circuit has stated, "The Texas Disciplinary Rules of Professional Conduct do not expressly apply to sanctions in federal courts, but a federal court may nevertheless hold attorneys accountable to the state code of professional conduct." *Resolution Trust Corp. v. H.R. "Bum" Bright, et al.*, 6 F.3d 336, 341 (5th Cir. 1993) (referencing *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); *In re Finkelstein*, 901 F.2d 1560, 1564 (11th Cir. 1990)). Federal Courts have also relied upon "the canons of ethics developed by the American Bar Association" as a source for professional standards. *Resolution Trust Corp*, 6 F.3d at 341 (referencing *In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992)).

Rule 8.4(c) of the American Bar Association's Model Rules of Professional Conduct sets forth that "[i]t is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice . . . ." MODEL RULES OF PROFESSIONAL CONDUCT RULE 8.4 (2009). Additionally, the Court of Appeals of Texas has explained that "[i]n Section IV of the Texas Lawyer's Creed, the lawyer steadfastly pledges 'I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage. . . .'" *In re the City of Lancaster*, 228 S.W.3d 437, 440 n.4 (Tex. App. 2007) (quoting "Texas Lawyer's Creed, Lawyer and Judge 6."). The Court of Appeals of Texas has also discussed that "an attorney owes a duty of candor to this Court and . . . the Texas Disciplinary Rules of Professional Conduct forbid a lawyer from making a false statement of material fact to a tribunal. See Tex. Disciplinary Rules Prof'l Conduct R. 3.03(a)(1)." *In re Freestone Underground Storage, Inc.*, 429 S.W.3d 110, 114 n.6 (Tex App. 2014).

Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, Rule 3.01 states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." Rule 3.01 Comment 2 establishes that "[i]t is also frivolous if the lawyer is unable either to make a good faith argument that the action taken is consistent with existing law or that it may be supported by a good faith argument for an extension, modification or reversal of existing law." Rule 3.03(a)

[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 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 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.

titled "Candor Toward The Tribunal" states that an attorney must not "(1) make a false statement of material fact or law to a tribunal; . . .[or] (4) fail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . ." Tex. Disciplinary R. Prof'l Conduct, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, art. X, § 9, Rules 3.01, 3.01 cmt. 2, 3.03 (Vernon 2013) (Tex. State Bar R.).

Texas Disciplinary Rules of Professional Conduct Rule 3.03 Comment (2) identifies that "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Rule 3.03 comment (3) states,

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(4), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing counsel.

Tex. Disciplinary R. Prof'l Conduct, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, art. X, § 9, Rule 3.03 cmts. 2, 3 (Vernon 2013) (Tex. State Bar R.).

Accordingly, pertinent rules of ethics and standards of conducts set forth by the Texas Disciplinary Rules of Professional Conduct and the American Bar Association establish that attorneys appearing before OCAHO have a duty to act candidly with the court by avoiding misrepresentation, by disclosing "adverse authority," and by not presenting frivolous arguments.

B. Respondent Has Failed To Substantiate Its Position Statement With Legal Authority

Respondent's counsel informed the undersigned and counsel for OSC on a prehearing conference call that he sought to file a pleading in support of respondent's position that USCIS should be interpleaded through a counter-complaint. Respondent has alleged that USCIS has abused its process by informing complainant OSC of possible paperwork irregularities, which serves as the basis for OSC's complaint against respondent. Moreover, respondent alleges that complainant OSC did not investigate respondent on its "own initiative" because USCIS provided information about respondent to OSC, and OSC "followed-up upon a referral by M&C" of USCIS (Respondent's Position Statement at 3). Respondent alleges that this sort of information sharing between OSC and DHS's USCIS is inappropriate due to a "lack of regulatory authority to pursue the Charge as outlined in 28 C.F.R. § 68.4." Respondent's Position Statement at 3. Moreover, respondent alleges that it can redress these claims before OCAHO.

In its Position Statement, respondent makes two unsupported statements that lack merit, especially because respondent failed to explain its arguments and failed to provide any relevant

legal authority to support its positions. First, respondent states that OSC lacks "regulatory authority to pursue the Charge as outlined in 28 C.F.R. § 68.4." Second, respondent states that "OSC did NOT conduct an investigation 'on his own initiative', but instead followed-up upon a referral by M&C." Respondent's Position Statement at 3 (emphasis and punctuation as in original).

Respondent's counsel has failed to set forth any mandatory or relevant authority to support its Position Statement. Additionally, respondent has failed to provide citations, let alone legal analysis or arguments, respecting any OCAHO rules or relevant statutes, OCAHO case precedent, Fifth Circuit precedent, Federal Rules of Civil Procedure or United States Code provisions that support its position that interpleading USCIS is possible or warranted. Such failures to the basic standards expected in appropriate pleading are fatal to respondent's arguments and undermine counsel's credibility before OCAHO with respect to this pleading.

Although respondent cites to 28 C.F.R. § 68.4 as authority for its argument that USCIS should be interpleaded as a counter-respondent because OSC lacks "regulatory authority" to pursue a charge based on a USCIS referral of information to OSC, this regulation does not relate to this case and circumstances. In relevant part, 28 C.F.R. § 68.4 sets forth OSC's deadline for assessing charges filed with OSC by individuals alleging discrimination, and 28 C.F.R. § 68.4 establishes OSC's deadline for filing a complaint with OCAHO based on an underlying charge alleging discrimination.

In this case, 28 C.F.R. § 68.4 is not relevant because it does not appear that an individual filed an underlying charge with OSC. In addition, the plain reading of 28 C.F.R. § 68.4 does not divest OSC of any authority to file a complaint based on a referral of information from DHS, which is the crux of respondent's argument. In fact, a different regulation found at 28 C.F.R. § 44.304 permits OSC to file such a complaint as discussed in detail below. Therefore, respondent has failed to prove that any regulation supports its position.

C. Legacy INS and DHS's USCIS Have a Long History of Working With OSC

OCAHO case law sets forth that legacy INS and now DHS's USCIS have maintained a relationship with OSC for many years whereby INS and DHS have referred cases to OSC with respect to potential unfair immigration-related employment practices. As early as 1991, OCAHO case law establishes the relationship between OSC and legacy INS. In an order denying a motion to quash a subpoena and authorizing enforcement of the subpoena, the validity of an INS referral to OSC is discussed. "OSC's investigation followed upon information received from INS. . . . In my judgment, the INS referral constitutes reasonable cause for investigation . . . . [S]ee also 8 U.S.C. § 1324b(b)(1) (an officer of INS may charge a violation of § 1324b)." *In Re Investigation of: Modern Maintenance Co., Inc.*, 2 OCAHO no. 359, 476, 477 (1991).

The relationship between legacy INS and OSC is also discussed in detail as follows in *Hernandez, et al. v. Farley Candy Co.*, 5 OCAHO no. 765, 367, 368-369 (1995) (footnotes omitted):

> INS is charged with enforcement of IRCA's prohibition against the employment of unauthorized aliens, including the requirement of § 1324a that employers timely complete employment eligibility verification forms (Forms I-9) for each individual hired. OSC is responsible for investigating allegations of discrimination based on an individual's national origin or citizenship status . . . as prohibited by § 1324b. While the two sections of Title 8 are related, and § 1324b was enacted in response to concerns that § 1324a would result in unfair immigration-related employment discrimination by employers, the two sections enacted separate and distinct violations, the policing and enforcement of which were assigned separately to INS and OSC. For example, this dichotomy is evident in the OCAHO regulation specifically affording OSC but not INS the opportunity to seek intervention in complaints alleging unfair immigration-related employment practices. See 28 C.F.R. § 68.15. The interplay of an employer's obligations under sections 1324a and 1324b respectively do not per se give rise to inconsistent practices on the part of INS and OSC as the agencies charged with enforcement of those obligations on behalf of the public.

Additionally, footnote 1 of *Hernandez* states, "That INS investigated Respondent for alleged § 1324a violations with regard to the same individuals who are Complainants in this case does not bar OSC from asserting its own cause of action under § 1324b." *Hernandez et al.*, 5 OCAHO 765, at 368 n.1 (1995) (finding Congressional intent for OSC's prosecution of pattern and practice cases pursuant to OSC's independent investigatory powers). This footnote highlights a scenario similar to the circumstances alleged in the present case.

Moreover, it appears that DHS's USCIS currently has a "Memorandum of Agreement" with OSC by which it refers case information related to "allegations of discrimination arising out of employer use of E-Verify." *Memorandum of Agreement Between U.S. Citizenship And Immigration Services U.S. Department of Homeland Security And Civil Rights Division U.S. Department of Justice Regarding Information Sharing And Case Referral* (March 17, 2010) at 3 <http://www.uscis.gov/sites/default/files/USCIS/Native%20Docs/USCIS_DOJ%20MOA_(signed)_17Mar10.pdf> ("Memorandum of Agreement"). The Memorandum of Agreement references the following sources of legal authority in support of the agreement: (1) "Section 274B of the Immigration and Nationality Act; 8 U.S.C. § 1324b"; (2) "Homeland Security Act of 2002 (Pub. L. No. 107-296"; (3) "Pub. L. 104-208, Div. C., Title IV, Subtitle A, §§ 401-05, as amended (8 U.S.C. § 1324a note)"; and (4) "5 U.S.C. § 552a, the Privacy Act of 1974." *Memorandum of Agreement* at 3.

The Memorandum of Agreement between OSC and DHS states,

> USCIS Verification Division will refer all matters that may involve an individual act or a pattern or practice of employment discrimination on the basis of national origin or citizenship status; document abuse; or retaliation. The USCIS Verification Division will also refer all matters that may involve the misuse, abuse, or fraudulent use of E-Verify that can result in the adverse treatment of employees. OSC may use such information for further investigation and, in instances when USCIS continues its investigative efforts regarding the matter, will coordinate its activities with USCIS as much as possible without compromising OSC's investigation.

Memorandum of Agreement at 3.

Employers who use the E-Verify system also enter into an agreement with DHS, whereby DHS can use data collected for compliance and enforcement actions. In fact, several versions of "The E-Verify Memorandum of Understanding For Employers" available on the internet includes specific language that permits DHS "to conduct Form I-9 compliance inspections, as well as any other enforcement or compliance activity authorized by law . . . to ensure proper use of E-Verify." *See The E-Verify Memorandum of Understanding For Employers* (June 11, 2013) at 2-3 < http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf>. This agreement includes a signature page for the employer and a representative from DHS.

Therefore, as set forth in OCAHO precedent and the above referenced Memorandum of Agreement and Memorandum of Understanding, OSC has a long history of receiving referrals from and working with legacy INS and DHS. Importantly, there is no indication in OCAHO case law or in the widely available Memoranda that demonstrates OSC and DHS working together lacks regulatory authority or violates any law. Additionally, as discussed below, this is not the appropriate forum to redress respondent's claims against DHS's USCIS.

D. OSC Investigates "On Its Own Initiative" When No Underlying Charge Is Filed

An Administrative Law Judge found in *United States v. McDonnell Douglas Corp.*, 3 OCAHO no. 507, 1053, 1061 (1993) "that OSC's statutorily awarded discretion to investigate unfair immigration-related employment practices on its own initiative, without a charging party, and the ability to file a complaint before an ALJ based on that investigation, are probative of the fact that OSC represents the public interest. 8 U.S.C. 1324b(d)(1)." In *United States v. Robison Fruit Ranch, Inc.*, 4 OCAHO no. 594, 23, 25 (1994), the Administrative Law Judge discussed that the "complaint was filed under OSC's independent investigatory powers after its investigation of charging parties' allegations of discriminatory termination by Respondent. OSC's investigation

determined the allegations to be unfounded, but led OSC to uncover the alleged document abuse."

Additional OCAHO precedent explains that "8 U.S.C. § 1324b(d)(1) and 28 C.F.R. § 44.304[] are applicable only to complaints brought by the Special Counsel pursuant to an investigation conducted on his own initiative, i.e., 'independent investigations,' and not to complaints which are based upon charges actually filed with its Office." *United States v. Fairfield Jersey, Inc.*, 9 OCAHO no. 1069, 2 (2001). *Fairfield Jersey* also sets forth that "enforcement proceedings may extend to like and related events which can reasonably be expected to grow out of the agency's investigation of a charge . . . and are thus not strictly limited to the allegations made by the charging party. A pattern or practice claim may be . . . initiated by OSC . . . or others." *Fairfield Jersey, Inc.*, 9 OCAHO no. 1069 at 4-5 (citations omitted).

Respondent errs when stating that OSC did not conduct an investigation "on its own initiative" in this case because it believes that a referral from USCIS to OSC would preclude an investigation by OSC "on its own initiative." OCAHO case law, a plain reading of the regulations, and other relevant sources consider an OSC investigation to be "on its own initiative" when there is not an underlying charging party associated with the complaint OSC files with OCAHO. The phrase "on its own initiative" does not mean that OSC thought to investigate a claim on its own initiative without any referral from DHS or another source, which is what respondent appears to be alleging. In fact, OCAHO case law and the Memorandum of Agreement between OSC and DHS indicate that OSC investigations brought on OSC's "own initiative" stem from a referral or tip from DHS or from another individual source.

Moreover, the Memorandum of Agreement document explains,

> Injured parties may file charges with OSC alleging a violation of 8 U.S.C. § 1324b within 180 days of the alleged discrimination. However, OSC also initiates independent investigations (without the filing of a complaint) if there is reason to believe that unlawful discrimination occurred. Although independent investigations normally involve alleged discriminatory policies that potentially affect many employees or applicants, OSC also conducts independent investigations when even one person is allegedly discriminated against.

Memorandum of Agreement at 2.

Title 8 U.S.C. § 1324b(b)(1) and 28 C.F.R. § 44.300(a)(2) specifically have allowed legacy INS and DHS to file charges with OSC "alleging that an unfair immigration-related employment practice has occurred or is occurring . . . ." And, 8 U.S.C. § 1324b(d)(1) permits OSC to investigate charges received or to investigate suspected discriminatory practices "on its own initiative" pursuant to 28 C.F.R. § 44.304. Respondent has failed to identify a single authority suggesting that the Immigration and Nationality Act ("INA") or pertinent regulations prevent

DHS's USCIS from referring allegations of unfair immigration-related employment practices to OSC, which is an allegation that seems contrary to the regulation allowing for DHS to file its own charge with OSC. *See* 28 C.F.R. § 44.300(a)(2).

Moreover, OCAHO jurisdiction does not include authority to adjudicate the validity of the Memorandum of Agreement between USCIS and OSC, which cites four different sources of authority for the agreement. In addition, it is likely that respondent signed a Memorandum of Understanding with USCIS pursuant to E-Verify use, which would allow USCIS to refer suspected violations of the INA to OSC and for which the undersigned has no authority to adjudicate. *See United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO no. 1157, 5 (2012).

Therefore, pertinent authority referenced above demonstrates that OSC has authority to investigate and file a complaint "on its own initiative" without an underlying charge, which historically has included referrals from DHS. In fact, there appears to be no relevant authority to contradict this referral agreement. Accordingly, respondent's statement that OSC lacks "regulatory authority to pursue the Charge as outline in 28 C.F.R. § 68.4" is unsupported and contradicted by the above-cited authorities.

E. Respondent Failed To Prove Its Claims Against USCIS Are Within OCAHO's Jurisdiction

Title 8 U.S.C. § 1324b does not authorize OCAHO to adjudicate respondent's desired counter-claim of malicious use of process by USCIS, which further undermines respondent's motion for interpleader. In cases involving unfair immigration-related employment practices, OCAHO's authority does not include an ability to regulate the prosecutorial discretion of OSC. Moreover, OCAHO does not have adjudicatory authority over DHS's decision to refer possible violations to OSC or to file a charge with OSC pursuant to 8 U.S.C. § 1324b(b)(1).

Although not an exhaustive list, OCAHO's Administrative law Judges have authority to rule on the timeliness of complaints filed with OCAHO and to regulate the course of hearings and discovery, issue subpoenas, compel testimony and evidence production, issue orders that include assessment of fines and remedial payments, and award attorney's fees pursuant to 8 U.S.C. §§1324b(d)(3)-(h). Reviewing 8 U.S.C. § 1324b(g)(2)(A), Administrative Law Judges have adjudicatory authority to determine whether "any person or entity named in the complaint has engaged in or is engaging in any . . . unfair immigration-related employment practices" and the judge must "issue and cause to be served . . . an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice." The scope of an Administrative Law Judge's order is set out at 8 U.S.C. §§ 1324b(g)(2)(B) and (C).

Respondent fails to prove how interpleader is necessary or even permitted in this action pursuant to OCAHO rules found at 28 C.F.R. part 68, Rule 22 of the Federal Rules of Civil Procedure, or interpleader statutes found at 28 U.S.C. § 1335, 1397, or 2361. Respondent has additionally

failed to show the appropriateness of joining additional claims or parties pursuant to Rules 18 or 20 of the Federal Rules of Civil Procedure. OCAHO rules do not contemplate interpleader, but do specifically prohibit the legacy INS, now DHS, from petitioning to intervene as a party in an unfair immigration-related employment case at 28 C.F.R. § 68.15. *See generally, Elhaj-Chehade v. University of Tex., Southwestern Med. Ctr. at Dallas*, 8 OCAHO no. 1018 (1998) (denying request to amend complaint to join party respondents and to add additional discrimination claim); *McNier v. San Francisco State Univ., College of Bus.*, 8 OCAHO no. 1030, 1, 2-5 (1999) (granting leave to amend complaint to add party respondents pursuant to 28 C.F.R. §§ 68.1 and 68.9(e) and Federal Rules of Civil Procedure 15 and 20). Accordingly, respondent has failed to demonstrate that interpleader is warranted or appropriate.

F. Plagiarism of Position Statement

Respondent's four page Position Statement titled "Louisiana Crane & Construction, LLC's Position Statement Regarding The Investigation of The Charge And The Hearing Flowing There From [sic]" contains a total of twenty-five sentences. Of the twenty-five sentences in this pleading, fourteen sentences comprising respondent's actual "Position Statement" have been copied and pasted verbatim from portions of a USCIS "Executive Summary," which was easily and quickly located on the internet as follows: *Executive Summary, Role of The E-Verify Monitoring And Compliance Branch* (April 23, 2013) <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/April%202013/ExecutiveSummary-MCTeleconference-April2013.pdf> ("Executive Summary").

It does not appear that respondent's counsel mistakenly failed to provide proper attribution to the original source of more than one-half of its Position Statement. It appears that respondent's counsel intentionally copied verbatim portions of the USCIS's Executive Summary because there is no reference to the USCIS document at all, there are no quotations marks surrounding any portion of this lengthy text that is broken into six paragraphs, and there is no indentation of any portion of the lengthy text that could indicate an attempt to quote another document. Moreover, counsel clearly introduces these fourteen copied sentences as counsel's own work product with the title and statement that these sentences are respondent's "Position Statement." Therefore, this appears to be a blatant act of plagiarism, which violates counsel's duty to act with integrity and with candor to the court.

Plagiarism in its simplest form maintains a consistent meaning, whether in an academic setting or in the practice of law.[2] In its most basic and recognized form, the undersigned defines

[2] The University of Texas at Austin, from which respondent's counsel and the undersigned possess degrees, defines plagiarism in Chapter 11 of the Institutional Rules on Student Services and Activities at Section 11-402(d): "'Plagiarism' includes, but is not limited to, the appropriation of, buying, receiving as a gift, or obtaining by any means material that is

plagiarism as the use of someone else's ideas or words without proper attribution to the author. In the practice of law, plagiaristic tendencies are often encouraged in an effort to practice law efficiently by not "reinventing the wheel" with every pleading filed and by reusing boilerplate language to dispense with routine legal issues. In addition, many senior lawyers and judges rely on the written collaborative efforts of their junior associates and law clerks to produce a document, even though the document drafters are rarely acknowledged.[3] *See generally* Douglas E. Abrams, *Plagiarism in Lawyers' Advocacy: Imposing Discipline for Conduct Prejudicial to the Administration of Justice*, 47 WAKE FOREST L. REV. 921 (2012); Peter A. Joy & Kevin C. Munigal, *The Problems of Plagiarism as an Ethics Offense*, CRIMINAL JUSTICE, Summer 2011 at 56.

Although collaborative attorney work product often resembles a patchwork quilt of phrases and ideas sewn together by many lawyers within a single office, the lack of author attribution to each contributor typically is not viewed by lawyers and judges as violating plagiarism standards. However, the verbatim copying of a document produced by an outside government source without proper attribution to the original source consistently should be viewed as plagiarism. In an article from the Wisconsin State Bar publication "Wisconsin Lawyer" on this topic, the authors posit a plagiarism standard that summarizes the difference between attorney work product and plagiarism as follows: "in the ordinary work of the lawyer, plagiarism should be defined to consist only of the word-for-word copying of a substantial, nonroutine portion of a document of which the lawyer expressly claims authorship." James D. Peterson & Jennifer L. Gregor, *Copycat: Plagiarism, Copyright Infringement, & Lawyers*, WISCONSIN LAWYER (June 2011) at 7.

Because respondent's counsel "expressly claims authorship" of the "Position Statement," which primarily was copied verbatim from a USCIS Executive Summary published on the internet without any attribution to the actual author, the undersigned finds that respondent's counsel has committed plagiarism, which is an act of misrepresentation to the court.

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attributable in whole or in part to another source, including words, ideas, illustration, structure, computer code, and other expression or media, and presenting that material as one's own academic work . . . ." The University of Texas at Austin, *Section 11-402(d), Institutional Rules on Student Services and Activities* (visited Feb. 10, 2015) <http://catalog.utexas.edu/general-information/appendices/appendix-c/student-discipline-and-conduct/>. Moreover, The University of Texas at Austin School of Law, where respondent's counsel attended law school, binds its students to an "Honor Code," which sets forth that its students are "governed by the Institutional Rules on Student Services and Activities. Students may be subject to discipline for cheating, plagiarism, and misrepresentations." The University of Texas at Austin School of Law, *Honor Code* (visited Feb. 10, 2015) <http://www.utexas.edu/law/sao/academics/honorcode.html> (citing *The University of Texas at Austin: The Law School Catalog 2010-2012*, Page 29).

[3] The undersigned judge researched and wrote this order without the assistance of a law clerk.

G. Attorneys Have a Duty To Be Candid With the Court and File Legally Sufficient Pleadings

In addition to the fourteen plagiarized sentences, the remaining eleven sentences of the Position Statement contain respondent's argument, but fail to provide adequate legal authority to support respondent's arguments. In fact, OCAHO precedent and pertinent regulations and code provisions contradict respondent's position; however, respondent has failed to mention this contradictory legal authority. Moreover, respondent's failure to address the legal authority adverse to its position is troubling in light of counsel's ethical duty to be candid with the court.

As previously noted, Texas Disciplinary Rules of Professional Conduct Rule 3.03(a)(4) establishes an attorney's duty to be candid with the court, stating that "an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction . . . ." Tex. Disciplinary R. Prof'l Conduct, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, art. X, § 9, Rule 3.03 (Vernon 2013) (Tex. State Bar R.). Attorneys also have a duty to bring only non-frivolous claims supported by legal authority before a court. *See* Tex. Disciplinary R. Prof'l Conduct, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A, art. X, § 9, Rule 3.01 (Vernon 2013) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."). The failure of respondent's counsel to provide any adequate precedent or viable legal analysis in support of respondent's claims demonstrates that counsel submitted a seriously deficient pleading and that counsel's conduct failed to "meet the high ethical standards expected of attorneys practicing before this tribunal." *Hsieh v. PMC-Sierra Inc.*, 9 OCAHO no. 1100, 33, 40 (2003) (issuing written reprimand to counsel for objectionable conduct including "unsupported and bad faith pleadings" and "failure to correct misstatements in pleadings").

In pertinent part, OCAHO's rules of practice and procedure vest authority in Administrative Law Judges to determine whether individuals appearing before OCAHO have acted ethically and with integrity, to exclude individuals from proceedings, to issue decisions and orders, and to "take other appropriate measures necessary to enable [the judge] to discharge the duties of the office" consistent with actions authorized by the Administrative Procedure Act. 28 C.F.R. §§ 68.28(5)-(8), 68.35. The Administrative Procedure Act allows Administrative Law Judges to preside over and "regulate the course" of hearings, to render "decisions," and to "take other action authorized by agency rule . . . ." 5 U.S.C. §§ 556(c)(5), (10), (11). Previously, an OCAHO Administrative Law Judge discussed that "[i]t is for the lawyer to define and provide substance to the theory and parameters of the client's case. It is for the judge to regulate the course of the proceeding." *United States v. Patrol & Guard Enters, Inc.*, 8 OCAHO no. 1052, 5 (2000) (citing *Butz v. Economou*, 438 U.S. 478, 513 (1978); 5 U.S.C. § 556(c)).

Respondent's counsel submitted a seriously deficient pleading, most of which was plagiarized, and counsel argued a position that appears contrary to all relevant authority and historical and

current practices between OSC and legacy INS and DHS. This failure to be candid with the court and to uphold the high ethical standards required of counsel has posed a significant burden on the court and demonstrates that counsel has "engaged in conduct prejudicial to the administration of justice." MODEL RULES OF PROFESSIONAL CONDUCT RULE 8.4 (2009). Based on the ethical standards established by the Texas Disciplinary Rules of Professional Conduct and the American Bar Association and pursuant to OCAHO's regulations and case law, respondent's counsel warrants a written reprimand for submitting the plagiarized and deficient Position Statement and for furthering its unsupported arguments. *See Hsieh*, 9 OCAHO no. 1100 at 33-41.

III. NOTICES OF APPEARANCE FOR RESPONDENT'S COUNSEL

Respondent's counsel Kevin Lashus and Margaret Murphy both have failed to file notices of appearance as required by 28 C.F.R. § 68.33(f), even though they were instructed to do so in the Notice of Case Assignment dated September 10, 2014. At this point in the proceedings, Mr. Lashus is deemed to have entered an appearance that satisfies OCAHO's appearance rule and is considered respondent's counsel of record based on his submission of the "Email Filing Program Attorney/Participant Registration Form and Certification." However, if Ms. Murphy is going to serve as a representative for respondent in this matter and continue to be listed as co-counsel on pleadings, she must file an appearance form pursuant to 28 C.F.R. § 68.33(f) and enroll in the email filing program. Should Ms. Murphy decide not to enter an appearance, she should not be included as co-counsel on respondent's filings. A courtesy copy of this order and the email filing enrollment forms have been mailed to Ms. Murphy, should she choose to enter an appearance in this case.

IV. CONCLUSION

Accordingly, respondent has failed to meet its burden of proving that USCIS should be interpleaded through a counter-complaint, and respondent has failed to demonstrate that OCAHO has jurisdiction to redress its malicious use of process claim against DHS's USCIS. Respondent's counsel is reprimanded for filing a Position Statement that contains 14 plagiarized sentences from a USCIS Executive Summary published on the internet and for failing to provide appropriate and relevant legal authority to support its arguments in the Position Statement. All parties appearing before OCAHO are expected to be candid with the court and to comply with pleading practices that adhere to the ethical standards set forth in OCAHO's regulations, the American Bar Association's Model Rules of Professional Conduct, and relevant state or local rules governing attorney conduct, such as the Texas Disciplinary Rules of Professional Conduct that govern counsel in this case.

ORDER

Respondent's motion to interplead USCIS as a counter respondent through a counter-complaint is DENIED. Respondent's counsel is REPRIMANDED for filing a plagiarized and legally deficient pleading. Margaret Murphy is ORDERED to file an appearance and register for OCAHO's Email Filing Program if she is to be considered co-counsel in this case.

SO ORDERED.

Dated and entered on March 12, 2015.

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Stacy S. Paddack
Administrative Law Judge